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THE
FEDERAL REPORTER.
VOLUME 59.

CASES ARGUED AND DETERMINED

IN THE

CIRCUIT COURTS OF APPEALS AND CIRCUIT
AND DISTRICT COURTS OF THE
UNITED STATES.

PERMANENT EDITION.

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FEDERAL REPORTER, VOLUME 59.

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²Commissioned Feb. 12, 1894.

³Deceased Dec. 1, 1893.

⁴Commissioned Associate Justice Supreme Court, Feb. 18, 1893.

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CASES

ARGUED AND DETERMINED

IN THE

UNITED STATES CIRCUIT COURTS OF APPEALS AND THE CIRCUIT AND DISTRICT COURTS.

AMERICAN ASS'N, Limited, v. HURST et al.

(Circuit Court of Appeals, Sixth Circuit. November 6, 1893.)

No. 100.

1. COURTS—INJUNCTION TO STAY PROCEEDING IN STATE COURT.

Sale of land by a sheriff under an execution issued out of a Kentucky court of equity on a sale bond filed against the sureties thereon is a "proceeding," within Rev. St. § 720, inhibiting injunctions by federal courts to stay proceedings in state courts, except in certain cases.

2. SAME.

The federal court cannot enjoin such a sale, even though the land levied upon belongs to a stranger to the proceeding.

Appeal from the Circuit Court of the United States for the District of Kentucky.

In Equity. Bill by the American Association, Limited, against E. Hurst and J. C. Colson, to enjoin a sheriff's sale. Bill dismissed. Complainant appeals. Affirmed.

Statement by TAFT, Circuit Judge:

This was an appeal from a decree of the United States circuit court for the district of Kentucky, dismissing the bill of the appellant, the American Association, Limited, on the ground that the court had no jurisdiction to grant the relief prayed for.

After averring that the American Association, Limited, was a corporation and citizen of the kingdom of Great Britain, and an alien, and that the defendants were citizens of Kentucky, and that the amount in controversy exceeded \$2,000, the bill set forth that the complainant was the owner of real estate in Bell county, Ky., the legal title to part of which was in the name of the complainant, and the legal title to the rest of which was in the name of Alex. A. Arthur, trustee; that all of the property described had lately been levied upon by Colson, one of the defendants, as sheriff of Bell county, Ky., under an execution issued in the Bell common pleas court in favor of the other defendant, E. Hurst, who was described in the execution as the master commissioner of said court; that this execution was issued against Alex. A. Arthur, trustee, and one John M. Brooks, for the sum of \$14,834.63; that the levy was made by Colson against all of this property as the property of the complainant, and that, as sheriff, Colson had advertised that he would on a

day subsequent to the filing of the bill, offer the property for sale to the highest and best bidder for cash in hand paid, under the execution; that before this, there had been instituted in the Bell court of common pleas an action in equity to procure the sale of certain real estate described in the proceeding as the property of the heirs of one Robert George; that the order for the sale of the real estate was entered, and the defendant Hurst was directed, as master commissioner, to make the sale; that, at the sale, the property was purchased by one Fish and another, who failed to comply with the terms of the sale, and subsequently transferred the benefit of their bid to one Alex. A. Arthur, denominated in the transfer as Alex. A. Arthur, trustee; that thereupon Arthur, trustee, and Brooks, above mentioned, executed two sale bonds as purchase money for the property, each in the sum of \$10,-827.25; that the execution levied upon complainant's property was issued on these bonds, which are given by the statute of Kentucky the force of judgments; that Arthur had no authority, as trustee for complainant, to purchase the property, to sign the bonds, or to make the complainant in any way liable to pay the purchase money; that the assignment was not made to him for the benefit of the complainant, and he did not in fact intend, and did not have any right, to bind the complainant in the execution of the bond; that nevertheless, upon the claim that Arthur, as trustee, was acting merely for the complainant in signing the bonds, Hurst, as commissioner of the court, caused the execution upon said bonds to be issued; that Colson had levied the execution, and was about to sell the property; that a cloud would be cast upon the title of the complainant to the property if Colson did sell it, and that the complainant would be unable to sell the same, and would be thereby irreparably damaged. The prayer of the bill was that Colson be enjoined from selling the property under the execution, and that Hurst be enjoined from directing such sale.

Humphrey & Davie, for appellant.

Richards, Weissinger & Baskin, for appellees.

Before TAFT and LURTON, Circuit Judges, and SEVERENS, District Judge.

TAFT, Circuit Judge, (after stating the facts.) The court below held that the remedy sought by complainant was forbidden in the federal court by section 720 of the Revised Statutes, which declares that the writ of injunction shall not be granted by any court of the United States to stop proceedings in any court of a state, except in cases where such injunction may be authorized by any law relating to proceedings in bankruptcy.

The questions necessary for us to consider are—First, whether the sale of land by a sheriff under an execution issued out of a Kentucky court of equity on a sale bond filed therein against the sureties thereon is "a proceeding" in that court, within the meaning of section 720, Rev. St.; and, second, whether such a sale is "a proceeding," within the section, even if the land to be sold has been improperly levied upon as the land of a surety in the sale bond, and in fact belongs to another person, a stranger to the proceeding.

1. The provision authorizing executions on sale bonds is to be found in chapter 38, art. 11, of Bullitt & Feland's Statutes of Kentucky, (page 560.) The first section of the chapter is as follows:

"Every bond taken on the sale of property under an order or judgment in chancery or on the sale of property under execution and every replevin and forthcoming bond shall be signed by the principal and sureties and attested by the person taking the same, or by some one in his presence. Subsec. 1. A bond so taken shall be returned to the proper office with a

report of the acts of the person taking it; and if taken under an execution, the latter must be returned with the bond. 2. All such bonds shall have the force and effect of a judgment, and on which if not paid at maturity, an execution may issue and shall be indorsed that no surety of any kind is to be taken."

Under the foregoing statute, the sale bond is a judgment against the principal and sureties thereon. In Kentucky the sale made by the commissioner in equity is not complete until a report of its terms and the sale bond taken shall have been returned to the court, and approved by a decree of confirmation. The right of the purchaser to take the property depends upon the sanction of that decree. *Arnett v. Anderson*, 11 Ky. Law Rep. 671, 672; *Forman v. Hunt*, 3 Dana, 614, 621; *Busey v. Hardin*, 2 B. Mon. 411; *Taylor v. Gilpin*, 3 Metc. (Ky.) 546; *Freem. Ex'ns*, 304a. When the order confirming the action of the commissioner is entered, it gives life to the sale bond, which then becomes an accepted obligation binding the principal and sureties to complete the sale in accordance with the terms of the bond, and is in effect a confessed judgment for the amount of the bond. It was formerly the practice in Kentucky, in proceedings in equity, for the chancellor to make an express provision in the order of sale that a sale bond for the deferred payments should be taken, which sale bond should have the effect of a judgment upon which an execution might issue. The bond was then taken by the commissioner, reported to the court, and his proceedings were confirmed. *Debard v. Crow*, 7 J. J. Marsh. 7, 10; *Leavitt & Co. v. Goggin*, 11 B. Mon. 229. It could hardly be contended that the execution issued on a sale bond, which was given the effect of a judgment by special order of the court, was not a proceeding in that court. Now that, by express statute, every order of sale impliedly requires the giving of a sale bond, which shall have the effect of a judgment, it is equally clear that the approval of the sale bond makes the execution, issued thereon in accordance with the statute, a proceeding of the court in which the bond is filed. The claim of counsel that it is a mere ministerial process issuing from the office of the court, without judicial sanction, cannot be sustained. It has been held in a number of cases that a purchaser at a judicial sale becomes a quasi party, and that, where credit is given to him under an order of a court of equity, the court retains jurisdiction to compel payment by him of the residue through attachment, or by resale of the property. *Wood v. Mann*, 3 Sumn. 318; *Clarkson v. Read*, 15 Grat. 288; *Stephens v. Magruder*, 31 Md. 168; *Freem. Ex'ns*, (2d Ed.) 313e. The statutory provision which we are considering merely gives another remedy, by which the court is required to secure to the parties in the case before it, payment of the purchase price bid at the sale had and confirmed by its decree.

2. But it is said that, even if an execution on a sale bond levied on the property of the obligees is a "proceeding" of the court in which the bond is filed, an attempt to levy such execution on the property of another, as the property of an obligor in the bond, is void, and as it is not authorized by the execution, and is without

the authority of the court, neither the levy nor the sale under it are "proceedings" of the court, within section 720. Counsel for appellant, to sustain this contention, rely on the case of *Cropper v. Coburn*, 2 Curt. 465, in which it was held by Mr. Justice Curtis, on the circuit, that the fifth section of the act of March 2, 1793, (1 Stat. 334; now section 720, Rev. St.,) did not prevent a United States court from enjoining a sheriff from levying on the property of A. under a process issued by a state court against B. In that case, Mr. Justice Curtis said:

"It must be admitted that an attachment on mesne process out of a state court, which the sheriff is authorized by that process to make, is a proceeding in a court of a state, within the meaning of this act of congress; for the word 'proceedings' may properly include all steps taken by the court, or by its officers under its precepts, from the institution of the suit to the close of the final process which may issue thereon. But it is equally clear that an attachment on mesne process, which the sheriff was not authorized by that process to make, is in no sense a proceeding of the court from which such process issued. Thus, if a sheriff, under a writ of attachment against the property of A., should take his body, or the property of B., this would not be a proceeding of the court, but a mere trespass, for which any appropriate remedy may be instantly sought in any court having jurisdiction. As Chancellor Kent remarked in his fourth Commentary, (page 410:) 'If a marshal of the United States, under an execution in favor of the United States against A., should seize the person or property of B., then the state courts have jurisdiction to protect the person or property so illegally invaded.'"

If this is sound, complainant's bill ought not to have been dismissed, but the proposition thus laid down by Mr. Justice Curtis has not met the approval of the supreme court of the United States. In *Freeman v. Howe*, 24 How. 450, that court held that when property was taken and held under process, mesne or final, by a court of the United States, it was in the custody of the law, and within the exclusive jurisdiction of the court from which the process issued, and that the possession of the officer of such court could not be disturbed by process from any state court. In this opinion the supreme court dissented from the language of Chancellor Kent, quoted and relied upon by Justice Curtis in *Cropper v. Coburn*, and reversed the decision of the supreme court of Massachusetts in *Howe v. Freeman*, reported in 14 Gray, 566, which was based on the decision in *Cropper v. Coburn*. The decision of *Freeman v. Howe* is commented on at length, and reaffirmed, in *Covell v. Heyman*, 111 U. S. 176, 4 Sup. Ct. 355, in which Mr. Justice Matthews delivered the opinion of the court. The same learned justice, when sitting on the circuit in *Perry v. Sharpe*, 8 Fed. 15, refers to *Cropper v. Coburn*, 2 Curt. 465, as contrary to subsequent authority. The principle of *Freeman v. Howe*, was reaffirmed, also, in the case of *Buck v. Colbath*, 3 Wall. 334, and was followed in *Daly v. Sheriff*, 1 Woods, 175, and in *Ruggles v. Simonton*, 3 Biss. 325.

It is contended that *Freeman v. Howe* and the subsequent cases do not apply to the case at bar because the result reached in them was founded solely on the public necessity of avoiding unseemly conflicts between courts over the possession of property, while this proceeding will affect only the levy of an execution on land and a sale thereunder; and by the law of Kentucky (*McBurnie v. Over-*

street, 8 B. Mon. 303) a levy on land merely establishes a lien, and does not disturb possession.

The principle of the decisions in *Freeman v. Howe*, *Buck v. Colbath*, and *Covell v. Heyman* has a much broader application than counsel for appellant concedes. The principle is that, in order to preserve the dignity and protect the effectiveness of the process of courts of concurrent jurisdiction, and to avoid unseemly conflicts between them, and between their respective executive officers, no remedy of an injunctive or dispossessory character will be afforded by one court against the acts of the executive officers of the other court, when done under color of an order or process issuing from such other court, because it would have the inconvenient and anomalous effect to stay the proceedings in one court to allow another court to investigate the validity of acts done under such proceedings. A replevin of personal property in the hands of its officer, or an injunction against a levy upon personal property by such officer, will certainly not more offend the dignity of the court, or more interfere with the due discharge of business before it, than will an injunction against a levy on real estate by its officer under color of its process. Moreover, the acts which it was here sought to enjoin were not mere levies upon real estate, but were the sale of it, and the execution of a deed to the purchaser, with a possible writ of possession, or at least with title upon which to found ejectment; so that, even if the principle of *Freeman v. Howe*, and other like cases, only applies when there is to be a conflict of possession between one court and another, we think the remedy here sought would come within their inhibition.

Of course, in the case of tortious levies upon either personal property or real estate, the person injured may always hold the executive officer liable, as a tortfeasor, for any wrong done in any court having jurisdiction; but comity and public policy require him to apply to the court issuing the process under color of which the wrong is or is about to be done for specific relief by order of injunction, or restoration of property. In *Buck v. Colbath*, *ubi supra*, Mr. Justice Miller points out the two kinds of process under which a sheriff or a marshal acts. In one, the order is directed against particular and described property; in the other, it is against all or any property of an individual to satisfy a judgment or decree or order of attachment. In the former case, the process is a complete protection to the officer executing it. In the latter case the marshal or sheriff is necessarily vested with a discretion to determine what property belongs to the debtor, in order that he may levy on it. For any injury he may do in the exercise of this discretion, he may be held liable in damages. The process of the court does not protect him from such an action, but it does shield him from injunction or replevin issuing out of another court, which would seriously interfere with and cripple the execution of the process of the court whose officer he is, by preventing an exercise by him of the discretion necessary to its efficiency. In the light of this distinction, it is clear that the act, however tortious, of an executive officer of a court, done under color of its process, is to be regarded as a "proceeding" of that court,

which comity and public policy require courts of concurrent jurisdiction not to interfere with by injunctive or dispossessory process. If this be the rule of comity and public policy in the absence of a statute, it is conclusive in determining the true construction of section 720, Rev. St., and the meaning of the words used therein, "proceedings in any court of the state." That section was passed, not to preserve comity and harmonious action between courts of the same sovereign exercising concurrent jurisdiction, but to attain such an end, and prevent unseemly conflict between courts of different sovereigns exercising concurrent jurisdiction over the same territory. The purpose of the statute is so important that a liberal construction should be given to accomplish it.

The decree of the court below dismissing the bill is affirmed.

PRESIDENT, etc., OF BOWDOIN COLLEGE et al. v. MERRITT et al.

(Circuit Court, N. D. California. November 27, 1893.)

No. 11,565.

1. FEDERAL COURTS—ENJOINING PROCEEDINGS IN STATE COURTS.

A federal court which has obtained jurisdiction may enjoin a party from prosecuting in a state court a subsequent action which will defeat or impair the same, notwithstanding the provision of Rev. St. § 720. *Sharon v. Terry*, 36 Fed. 365, followed.

2. APPEARANCE—INTERVENING PETITION.

One who files an intervening petition thereby submits himself to the jurisdiction of the court.

In Equity. Suit by the president and trustees of Bowdoin College and others against James P. Merritt, Frederick A. Merritt, and others, to remove cloud from title. A demurrer to the bill was heretofore overruled. 54 Fed. 55. The case is now heard on an application to file a supplemental bill making Harry P. Merritt a party defendant, and for injunction to restrain the prosecution of an action commenced by him in the superior court of Alameda county, Cal. Leave given, and preliminary injunction granted.

Blake, Williams & Harrison and Pillsbury & Hayne, for complainants.

Horace W. Philbrook and Arthur Rodgers, for respondent James P. Merritt.

McKENNA, Circuit Judge. The facts of this case have become familiar. It will only be necessary, therefore, to say, in general, it is brought by the college and certain persons as beneficiaries of a trust deed made by one Catherine Garcelon to the defendants Stanley and Purington. They sue for themselves and all others interested under the deed. The suit is to enjoin the defendant J. P. Merritt from asserting claim to the property described in the deed, contrary to his contract, as heir of Dr. Merritt, from whom Mrs. Garcelon derived the property, and thereby embarrass or prevent the execution of the trust; and the action is, as Judge Hawley said, to quiet the title. The right of complainants to sue was de-

cided by Judge Hawley, sitting as circuit judge, and has become the law of the case, precluding further discussion on the pleadings. 54 Fed. 55.

Harry P. Merritt, against whom the present proceeding is described, is a beneficiary under the trust deed aforesaid, \$10,000 being directed thereby to be given to him. He was also made one of the executors of Mrs. Garcelon's will, and one of the residuary legatees thereof. The supplemental bill alleges that he was made legatee, not to give him standing to attack the trust in favor of complainants, but to protect and preserve it; that he knew of this purpose, and induced Mrs. Garcelon to believe that he would execute it; that he made complainants believe that he would execute it, and at the time of the commencement of this suit was friendly to, and co-operated in, its purpose; and that on the 12th day of March, 1892, he filed, with other beneficiaries, a petition of intervention in said suit, to be made a party plaintiff thereto, in which petition he affirmed the truth of the allegations of the bill of complainants. This petition is still pending. Afterwards, it is alleged, he conspired with James P. Merritt and others to defeat the said trust, resigned his position of executor, and it was agreed between him and said James P. Merritt and others that James P. should contest the will, and if he should fail he would, as residuary legatee, attack the trust deed on the ground of mental incapacity of Mrs. Garcelon to make the same; that James P. Merritt prosecuted a contest against said will in the superior court of Alameda county, which was defeated; and that Harry P. Merritt, in execution of the conspiracy with James P. Merritt and others, has commenced a suit in the superior court of Alameda county against the trustees of said trust deed, and he has petitioned the court for the appointment of a receiver of the property described therein. The complainants were originally made defendants in said suit, but were dismissed on motion of said Harry P. Merritt.

The object of the supplemental bill is to make Harry P. Merritt a party defendant in this action, and enjoin him from the further prosecution of said suit in the state court. But it is urged by his counsel that his cause of action is independent of that of the other Merritt, though it may require the decision of the same questions, and that an injunction restraining him is prohibited by section 720 of the Revised Statutes. It is as follows: "The writ of injunction shall not be granted by any court of the United States to stay proceedings in any court of a state except in cases where such injunction may be authorized by any law relating to proceedings in bankruptcy." In *Sharon v. Terry*, 36 Fed. 365, this section was held by Judges Field, Sawyer, and Sabin not to apply, where the federal court has first obtained jurisdiction. Justice Field, delivering the opinion of the court, said, "In such cases the federal court may restrain all proceedings in a state court which would have the effect of defeating or impairing its jurisdiction." In support of this the learned justice cited *Fisk v. Railroad Co.*, 10 Blatchf. 520; *Wagner v. Drake*, 31 Fed. 851; *French v. Hay*,

22 Wall. 250; *Dietzsch v. Huidekoper*, 103 U. S. 494. The suit of complainants in this court was prior in time to Merritt's suit in the state court; and it is very clear, if he should succeed in having a receiver appointed of the property, the jurisdiction of this court would be very much embarrassed, if not defeated or impaired. If, therefore, this court had jurisdiction of said Merritt at the time he commenced his suit, it can and ought to enjoin its further prosecution.

When a court obtains jurisdiction of a defendant is clear. It is by service of process upon him, or his voluntary appearance. The appearance of the plaintiff is always voluntary. He invokes jurisdiction by filing a petition, bill, or complaint, or it may be jurisdiction in equity can be invoked for him, if he have a common interest with others, and some of them should sue for themselves and all others, including him. The bill in this case was filed, not only on behalf of plaintiffs by name, but on behalf of all others interested, of whom Merritt was one. In a sense, he was a party to the action. Indeed, a suit which is brought by some and not by all the parties having a common interest must be brought on behalf of all interested, or it will be demurrable for want of proper parties. *Story, Eq. Pl. § 107*. And such a bill binds the rights and interests of the others. *Id. § 128*. The right of a few to sue for all existing, with power in the suit to bind the right and interest of all, it would not be unreasonable to contend, would give a jurisdiction which could be protected from an attempt to impair or defeat it by a subsequent suit by any of the parties interested, in another court. But this need not be insisted on. It was certainly open to Merritt to come into the action, and he filed a petition to intervene. By this, complainants contend, he appeared, and submitted to the jurisdiction of the court.

In *Jack v. Railroad Co.*, 49 Iowa, 627, third parties intervened, claiming they were interested in the subject-matter of the action, and filed their petition of intervention. The plaintiffs demurred to and moved to strike it from the files. Both were overruled. The plaintiffs amended their petition, and filed an answer to the petition of intervention. These pleadings were stricken from the files, and plaintiffs appealed. The interveners were residents of Dallas county, and therefore insisted the amendment to the petition was properly struck off because the action could only be brought against them in that county. The court held that the interveners voluntarily appeared in the action, and were estopped from saying that the court did not have jurisdiction over them for any purpose or cause which, by proper amendment to the pleadings, could be joined with the pending action. It may be said this case is distinguishable from the one at bar, inasmuch as the petition for intervention was filed, and petitioner participated in the case. But jurisdiction must attach at some moment of time, and the proper and efficient moment must be when the jurisdiction is first appealed to and invoked. It is from the first moment that a party appeals to the jurisdiction of the court that he is estopped to deny it. And

this was, in effect, decided in *Cooley v. Lawrence*, 12 N. Y. Super. Ct. 609. The opinion states that, by a rule of the supreme court of the state, service of an appearance, or retainer by an attorney, shall in all cases be deemed an appearance, except where special bail is required; and the plaintiff, in filing such notice at any time thereafter, may have the appearance of the defendant entered nunc pro tunc. And notice of retainer even, was held to have the same effect as an appearance actually entered. *Francis v. Sitts*, 2 Hill, 362. Judge Hoffman, rendering the opinion of the court, said:

"What, then, is the entry of an appearance in a state court must be interpreted by the court, and the practice of that court; and I think that what is held in such court to be a submission to its authority in the cause, whether coerced or voluntary, must be deemed an appearance, and, further, when such submission has once been made it cannot be retracted."

I think, therefore, that, when Harry P. Merritt filed his petition for intervention, he submitted himself to the jurisdiction of the court.

Leave to file the supplemental bill is granted, and the preliminary injunction is granted, as prayed for.

KING v. UNITED STATES.

(Circuit Court, D. South Carolina. December 11, 1893.)

1. FEDERAL COURTS—JURISDICTION—RESIDENCE IN DISTRICT.

One having his business in a federal judicial district, and living therein for six months of the year in his own house, served by his own domestics, leaving during the unhealthy season for reasons of health only, is a resident of the district, and can sue in the courts thereof.

2. EMINENT DOMAIN—FLOWAGE OF LANDS—GOVERNMENT DAMS.

The flooding of a plantation by a government dam, so as to render it unfit for cultivation, is a taking for public use, requiring compensation, although the government actually occupies no part thereof.

3. SAME—LIMITATION OF ACTIONS.

Where water is thrown back by a government dam, on its completion, so as to flow a plantation, but the full effect in rendering the land unfit for cultivation is not ascertained until three years later, the six-years limitation does not begin to run until the latter time.

Petition by Mitchell King against the United States to recover damages for a flowage of lands. Judgment for petitioner.

Bryan & Bryan, for plaintiff.

W. Perry Murphy, for the United States.

SIMONTON, District Judge. This action was brought in this court under provision of Act Cong. March 3, 1887, c. 359, §§ 1, 2, etc.

Findings of Fact.

(1) The above petition was in compliance with the requirements of Act March 3, 1887, c. 359, duly filed in the clerk's office, circuit court of the United States for the district of South Carolina, on the 19th day of January, 1893, and copies thereof duly served on the

United States district attorney and the attorney general of the United States, and said law in all respects complied with.

(2) Mitchell King, the plaintiff, is a rice planter on the Savannah river. He owns a plantation on the South Carolina side of the river, in Beaufort county. His sole occupation is cultivating this plantation. To this end, since 1890, he has been living upon it from November until the middle of May in each year, in a furnished dwelling house, and with domestic servants. After May 15th, he goes to Savannah,—the plantation then becoming unhealthy,—and lives in a boarding house; visiting his plantation at intervals, longer or shorter, as the state of the crop may require. He has registered and voted in Savannah, and does not vote in South Carolina.

(3) He owns in fee simple another plantation on the Savannah river, the subject-matter of this suit, particularly described in the complaint, known as "Red Knoll," formerly used exclusively in the cultivation of rice, situate on Argyle island, about 12 miles by river above the city of Savannah. This plantation has been cultivated in rice for very many years, and was in first-class order. It has been owned by plaintiff since 1881, contains 414 acres, and with the natural flow of the current of the Savannah river, and unimpaired drainage, is worth from \$30 to \$40 per acre, by market value.

(4) Plaintiff continued to plant rice since his ownership in 1881. His crops grew worse and worse, and in 1888 he abandoned the plantation, it having become unfit for cultivation. It is not now cultivated, except in small knolls or patches, and by colored people.

(5) On the Savannah river, where this plantation lies, the water is always fresh, and land below high-water mark is reclaimed from the river by dykes or banks. Through these banks are inserted trunks or wooden boxes, having flood gates in each of them, leading into canals and ditches through the reclaimed land. Through these the lands are irrigated, and through them, also, the lands are drained, when the time comes for draining the water off. The rise and fall of the tide (fresh water) contributed materially to this drainage.

(6) In ——— the United States government, in the lawful exercise of its powers of eminent domain and regulation of commerce, under appropriations made for several years, and now being made, by congress, for the purpose, and under the direction of the secretary of war, vested with full discretion by congress in the premises, erected, and are now erecting and maintaining, certain structures in the Savannah river, beginning at points below this plantation; said structures being intended both to deepen the channel, and to raise the natural level of the current of that river. One of these, and the most important, is the cross-tide dam between Hutchinson island and Argyle island, completed in 1885. This is the obstruction nearest to this plantation of plaintiff, being about six miles off.

(7) By reason of this obstruction, the direction of the current is changed, the force of the ebb tide in the river is diminished, and the fresh water is backed up towards the plantation of plaintiff, raising the level of the current above its normal, natural level from 12 to 18 inches at the banks of the said plantation. This result followed

the erection of the cross-tide dam, and the height of the water has remained the same since that time to the present.

(8) The first effect of this is to deprive the plantation of that much fall of the tide, and so diminish its drainage. Another result is that the trunks which theretofore necessarily had been placed just above the level of low tide came below that line. Another result was that by seepage the water pressed under the bank, and rose in the plantation, in a number of small springs, until gradually the water level in the land rose to the height of the increased water level in the river, and the superadded water in the plantation was 18 inches thereby.

(9) The general result is that, by reason of the diminished drainage capacity of the plantation, neither the water let in for the purposes of irrigation, nor overflows from freshets, nor the superadded water thus forced into the plantation by seepage, could be gotten off the land, which thereby and therefrom became sodden, sour, and boggy, gradually losing its productive power; so that in 1888 it became almost valueless, certainly for rice planting, and probably for any other known system of agriculture. This is its present and permanent condition, and its ordinary and necessary use for agriculture is destroyed.

(10) This gradual result was begun to be felt when the cross-tide dam was finished, and was experienced in 1885, 1886, and 1887, and gradually grew worse, and has existed continuously to the present time. The plantation was finally abandoned from these causes in 1888.

(11) Beyond the backing up of the water on and in the plantation by reason of the obstructions, and this invasion of these lands by this superadded water around and in the plantation as above described, rendered necessary by the execution of the government plans as set forth above, the United States government has not and does not use these lands for any purpose, nor is it in possession of them, or any part of them.

(12) That the purpose of raising the waters of the Savannah river, and backing the waters thereof at and upon, around and in the plantation of the petitioner, is for the improvement of the harbor of Savannah, and deepening the waters of the Savannah river at the port of Savannah, a port of entry of the United States, situated within the state of Georgia, on the Savannah river,—a navigable river of the United States.

(13) The difference between the market value of the said plantation described in the petition before the obstructions of the United States government, above set forth, and the value of the plantation after the said obstructions and the backing of the waters of the Savannah river upon, at, in, and around said plantation, is the sum of \$10,000, the amount claimed by the petitioner.

The district attorney, in behalf of the United States, entered his motion to dismiss the petition on these grounds: (1) Because the plaintiff is not a resident of this district, and for this reason the court has no jurisdiction on his claim. (2) That his cause of ac-

tion accrued in 1885, when the cross-tide dam was erected, more than six years before he filed his petition, and he cannot maintain his suit. It is a condition precedent to his right to sue that the cause of action accrued within six years prior to his suit. (3) That the evidence discloses no such taking of the plaintiff's land for public purposes as brings him within the fifth amendment and so entitled to compensation.

Conclusions of Law.

1. The plaintiff having his business in South Carolina, remaining in that state six months in the year, with a house in which he lives, and domestics by whom he is served, leaving during the unhealthy season for health only, is a resident of this district, and the court has jurisdiction on his claim.

2. Although the water in Savannah river was raised and thrown on the plantation when the dam was built, in 1885, the full consequences were not ascertained and realized until 1888, when the plantation was abandoned. In that year the cause of action was complete. This action, begun in 1893, is within the statutory period of six years.

3. The government has not gone into actual occupancy of this land. But by reason of this public work, occasioned by the public work fulfilling its purpose, the water in the Savannah river has been raised at plaintiff's land, has been backed on it so that the drainage has been destroyed, the water kept on the land, and forced up into it, making it finally wholly unfit for cultivation. This is a taking of the land for public purposes, for which compensation must be provided. *Pumpelly v. Green Bay Co.*, 13 Wall. 181.

4. The claimant is entitled to his damages, \$10,000. Let judgment be entered accordingly.

BLYDENSTEIN et al. v. NEW YORK SECURITY & TRUST CO.

(Circuit Court, S. D. New York. December 30, 1893.)

COURTS—FEDERAL AND STATE—CONFLICTING JURISDICTION.

It is no defense to a suit brought in a federal court by an alien to recover money from a citizen that defendant, after the commencement of the suit, has been ordered by a state court, pursuant to a state statute, to hold the money to the credit of an action pending therein, as if it were paid into court; for the federal jurisdiction cannot be thus impaired.

At Law. Action by Benjamin W. Blydenstein and others against the New York Security & Trust Company to recover money. On demurrer to a defense set up in the answer. Demurrer sustained.

Antonio Knauth, for plaintiffs.

James Byrne, for defendant.

WHEELER, District Judge. This action was brought by the plaintiffs, citizens of Great Britain and Holland, in February, 1893, against the defendant, a corporation of the state of New York, to

recover \$4,347.98 alleged to have been received by the defendant from the wrongful conversion of 38 bales of burlaps belonging to the plaintiffs. For an additional affirmative defense the defendant sets up, without alleging upon what process or procedure, that—

“On or about the 11th day of April, 1893, an order was duly entered in an action then and now pending in the supreme court of the state of New York, a court of general jurisdiction, in which action the defendant herein was plaintiff, and Lipman & Co. and many others, including these plaintiffs, were defendants. This order, among other things, directed that the defendant herein hold, as a separate fund, deposited to the credit of that action, as if the same had been paid into court, the proceeds of the sale of the 200 bales of burlaps above mentioned as having been sold. Said order is still in force, and the defendant now holds said proceeds of the sale, including the sum for which the plaintiffs herein demand judgment, deposited with it to the credit of that action as if the same had been paid into court. The defendant herein is a corporation authorized by the laws of the state of New York to act, under an order of the supreme court of New York, as a depository of moneys paid into court.”

To this defense the plaintiffs demur.

Section 743 of the Code of Civil Procedure of New York provides that “a party bringing money into court pursuant to the direction of the court is discharged thereby from all further liability to the extent of the money so paid in.” The defendant relies upon this order as constituting the payment, in effect, of the money into court, pursuant to the direction of the court, thereby amounting to a payment of the claim at common law, and to a discharge under this statute; and expressly waives reliance upon it as a judgment in favor of the plaintiffs merging their cause of action, or against them extinguishing it. This proceeding is, in argument, likened to payment to some third party on request of the plaintiffs, which would be the same as payment to the plaintiffs; but they do not show, nor allege anything amounting to, any such request. The proceeding appears to have been wholly in invitum, and to rest entirely upon the power of the court, and not upon any request or consent of the plaintiffs. It in no wise amounts to a payment at common law.

When this suit was brought, this money, upon the allegations of the plaintiffs, which, for this purpose, must be taken to be true, was in the hands of the defendant, belonging to the plaintiffs. It is, for the purpose of this suit, so now, unless the defendant could, as has been urged, in some way through the power of the state court, transfer the litigation from this court to that. With reference to a similar argument, Mr. Justice Campbell, for the court, in *Hyde v. Stone*, 20 How. 175 said:

“But this court has repeatedly decided that the jurisdiction of the courts of the United States over controversies between citizens of different states cannot be impaired by the laws of the states which prescribe the modes of redress in their courts, or which regulate the distribution of their judicial power.”

To the same effect appears to be *Railroad Co. v. Gomila*, 132 U. S. 478, 10 Sup. Ct. 155; and *Cole v. Cunningham*, 133 U. S. 107, 10 Sup. Ct. 269, which holds that the courts of a state may restrain its citizens from proceeding in the courts of another state, does not

appear to be to the contrary. The rights of the plaintiffs as citizens of foreign countries in the courts of the United States are as extensive as those of citizens of the different states in those courts, and equally without the reach of the laws of the states. 24 Stat. 552; 25 Stat. 433.

Demurrer sustained.

HAGENBECK v. HAGENBECK ZOOLOGICAL ARENA CO. et al.

(Circuit Court, N. D. Illinois. December 23, 1893.)

1. EQUITY JURISDICTION—ACCOUNTING.

Where the complainant claims from the defendant an exact sum of money, and the defendant admits that complainant is entitled to that sum, less only certain unliquidated damages, there is no ground for an accounting.

2. PLEADING—ALLEGATION OF CORPORATE INSOLVENCY.

An allegation that the assets of a corporation are insufficient to pay all its liabilities, counting its capital stock as a liability of the corporation to its stockholders, is not sufficient to show that the corporation is insolvent.

3. TRUSTS—EQUITY JURISDICTION.

Complainant agreed to furnish trained wild animals for exhibition by defendant in its arena, complainant to receive each day a certain proportion of gross receipts. *Held*, that defendant's possession of complainant's share of the receipts constituted a trust cognizable in equity.

4. TRUSTS—SUIT TO ENFORCE—RECEIVER.

In a suit to compel a trustee to account for trust funds, which he should pay over to the beneficiary, and which he retains because of an alleged claim against the beneficiary for breach of contract, it is proper to appoint a receiver to take charge of the fund.

In Equity. On motion for a receiver. Suit by Carl Hagenbeck against the Hagenbeck Zoological Arena Company and others for a receiver and an accounting. Complainant moves for a receiver. Granted.

Vocke & Healy, for complainant.

Moran, Kraus, Mayer & Stein, for defendants.

GROSSCUP, District Judge. This is a motion for the appointment of a receiver. The bill and answer, taken together, show that certain of the defendants, who subsequently incorporated the Hagenbeck Zoological Arena Company, procured a concession from the Columbian Exposition under which, upon payment of 25 per cent. of the gross receipts, they and their successors were permitted to exhibit, on the grounds of the Exposition, a show of trained animals. Subsequently, an agreement was entered into between them and Carl Hagenbeck, a citizen of Prussia, by the terms of which the defendants were to build and maintain, on the grounds of the Exposition, a suitable arena, and conduct and maintain therein a show of wild animals, and the complainant was to bring to the Exposition his trained animals, and supervise them while here, for which he was to receive, after payment of the stipulated amount to the Exposition Company, one-half of the remaining gross receipts of the show, the balance to be retained by the defendants. In accordance with this agreement, the particular terms of which

are not specially important in this connection, Hagenbeck brought over his trained animals, and installed them in the arena provided by the Hagenbeck Zoological Arena Company. The show was conducted substantially as provided in the contract throughout the summer, and the defendants continued to turn over to the Exposition Company and Hagenbeck the stipulated gross receipts, until the early part of October, 1893, when, upon the pretext that the complainant had not complied fully with the terms of his agreement, the further turning over of the receipts was stopped. Thereafter there accumulated in the treasury of the company a large amount of money, which, under the terms of the contract, would have gone to the complainant, but was withheld, as the defendants say, to recoup them for damages growing out of the complainant's alleged failure to fully perform his contract. These alleged breaches are specifically set up in the bill and answers, together with other breaches alleged by the complainant to have been made by the defendants.

It is apparent from both the bill and answer that, independently of these claims for damages, there is no necessity for an accounting between the parties. The bill shows, and the answer admits, the exact amount of the gross receipts for the period covered, and there is no denial that, subject to the amount paid the Exposition Company, one-half of these are properly coming to the complainant, but for the damages arising from the breaches set forth. These damages are, however, unliquidated, and are in no sense the subject-matter of an accounting proper.

Neither is there, in my opinion, any showing that the corporation is insolvent. Some pretense is made that its assets will not be sufficient to meet its liabilities, including the alleged liability to its stockholders for the return of their subscriptions; but the credit of a stockholder, based upon his subscription, is not to be taken into account in determining the solvency of the corporation.

I am not able to find, upon the facts submitted in the bill and answer, that any partnership existed between the complainant and the defendants. What their liability in that respect to third parties would have been is of no consequence in this case. The evidence does not disclose that, as between themselves, there was any intention to create a partnership, or assume the obligations of such a relation.

The remaining and principal question is whether, under the relation existing, the defendants, from time to time, held one-half of the gross receipts of the show, less 25 per cent., in trust for the complainant, and, if so, what was the nature of the trust. It is plain that, unless the relation is one of essential trust, as distinguished from a quasi trust, or a relation in the nature of a trust only, equity will take no jurisdiction over the subject-matter. A long line of cases has been cited by counsel on either side illustrative of what character of a trust courts of equity will specifically enforce. It is not necessary to review these cases. The test or rule applicable to the case at bar is sufficiently disclosed by a com-

parison of two distinct classes of these cases. It is admitted, for instance, that the intrusting of money to an agent, for a specific purpose, creates a trust in favor of the principal, which will be enforced in a court of equity. On the other hand, the loaning of money upon a promise to repay, though creating a quasi trust between the borrower and lender, does not constitute such a relation as is cognizable in equity. It will be observed that, in the first case, the agent acquires no title in the money possessed, and no right of possession, except for the specific purpose named; while, in the second, a right of possession goes along with the funds, and the lender relies upon a promise, and not upon the thing in specie.

If it were the intention of the parties to this contract that one-half of the remaining gross receipts, after the payment of the sum due the Exposition Company, should belong in specie to the complainant, and should be in the custody of the defendants simply for transmission to the complainant, there would, in my opinion, be created essentially and technically a trust in that fund. If, on the other hand, the complainant had simply the promise of the defendants to pay him each day, for the use of his animals, and the supervision thereof, a sum of money equal to one-half the remaining gross receipts, such would create, at most, only a quasi trust. The contract and its surroundings do not leave this question free from doubt, but, it seems to me, the parties could not have intended that complainant should rely upon a promise only. It is significant that he was not to receive his money at stated intervals of a week or a month, but at the close of each day, and as soon as the gross receipts could be ascertained. This discloses a probable purpose to have his proportion of the gross receipts in specie,—to have, in short, one-half the actual remaining gross receipts, and not merely their equivalent in money.

The show was the joint production of both parties. The plaintiff contributed the animals, and gave to it his personal supervision. The defendants contributed the buildings and necessary equipments, and the personal force needed for performance and maintenance, and the gross receipts were to be divided, practically, at the close of the day's exhibition. The arrangement was essentially the same as if two money takers had been in the box office, and the receipts divided as they came in,—one-fourth to the Exposition Company, and the remainder in halves to the two parties. The defendant and its agents were, in my judgment, simply the custodian of these receipts until the close of the day's exhibition, and had no right of property or possession in them, other than to turn them over to the complainant the moment the convenience of the arrangement permitted. Suppose that a portion of these receipts had been in gold, and the balance in silver, and a premium on the first had appeared during the course of the summer, would it be claimed that the defendants could retain the gold receipts, and turn over to the complainant nothing but the depreciated silver? Such would be their right if their obligation was, not to divide the actual receipts, but to pay only in legal tender one-half the amount of the

receipts. Or, suppose that the agents, at the close of the day's exhibition, and before the division was made, had been overpowered by robbers, or had been overtaken by a fire, which consumed the paper receipts, neither the crime nor the casualty resulting in any degree from their fault, could the complainant, under a fair interpretation of the spirit of the arrangement, have still insisted upon an amount of money equal to one-half of the receipts thus lost or stolen? Such would have been his legal right if the contention of the defendants can be maintained. In my judgment the parties did not intend any such results. Taking this view of the meaning of the parties as expressed in this contract, I am of the opinion that one-half of each day's receipts, after the payment of the Exposition Company, was held in trust for the complainant, and that the defendants, in refusing to transmit to the complainant, at the close of each day, were guilty of a wrongful breach of trust, for which a remedy exists in a court of equity.

The appointment of a receiver is ancillary to this jurisdiction, but seems to me to be essential to a fair enforcement of the complainant's rights. It is true that a court of equity will not appoint a receiver in every case of trust of which it takes jurisdiction, but this case appears to me to be one in which the appointment should be made. The defendants have no right, in law, to arbitrarily seize upon that which belongs to another, even to secure a liquidation of their supposed damages. It does not seem to me that the cause for damages made out by the defendants is strong enough upon the bill and answer to justify the court in depriving the complainant of his prayer for a receiver. The defendants, according to the facts set forth in the bill and answer, did not make any claim for damages until near the termination of the Exposition. So long a delay may not defeat their right now, but certainly does not recommend their cause to the court. The presumption arising from it is that the injury could not have been greatly felt, or some complaint would have been made earlier during the association of the parties. Unless a cause for damages stronger than appears in the mere allegations of these papers existed, the defendants were not justified in withholding the money that belonged to the complainant. The case made out, therefore, is one where the defendants, so far as the court can judge now, wrongfully withhold a trust fund.

The motion for a receiver will therefore be granted.

SOUTHERN PAC. R. CO. v. TEMPLE et al.

(Circuit Court, S. D. California. December 19, 1893.)

No. 169.

EQUITY PRACTICE—DECREE PRO CONFESSO—NOTICE.

A defendant who has appeared by solicitor is entitled to notice of an application for a decree, after entry of an order pro confesso, for the purpose of being heard upon the form and extent of the decree. *Thomson v. Wooster*, 5 Sup. Ct. 788, 114 U. S. 104, applied.

v.59F.no.1—2

In Equity. Bill by the Southern Pacific Railroad Company against F. P. F. Temple and others. On motion to vacate a decree pro confesso. Granted.

J. D. Redding and Creed Haymond, for complainant.

J. B. Dunlap, for defendants.

ROSS, District Judge. This suit was brought to obtain certain relief in respect to lands. All of the defendants except F. P. F. Temple and Richard Garvey, as to whom the suit was subsequently dismissed, appeared by their solicitor, who filed, on their behalf, a demurrer to the bill. The demurrer was by the court overruled on February 8, 1892, with leave to the defendants to answer within the usual time. No answer or other pleading having been filed by the defendants within such time, their default was, on application of the complainant, duly entered on April 25, 1892, and an order entered in the order book that the complainant's bill of complaint be taken pro confesso as against the defendants in default. Subsequently, to wit, on September 14, 1892, upon the application of complainant, the court entered thereon a decree pro confesso. Of the application for the decree, no notice was given to the defendants or their solicitor. And now, upon affidavits setting forth that the defendants have, and at all times have had, a meritorious defense to the suit, and setting forth that neither they nor their solicitor ever had any notice of the overruling of their demurrer to the bill, or of the entry of the order pro confesso, or of the application of the complainant for the decree pro confesso, they ask that the decree and default be vacated, and that they be permitted to answer to the merits.

By the equity rules, said the supreme court in *Thomson v. Wooster*, 114 U. S. 104, 5 Sup. Ct. 788—

"A decree pro confesso may be had if the defendant, on being served with process, fails to appear within the time required; or if, having appeared, he fails to plead, demur, or answer to the bill within the time limited for that purpose; or if he fails to answer after a former plea, demurrer, or answer is overruled or declared insufficient. The twelfth rule in equity prescribes the time when the subpoena shall be made returnable, and directs that 'at the bottom of the subpoena shall be placed a memorandum that the defendant is to enter his appearance in the suit in the clerk's office on or before the day at which the writ is returnable; otherwise, the bill may be taken pro confesso.' The eighteenth rule requires the defendant to file his plea, demurrer, or answer (unless he gets an enlargement of the time) on the rule day next succeeding that of entering his appearance; and in default thereof the plaintiff may, at his election, enter an order (as of course) in the order book that the bill be taken pro confesso, and thereupon the cause shall be proceeded in ex parte, and the matter of the bill may be decreed by the court at any time after the expiration of thirty days from the entry of said order, if the same can be done without an answer, and is proper to be decreed; or the plaintiff, if he requires any discovery or answer to enable him to obtain a proper decree, shall be entitled to process of attachment against the defendant to compel an answer, etc. And the nineteenth rule declares that the decree rendered upon a bill taken pro confesso shall be deemed absolute, unless the court shall at the same term set aside the same, or enlarge the time for filing the answer, upon cause shown, upon motion and affidavit of the defendant."

"It is thus seen that, by our practice, a decree pro confesso is not a decree as of course according to the prayer of the bill, nor merely such as the complainant chooses to take it; but that it is made (or should be made) by the court, according to what is proper to be decreed upon the statements of the bill, assumed to be true. This gives it the greater solemnity, and accords with the English practice, as well as that of New York. Chancellor Kent, quoting Lord Eldon, says: 'Where the bill is thus taken pro confesso, and the cause is set down for hearing, the course (says Lord Eldon, in *Geary v. Sheridan*, 8 Ves. 192) is for the court to hear the pleadings, and itself to pronounce the decree, and not to permit the plaintiff to take, at his own discretion, such a decree as he could abide by, as in the case of default by the defendant at the hearing.' *Rose v. Woodruff*, 4 Johns. Ch. 547, 548. Our rules do not require the cause to be set down for hearing at a regular term, but, after the entry of the order to take the bill pro confesso, the eighteenth rule declares that thereupon the cause shall be proceeded in ex parte, and the matter of the bill may be decreed by the court at any time after the expiration of thirty days from the entry of such order, if it can be done without answer, and is proper to be decreed. This language shows that the matter of the bill ought at least to be opened and explained to the court when the decree is applied for, so that the court may see that the decree is a proper one. The binding character of the decree, as declared in rule 19, renders it proper that this degree of precaution should be taken."

This being so, it results, I think, that the defendant who has appeared by his solicitor to the bill is entitled to notice of the application for a decree pro confesso. In *Thomson v. Wooster*, supra, such notice was given; and in *Bennett v. Hoefner*, 17 Blatchf. 341, it was held that a party who has appeared by a solicitor is of right entitled to notice of application for a decree after an order pro confesso, and has the right to be heard as to the form of the decree, and upon such other questions as can be presented upon the complainant's pleadings and proof; this, obviously, to the end that the decree be not allowed to go beyond the case made by the bill, and such proofs as the complainant may make.

It results that the decree must be vacated. I am further of opinion, in view of the affidavits, that the ends of justice will be best attained by setting aside the default, and permitting an answer to be filed, so that the cause may be determined on its merits. An order to that effect will be entered.

OCONTO WATER CO. v. NATIONAL FOUNDRY & PIPE WORKS,
Limited.

(Circuit Court of Appeals, Seventh Circuit. November 7, 1893.)

No. 91.

1. MECHANIC'S LIEN—PROPERTY SUBJECT TO—WATER COMPANIES.

Rev. St. Wis. § 3314, which provides that, in case any person shall purchase machinery to be placed on premises in which the purchaser has not an interest sufficient for a lien, the person furnishing the machinery shall have a lien on it, and a right to remove it, does not apply to the pipes of a water company, laid through the streets of a town, and connected with the pumping works of the company. The plant of the company is an integer, and cannot be separated under a lien.

2. SAME.

The public policy of Wisconsin is independent of that of other states, and under it the property of quasi public corporations is subject to the

general lien laws. In this respect a water company does not differ from a railroad company. *Hill v. Railroad Co.*, 11 Wis. 215, followed.

8. SAME.

The entire plant of a water company, including piping laid in the streets of a city, and the interest of the company in the premises, are by Rev. St. Wis. § 3314, subject to the lien of the material man furnishing the piping.

4. SAME—QUASI PUBLIC CORPORATION — ENFORCEMENT OF LIEN — FRANCHISE AND PLANT

Where the law gives the material man a specific lien upon a certain plant, and the plant and franchise, being that of a water company, cannot be separated by judicial sale because of their peculiar public use, a court of equity has power to decree the sale of both plant and franchise in satisfaction of the lien. 52 Fed. 43, affirmed.

Appeal from the Circuit Court of the United States for the Eastern District of Wisconsin.

In Equity. Bill by the National Foundry & Pipe Works, Limited, against the Oconto Water Company, to foreclose a mechanic's lien. Complainant obtained a decree. 52 Fed. 43. Defendant appeals. Affirmed.

W. H. Webster, for appellant.

George H. Noyes, for appellee.

Before WOODS, Circuit Judge, and BUNN and BAKER, District Judges.

PER CURIAM. We concur in the opinion and conclusion of the circuit court as reported in 52 Fed. 43. The decree below is therefore affirmed.

JOHNSON RAILROAD SIGNAL CO. v. UNION SWITCH & SIGNAL CO.

(Circuit Court, W. D. Pennsylvania. October 2, 1893.)

No. 13.

1. PRINCIPAL AND AGENT—POWERS OF AGENT—PATENT RIGHTS.

A power of attorney which, in consideration of a prescribed royalty, appoints the donee sole agent in the United States "for the purpose of working and developing the business of said patents," with power to "negotiate the sale of the said patents upon terms to be agreed upon," creates a mere agency, not coupled with an interest, and gives the agent no right to convey or assign the patents without the assent of his principal.

2. PATENTS—ASSIGNMENT.

A contract which purports to convey, for a prescribed royalty, the sole and exclusive right and license to make, use, and sell in the United States the improvements covered by a patent for the full term thereof, is in substance an absolute assignment, and nothing remains in the assignor.

3. SAME—POWER OF ATTORNEY.

An assignment of a patent by an attorney in fact does not bind the principal unless executed in his name and under his seal, and is ineffective if it runs in the attorney's name and seal. *Machesney v. Brown*, 29 Fed. 145, followed.

In Equity. Bill by the Johnson Railroad Signal Company against the Union Switch & Signal Company, for infringement of letters patent No. 241,246, issued to Frederick Cheeswright. Cheeswright, by a power of attorney, the provisions of which are set out in the

opinion, constituted one Yeomans his attorney in fact in the matter of the patent, and defendant claims under a conveyance by Yeomans, dated March 21, 1882. Plaintiff claims title to the same patent under a power of attorney from Cheeswright to Henry Bezer, dated October 31, 1889, and an absolute assignment of the patent from the latter. The case was heretofore heard on motion for leave to file a cross bill, and for an order for substituted service. 43 Fed. 331. Afterwards, a motion by the cross complainant for an injunction was denied. 51 Fed. 85. Decree is now rendered for complainant.

George W. Miller and William R. Blair, for complainant.

George H. Christy and S. Schoyer, Jr., for defendant.

Before ACHESON, Circuit Judge, and BUFFINGTON, District Judge.

ACHESON, Circuit Judge. The new proofs fail to show that Cheeswright assented to or ratified the instrument of March 21, 1882, or that he acquiesced therein after knowledge. The burden of proof is here upon the defendant in the original bill, the Union Switch & Signal Company. As between Yeomans and Cheeswright, it is oath against oath. There are, however, circumstances in the case which greatly discredit Yeomans. Then the correspondence, as a whole, sustains Cheeswright. We are altogether convinced that he was not fully informed as to the nature of the arrangement between Yeomans and the defendant. This, we think, is demonstrable from the letters. That he was not furnished with a copy of the writing of March 21, 1882, or advised of its contents, he swears positively. We are satisfied that he speaks the truth. In our judgment, the clear weight of the evidence is with the plaintiff, the Johnson Railroad Signal Company.

Upon the question of title, then, the case depends—as it did when before the court on the motion for an injunction, (51 Fed. 85)—upon the papers under which the respective parties claim ownership of the letters patent, the subject-matter of this suit. The question has been reargued, and it has been again carefully considered. By the written instrument of September 10, 1881, executed under the hand and seal of Cheeswright, the latter appointed Yeomans his “sole agent” for the United States “for the purpose of working and developing the business of the said patents in those parts, for and in consideration of a payment to be well and truly made by the said D. M. Yeomans to me, the said Frederick Cheeswright, my heirs, executors, administrators, and assigns, as royalty, of four pounds per lever, British money, for every lever fitted upon any railway in the United States, to which Sykes’ system of signaling may be attached or connected, with power for the said D. M. Yeomans to negotiate the sale of the said patents upon terms to be agreed upon.”

It will be perceived that this instrument contains no words of conveyance or assignment. It grants to Yeomans no interest whatsoever in the patents. It simply confers an authority upon him to

act as agent for Cheeswright for the purpose specified. *Sewing-Machine Co. v. Ewing*, 141 U. S. 627, 12 Sup. Ct. 94. The power concerns the interest of the principal alone. It is very clear upon the authorities that it was not a power coupled with an interest. *Hunt v. Rousmanier*, 8 Wheat. 174; *State v. Walker*, 125 U. S. 339, 8 Sup. Ct. 929; *Hartley's Appeal*, 53 Pa. St. 212; *Blackstone v. Buttermore*, Id. 266. Yeomans did not bind himself to act for any certain period. He was free to terminate his relation with Cheeswright, and the latter had the like right. *Sewing-Machine Co. v. Ewing*, supra; *Coffin v. Landis*, 46 Pa. St. 426. The agency was a personal one. The power was to Yeomans alone, not to his assigns. Cheeswright placed his trust in Yeomans individually. The agency, therefore, was not transferable. *Whart. Ag. § 28*. The power of attorney (for this, and nothing else, it was) contemplated two things: First, "the working and developing the business of the said patents;" second, the negotiation of the sale of the patents "upon terms to be agreed upon." At the argument it was conceded by the counsel for the defendant, the Union Switch & Signal Company, that, under the clause, "with power for the said D. M. Yeomans to negotiate the sale of the said patents upon terms to be agreed upon," Yeomans could not consummate a sale of the patents without Cheeswright's approval of the terms of the sale. This must be the correct construction; otherwise, the words "upon terms to be agreed upon" would be without force and useless, for a sale to be made by Yeomans would imply, and necessarily involve, an agreement as to terms as between him and the other party to the contract. Yeomans could "negotiate" a sale, but the terms were to be accepted by Cheeswright before it became a binding contract. This, we think, is the clear, and, indeed, is the agreed, meaning of the clause.

Now, such being the character of the power of attorney which Yeomans held, he executed under his hand and seal, in his own name, and solely as his own act and deed, the instrument of March 21, 1882. This paper, after reciting that by an instrument in writing executed by Cheeswright, September 10, 1881, Yeomans "is appointed sole agent for the United States of America, for the purpose of working and developing the said patents in those parts, for and in consideration of a royalty therein named," and that the Union Switch & Signal Company "is desirous of acquiring the sole and exclusive right and license of making, using, and selling in the United States the said patented inventions," proceeds thus:

"Now, in carrying out and accomplishing the purposes of the said agency, the said D. M. Yeomans, for and in consideration of one dollar to him in hand paid, and of royalties to be paid as hereinafter set forth, has given and granted, and does hereby give and grant, to the said the Union Switch and Signal Company, its successors and assigns, the sole and exclusive right and license, under said recited patents, to make, use, and sell the improvements therein described and claimed, or intended so to be, to the full ends of the respective terms of said patents: provided that and by the acceptance hereof the said licensee agrees that he will well and truly pay to the said Yeomans, quarterly, during said respective terms, and to his heirs, executors, administrators, and assigns, as royalty, four pounds per lever, British money, for every lever fitted by it upon any railway in the United States, to which

Sykes' system of signaling may be attached. Witness the hand and seal of the said D. M. Yeomans this 21st day of March, 1882.

"D. M. Yeomans. [Seal.]"

Was this an authorized and valid instrument, as against Cheeswright, under the powers he had conferred upon Yeomans? The paper, it will be observed, purports to grant to the corporation, its successors and assigns, the sole and exclusive right and license under the patents to make, use, and sell the improvements therein described and claimed, to the full ends of the respective terms of the patents. What was this but a sale of the patents? Section 4884, Rev. St. U. S., provides:

"Every patent shall contain * * * a grant to the patentee, his heirs or assigns, for the term of seventeen years, of the exclusive right to make, use, and vend the invention or discovery throughout the United States, and the territories thereof."

Manifestly, Yeomans' grant to the Union Switch & Signal Company was as comprehensive as the grant by the United States to Cheeswright. It was a transfer of the entire patents. *Waterman v. Mackenzie*, 138 U. S. 252, 255, 11 Sup. Ct. 334. If it could be said that the grant here was not a sale of the patents technically, it certainly was a sale in substance and effect. A grant by the owner of a patent to a corporation, its successors and assigns, of the sole and exclusive right and license to make, use, and sell the patented improvement during the term of the patent, vests the entire invention and monopoly in the alienee. *Nellis v. Manufacturing Co.*, 13 Fed. 451; *Pickhardt v. Packard*, 22 Fed. 530, 532; *Rob. Pat.* § 763. Under such an assignment, absolutely nothing remains in the assignor. Such assignee is substituted for the original patentee, and is invested with all his rights. *Id.* § 762; Rev. St. §§ 4898, 4916, 4917, 4919. But, as we have seen, Yeomans was not authorized to sell the patents without the concurrence of his principal, and there was no such concurrence. As an attempted sale, then, the instrument was inoperative and void.

The defendant, however, denying that the transaction of March 21, 1882, was a sale of the patents, contends that it was a method of "working and developing the business of the said patents," within the scope of the first clause of the power of attorney. Is there any fair ground upon which this proposition can be defended? The language, "working and developing the business of the said patents," it may be conceded, is somewhat indefinite, and involved the exercise by Yeomans of reasonable discretion. Doubtless, he might have granted a special license to each railway company which adopted Sykes' system, and also ordinary shop rights to manufacturers. We need not now define the precise limits of his authority under this first clause. Obviously, it did not extend to a sale of the patents, for that was provided for in the second clause; and we think it may be confidently affirmed that the first clause did not authorize that which was substantially a sale, even if not technically and nominally so.

Now the "working and developing the business of the said patents" was the declared purpose for which Yeomans was appointed

the "sole agent" of Cheeswright, and the business, it is to be noted, was to be conducted by Yeomans as such agent. But the instrument in question undertook to terminate Yeomans' agency, and to transfer to a stranger to Cheeswright the exclusive right to operate the patents; not, however, as the agent or in the interest of Cheeswright, but at the pleasure and for the benefit of the alienee. This was something far more objectionable than a mere transfer of his agency, which, as we have seen, was beyond the power of Yeomans. Moreover, the agency of Yeomans was determinable at the will of Cheeswright; but Yeomans essayed to invest his grantee with the irrevocable right to practice the invention to the exclusion of everybody else, even the owner of the patents. Then, again, the paper did not bind the grantee to do anything. In the interest of rival safety appliances, the Union Switch & Signal Company was at liberty to suppress the Sykes invention altogether. The company was not bound to fit a single lever. In fine, under color of his agency to work and develop the business of the patents, (which agency did not authorize a sale,) Yeomans undertook to dispose of the whole beneficial interest in the patents by an exclusive and irrevocable grant to the Union Switch & Signal Company, without compensation to Cheeswright, or any reservation whatsoever to him, and without even a stipulation by the grantee that it would work and develop the business of the patents, or use the invention at all. Manifestly, Yeomans' grant, instead of being in the line of his agency, frustrated it, and defeated the clearly expressed intention of his principal. We have only to add that there is no testimony to show that what Yeomans did was an ordinary or commercially approved method of working and developing the business of the patent. It is, we think, quite impossible to sustain the act of Yeomans as a fair exercise of his authority.

There is still another objection to the instrument of March 21, 1882, which, under authorities, seems to be equally fatal. It does not purport to be the act and deed of Cheeswright, but of Yeomans alone. For a recited nominal consideration paid to him in hand, and a contingent quarterly royalty to be paid to him, and to his heirs, executors, administrators, and assigns, Yeomans personally made the grant. Plainly, upon the face of the paper, the transaction was between Yeomans individually and the Union Switch & Signal Company; and, if we are at liberty to look at the parol evidence dehors the writing, we discover that Yeomans did not regard himself as acting as agent for Cheeswright in what he did, or intend so to act. His surprising statement, when on the stand as a witness for the defendant, was this:

"I did not consider myself the agent of Frederick Cheeswright to the extent of my conveyance to the Union Switch and Signal Company. I only conveyed to them the rights and interests I had purchased in the patents."

It is, however, shown that he had no right, title, or interest whatever in the patents, by purchase or otherwise. In *Machenev v. Brown*, 29 Fed. 145, Judge Wallace held that the assignment of a patent for an invention, when executed by one acting as attorney, by an instrument under seal, must be executed in the name

of the principal, and purport to be sealed with his seal, in order to bind the principal, although in the preamble to the deed of assignment the power of attorney was recited. There was a like ruling with respect to the grant of a license to use a patent in *Pryor v. Coulter*, 1 Bailey, 517. Undoubtedly, the general rule is that, to bind the principal, an instrument under seal must be in his name. *Whart. Ag. § 283*; *Story, Ag. §§ 147, 148*; *Clarke v. Courtney*, 5 Pet. 319, 349; *Elwell v. Shaw*, 16 Mass. 42; *Kiersted v. Railroad Co.*, 69 N. Y. 343; *Heffernan v. Addams*, 7 Watts, 116; *Strohecker v. Bank*, 8 Watts, 188, 190; *Bassett v. Hawk*, 114 Pa. St. 502, 504, 8 Atl. 18. There is no equitable reason for taking this case out of the operation of the rule. Cheeswright has never received a farthing under the assignment of March 21, 1882; but Yeomans, it appears, was paid by the defendant a large money consideration upon his execution of the papers,—a fact which was concealed from Cheeswright. Moreover, the paper was not drawn so as to protect the rights of Cheeswright, or to secure him anything. In very truth, it completely ignored him and his interests.

Upon the whole case, we are of the opinion that the instrument executed by Yeomans on March 21, 1882, was not binding upon his principal. That paper being out of the way, the title of the plaintiff to the letters patent in suit is complete, and, as there is evidence of infringement and threatened infringement by the defendant, the plaintiff is entitled to a decree for an injunction and an account. We have had some difficulty in determining how far back the accounting should go. Our conclusion is that, in its dealings with Yeomans, bad faith to Cheeswright is not imputable to the defendant company. Then, Cheeswright did know that some business relation existed between Yeomans and the defendant with reference to the working of the patented invention. He supposed that the defendant was manufacturing and fitting signals for Yeomans under his agency, and with this he seems to have been content. We think, then, that it would be doing substantial justice to commence the accounting at the date when Yeomans' power of attorney was revoked by Cheeswright by his appointment of Henry Bezer as his attorney in fact.

Let a decree be drawn in accordance with the foregoing views.

BUFFINGTON, District Judge, concurs.

STREET et al. v. MARYLAND CENT. RY. CO. et al.

(Circuit Court, D. Maryland. November 15, 1893.)

1. RAILROAD COMPANIES—RECEIVERS—IMPROVEMENTS—RECEIVER'S CERTIFICATES.

A receiver of a small, local narrow-gauge railroad, appointed on the petition of a comparatively small holder of stock, will not be authorized to issue receiver's certificates to provide for new equipment, additional sidings, and permanent structures, in order to test its earning capacity if fully developed, when the measure is opposed by all other interests, and the first mortgage bondholders are pressing for a foreclosure of

their past-due mortgage; it being apparent, furthermore, that the road could not, in any reasonable time cancel the certificates, and resume payment of interest on its bonds, and that the first measure of any new owners would be to change the road to a standard gauge, thus rendering the proposed improvements useless.

2. SAME—PRIORITIES—LABOR AND MATERIAL CLAIMS.

Where a railroad receiver is appointed on the petition, not of the bondholders, but of a stockholder, and no earnings have been diverted to pay interest on the bonds, there is no lien or equity requiring the payment of past-due labor and material claims out of the corpus of the property by the issuance of receiver's certificates. There is, however, an equity requiring payment of those whose labor actually kept the road a going concern out of any net earnings which the receiver may realize, but these earnings cannot be anticipated by raising money on receiver's certificates, except by agreement of the parties.

In Equity. Suit by Joseph M. Street and others against the Maryland Central Railway Company and others in which a receiver was appointed for the defendant company. Heard on petitions for allowance of claims alleged to be entitled to preference, and for issuance of receiver's certificates to provide for improvements.

Stevenson A. Williams, for Joseph M. Street.

D. G. McIntosh and N. P. Bond, for receiver William H. Bosley.

John P. Poe, R. R. Boarman, and Winfield J. Taylor, for Baltimore & L. R. Co. and the Baltimore Forwarding Co., etc.

R. M. Venable and William A. Fisher, for Mercantile Trust & Deposit Co., trustee for bondholders.

L. H. Robinson, for Thomas M. Shanahan and others, laborers.

James A. Irving, for New York Equipment Co., of New York.

E. P. Keech, Jr., for Morton Safety Heating Co.

MORRIS, District Judge. The matters now before the court arise upon the petition of several classes of creditors urging the court to allow and provide for the payment of their claims as debts having a preference; also upon the reports of the receiver calling the attention of the court to the necessity for certain repairs and betterments to the roadbed, bridges, and trestles, and to the necessity for additional equipment of cars and engines in order to handle passenger and freight traffic; also upon the petitions contained in the supplemental bill of the complainant Street, filed October 16, 1893, praying the court to restrain the first mortgage bondholders from proceeding to sell under their mortgage until by improved management, and, with the roadbed and equipment put in proper condition for business, the real value of the railroad can be demonstrated by the receiver, the money to accomplish this to be raised upon receiver's certificates.

At the threshold of the question of the extent to which the court ought to authorize expenditures beyond the current earnings of the railroad is the question whether the railroad under the receivership is to be merely kept a going concern until in the regular course of legal procedure, under the bill filed for that purpose, a decree for sale is entered, or whether, as prayed in the complainants' supplemental bill, the roadbed is to be improved and its rolling stock and general equipment increased, and the whole property put in such

improved condition as to enable it to get and to do all the business which it might reasonably obtain, and so to demonstrate its earning capacity. Aside from the question how far it is ever right or within the power of a court, against the objection and protest of mortgage creditors having large secured debts, and others having a large pecuniary interest in a railroad property, to undertake such an enterprise, the facts with respect to this property and this litigation are such as to leave no doubt as to the duty of the court. This railroad in Maryland is a line about 43½ miles in length. It is a narrow-gauge local road, out of repair, and insufficiently equipped in every particular. It is only five years since the corporation was reorganized, and yet it is now insolvent, immeshed in complications, and with a large floating debt. There is an admitted first mortgage debt of \$850,000, and a second mortgage under which \$900,000 of bonds have been issued, a portion of which at least may be established to be bona fide incumbrances. The first mortgage is now in default for nonpayment of the six-months interest due last July, and under the terms of the mortgage the whole principal has been declared due. A bill to foreclose this mortgage has been filed. It is shown that the corporation cannot be extricated from its insolvency, and that there will be a sale of its property by its mortgage creditors. With respect to its income, although under the receivership the earnings have been increased, and no doubt, with the tracks and trestles in improved condition, and with sufficient rolling stock, the receiver could further increase its earnings, it is evident that in no reasonable period of time would the net earnings suffice to repay the proposed expenditures, and also pay the current interest on the admitted mortgage debt. The first mortgage bondholders appear to have been in no manner implicated in the management of the property. The installment of interest due to them was not in default until after the receiver was appointed at the instance of the complainant stockholder. Under these circumstances what justice or equity could there be in the court saying to these bondholders:

"You shall not foreclose your mortgage according to its terms under which you took your bonds. You shall go without the interest due you until the court has improved the property and ascertained its earning capacity; and, moreover, against your objections, the court will issue enough certificates of indebtedness to raise money to put the road in first-rate condition, and supply it with equipment, which indebtedness shall have priority over your mortgage, and shall be first taken out of the proceeds of the property when the court thinks the proper time has come to decree a sale?"

A further consideration in this case is the general concession of all the parties that probably the first step of any new owners would be to change the railroad from a narrow-gauge to a standard-gauge road, in which event much of the proposed expenditures would be unavailable. It is to be borne in mind, also, that the only party to the cause advocating any considerable expenditures upon the property is the complainant, whose holding of stock is comparatively small, and, coming after the mortgage debts and all unsecured debts and liabilities, he can have only a remote

chance of being benefited. All the other parties in interest strongly oppose the expenditures. There can be no doubt that this is a case in which the expenditures should be strictly confined to those which cannot be avoided, and to such repairs as are required to keep the railroad in operation, and reasonably safe for those who travel on it and those who operate it, and that the court should not approve any policy in its management which looks to preventing the bondholders from foreclosing in accordance with the terms of their mortgage, and should refuse the application for an injunction to restrain them. The safe operation of the railroad and the preservation of the property from further depreciation is the only judicial function of the court in connection with it.

Special Expenditures which will be Authorized. There are several items brought to the attention of the court by the receiver which are required by the necessities of the road, and which will be authorized. One new engine is absolutely required, and the purchase will be authorized. The purchase of a moderate number of new ties to replace any which render the road unsafe, such renewals as would be considered ordinary, necessary, current repairs, will be ordered. The strengthening of certain of the trestles by guards or other proper and necessary braces will be directed. The lowering of the tracks under North avenue, as required by the ordinance of the city of Baltimore, has been authorized. Some necessary refitting of the passenger coaches may also be directed.

Debts not incurred by the Receiver, but which he will have to Pay. The New York Equipment Company furnished for the use of the railroad certain locomotives and cars, under contracts of lease and conditional sale, retaining the title to the property and the right to reclaim the property upon default in payment of the installments of purchase money. The Morton Safety Heating Company supplied heating apparatus for passenger cars under similar contracts. All this property is now in possession of the receiver, and he cannot operate the road without it. He cannot retain it without complying with the contracts, and must pay the current installments and those which have fallen due since the property has been in his hands. He should take an assignment of the notes given for the payments in such manner as to protect his lien for the sums paid. There remains to be considered a large item of past-due indebtedness, namely, the arrears of wages due the employes of the railroad at the time the receiver was put in possession. He was put in possession May 17th, and the unpaid pay rolls for three months prior amount to over \$21,000. Of this the receiver has calculated that \$14,471.86 would be fairly chargeable against the road in Maryland, \$6,750.55 against the road in Pennsylvania. It is apparent, however, that these claims are not all due to persons who were engaged in operating the Baltimore & Lehigh Railroad. Some were the employes of the forwarding company which had contracted to standard gauge the road. All the receiver is collecting out of which to pay any of these claims is the net income from the earnings of the Baltimore & Lehigh Railroad after paying

its current operating expenses. There is no law of the state which gives a lien upon the corpus of the property for the payment of these wages and labor claims. There is no equity as against the mortgage creditors to require them to admit these claims as prior to their mortgages. The receiver was not appointed at their instance, but at the instance of a stockholder. There was no interest paid on these bonds during the three months covered by these arrears of wages, and no diversion for the benefit of the bondholders, and, there being no default in the mortgages, they had no right to disturb the possession and management of the corporation. To say that these claims must be paid without reference to the net earnings of the road in the hands of the receiver, and that receiver's certificates shall be issued to raise money to pay them, is to give these claims a priority which the law has not provided, and which cannot be given without the consent of the bondholders any more than to other unsecured creditors. Those claims of wages of persons who were actually engaged in the practical operation of the railroad, and by whose labor it was kept going, have an equity to be paid out of any net income which the receiver may be able to realize from running the road, and perhaps it may be possible in some way to anticipate these earnings, and provide for the immediate relief of this class of claimants; but this can be done, if at all, only by agreement. I will sign orders that may be prepared in accordance with the foregoing rulings.

DOUGLASS et al. v. BYRNES et al.

(Circuit Court, D. Nevada. December 18, 1893.)

1. EMINENT DOMAIN—MINING — LOCATION OF TUNNEL — DISCRETION OF PETITIONERS

In condemning a right of way for a tunnel to a mining claim under the Nevada statute, a large discretion is necessarily vested in the petitioners in selecting the route of the tunnel, and this discretion will not be reviewed by the court unless they have exceeded the authority of the statute or acted in bad faith.

2. SAME—RIGHT TO CONDEMN.

The fact that petitioners actually constructed the tunnel before taking steps to condemn the lands cannot affect their right of condemnation.

3. SAME—TUNNEL THROUGH OTHER CLAIMS.

Statutory authority to condemn "real estate" necessary for carrying on the business of mining (Gen. St. Nev. §§ 256-273) includes power to condemn a right of way for a tunnel through other mining claims, when necessary to the development of a given mine.

Petition by J. M. Douglass and the Goodman Gold & Silver Mining Company to condemn a right of way for a tunnel through certain mining ground in which defendants claim an interest.

F. M. Huffaker and Baker, Wines & Dorsey, for petitioners.
E. L. Campbell and W. E. F. Deal, for defendants.

HAWLEY, District Judge, (orally.) The Goodman Gold & Silver Mining Company, a corporation organized and existing under the

laws of the state of Nevada, is the owner of the patented mining claim and mining ground, situate in the Devil's Gate and Chinatown mining district, known as the "Goodman Mine." J. M. Douglass is the owner and holder of a controlling interest of the capital stock of said corporation, and now is, and for two years last past has been, engaged in working the Goodman mine for his own benefit, in his own individual interest, at his sole expense and outlay, with the knowledge and consent of said corporation. Having such ownership and interest in the Goodman mine, they claim the right, under the provisions of the "act to encourage the mining, milling, smelting or other reduction of ores in the state of Nevada," (Gen. St. Nev. §§ 256-273,) to condemn the right of way for a tunnel 7½ feet wide by 7½ feet high, from the Contact mine, through five intervening mining claims and locations, viz. the Atlantic, Annie, Red Jacket, South End, and Clinton, to the Goodman mine, and to appropriate so much of each of said intervening mining claims as is and will be necessary for the proper construction and maintenance of said tunnel.

The evidence shows that several years ago a tunnel was run through the Contact mine into the Atlantic ground; that a portion of this tunnel, by lapse of time and nonuse, had become out of repair; that petitioner Douglass claims to be the owner of one-half of the Contact mine; that the defendants Byrnes and Mulville claim to be the owners of the tunnel, from its mouth on the Contact mine, into the Atlantic mine, and they claim that any interest which Douglass may have in the Contact mine is held in trust for them, and is subject to their rights to work the Atlantic mine through the tunnel; that in February, 1892, petitioner Douglass located a tunnel right, under the act of congress, commencing at the mouth of the old tunnel on the Contact mine, and running through the intervening mining claims before mentioned to the Goodman mine; that he cleaned out the old tunnel running into the Atlantic ground, and repaired it, and has constructed a tunnel the balance of the way through the other claims to the line of the Goodman mine; that the defendants Byrnes and Mulville, claiming to be the owners of the Atlantic ground and the old tunnel, commenced an action in ejectment to recover the possession of the tunnel; that thereafter this proceeding was instituted in the state district court, by petitioner Douglass, and subsequently removed to this court, and the Goodman Mining Company was, upon motion of defendants, made a party petitioner herein; that a feasible, economical, direct, and convenient way of running the tunnel is on the line which Douglass selected; that a tunnel could have been constructed a few feet higher or lower, or a few feet on either side thereof, so as not to interfere with the old tunnel, without much more inconvenience or expense, but no place could have been selected without the necessity of running through the ground of various mining claims before reaching the Goodman mine; that the Atlantic, Red Jacket, and South End are patented mining claims, and the Annie and Clinton are not patented.

Section 1 of the act of the legislature of the state of Nevada reads as follows:

"The production and reduction of ores are of vital necessity to the people of this state; are pursuits in which all are interested, and from which all derive a benefit; so the mining, milling, smelting, or other reduction of ores are hereby declared to be for the public use, and the right of eminent domain may be exercised therefor."

Section 2 provides, among other things, that:

"Any person, company, or corporation engaged in mining, milling, smelting, or other reduction of ores may acquire any real estate, or any right, title, interest, estate, or claim therein or thereto necessary for the purposes of any such business, by means of the special proceedings prescribed in this act."

Section 6 provides that:

"Upon the hearing of the allegations and proofs of the said parties, if the said court or judge shall be satisfied that the said lands, or any part thereof, are necessary or proper for any of the purposes mentioned in said petition, then such court or judge shall appoint three competent and disinterested persons as commissioners."

Other sections of the act provide how the proceedings shall be commenced, what shall be set forth in the petition, who shall be made defendants, how the commissioners shall be selected, the manner in which they shall proceed, etc.

The question whether the defendants Byrnes and Mulville are the owners of the tunnel right of way, from its mouth on the Contact mine into the Atlantic ground, need not be determined at this stage of the proceedings. The act contemplates that the parties having any right, title, or interest in the lands sought to be condemned shall make proof of their interest in the land and of its value before the commissioners. In fact, this court cannot, at the present time, determine any question of title to any of the mining claims, for it may be that other parties who have not appeared and answered the petition will appear and assert some right, title, or interest before the commissioners, if any are appointed. Section 3 of the act provides that:

"The persons in occupation of said tract or tracts of land, and those having any right, title, or interest therein, whether named in the petition or not, shall be defendants thereto, and may appear and show cause against the same, and may appear and be heard before the commissioners herein provided for, and in proceedings subsequent thereto, in the same manner as if they had appeared and answered said petition."

The court at the present time can only be called upon to determine whether "the said lands, or any part thereof, are necessary or proper for any of the purposes mentioned in said petition," as provided in section 6, and whether the act authorizes such lands to be condemned for the purposes set forth in the petition. The constitutionality of the act, and the fact that the business of mining is a "public use" in this state, is settled and determined by the decisions of the supreme court in *Mining Co. v. Seawell*, 11 Nev. 394, and *Mining Co. v. Corcoran*, 15 Nev. 147. See, also, *Lewis, Em. Dom.* § 1184; *Mills, Em. Dom.* § 20.

The power of the legislature having been fully recognized and sanctioned, the purpose of the act should not be hampered by any

narrow or technical objections. The importance of encouraging the mining industry of this state must be kept in view. This was the object, intent, and purpose of the legislature in passing the act, and its wisdom, policy, and expediency was thereby determined. A reasonable, fair, just, broad, and liberal view should be taken by the court in interpreting its provisions. Defendants claim that the petition should be denied because the evidence shows that there were other places in the vicinity as well adapted as the one selected by Mr. Douglass, where the tunnel could have been run without interfering with the old tunnel on the Contact and Atlantic mining claims. The testimony upon this point is not relevant to the real issues in the case. A large discretion is necessarily invested in petitioners in the selection of the route for the tunnel. It must be presumed that self-interest, if nothing else, will dictate that they would not abuse this power. It is not within the power of the court to absolutely control the exercise of this discretion in selecting the land to be condemned. It will not be reviewed by the court unless it appears that they have exceeded the authority of the statute, and have acted in bad faith. In *Mining Co. v. Corcoran*, there is a complete answer to the claim made by defendants upon this point. The court in that case, in reply to a similar contention, said:

"It may, for the sake of the argument, be admitted, as claimed by appellants, that respondent could have gone six hundred feet further west or six hundred feet further east, and procured other land upon which to erect the necessary hoisting works and sink a shaft. The record, however, shows that all the adjacent lands are located and claimed as mining locations; hence the same objection could have been urged wherever the location of a site was chosen; and, if this fact should be considered of sufficient importance to prevent the condemnation of the lands in question, then it would follow that no lands could ever be procured by the respondent under the act of the legislature. This case would then come within the category of cases which, as was said in *Mining Co. v. Seawell*, were liable to happen, that 'individuals, by securing a title to the barren lands adjacent to the mines, mills, or works, have it within their power, by unreasonably refusing to part with their lands for a just and fair compensation, which capital is always willing to give without litigation, to greatly embarrass, if not entirely defeat, the business of mining in such localities;' and confirms the opinion there advanced, that 'the mineral wealth of this state ought not to be left undeveloped for the want of any quantity of land actually necessary to enable the owner or owners of mines to conduct and carry on the business of mining.' The law does not contemplate that an 'absolute necessity' should exist for the identical lands sought to be condemned. The selection of any site for the purposes specified must necessarily, to some extent, be arbitrary. The position contended for by appellants is not sustained by any sound reasoning, and is wholly unsupported by authority."

See, also, *Railroad Co. v. Kip*, 46 N. Y. 553; *Ex parte Boston & A. R. Co.*, 53 N. Y. 576; *New York Cent. & H. R. R. Co. v. Metropolitan Gaslight Co.*, 63 N. Y. 326; *Mills*, Em. Dom. § 62; *Lewis*, Em. Dom. § 395.

The real question is whether the site selected by petitioners can be condemned. It will be conceded, as claimed by defendants, that no person can appropriate any land for his own mere private use and convenience. But the petitioners are not seeking to condemn any lands solely for their own private gain, or, from willful or malicious motives,

to injure or destroy the rights of other parties. The act of Douglass in taking possession of the premises and constructing the tunnel without first obtaining the consent of the owners of the mining claims through which it passes, or taking the necessary steps to condemn the right of way, may to some extent account for, if it does not justify, the criticism of counsel as to his conduct. But "the courts cannot dictate the order in which the petitioner shall proceed to acquire property or rights." Lewis, Em. Dom. § 395. The duty of this court ends by determining whether the course now being pursued can be sustained. It cannot be claimed that the petitioners, by the institution of this proceeding, are attempting to wrongfully obtain possession of any of the mining claims owned by other parties, or to destroy any rights which the owners of such claims may have therein. They only ask the right to condemn an easement—a right of way to construct and maintain a tunnel—through the mining lands owned by other persons or corporations, so as to enable them to properly drain, work, and develop the Goodman mine. The tunnel commences on a level with American Flat ravine, and the land upon which the mining claims are located rises steeply from the mouth of the tunnel. The evidence shows that it is necessary to construct a tunnel through the other mining claims in order to properly drain the water from the Goodman mine. Other attempts to accomplish this purpose by the erection of expensive hoisting works and machinery have proved unavailing for that purpose. The Goodman mine cannot be successfully worked without the aid and advantage which such a tunnel will give. There is as much of a necessity for the running of this tunnel as there was for the construction of the road in *Mining Co. v. Seawell*, or for the sinking of a shaft in *Mining Co. v. Corcoran*; and in the light of those authorities, and of the principles therein discussed and announced, it seems clear to my mind that this case comes strictly within the provisions of the statute authorizing condemnation to be made. A tunnel properly constructed through a mining claim cannot, as a general rule, be said to seriously interfere with the rights of the owner. Ordinarily, the running of such a tunnel would prove to be of great advantage and benefit to the several mining claims through which it passes; and especially would this be so if proper provision could be made for the owners of such claims to have the use and occupancy thereof, in common with others, for the purpose of working their respective mines. But in any event it is difficult to see what particular objection can be urged to the running of the tunnel, if proper damages are assessed for the injury that may be caused to the mining claims through which it passes. As was said by the court in *Mining Co. v. Seawell*:

"The property of the citizen is sufficiently guarded by the constitution, and he is protected in its enjoyment and use, except in the extreme cases of necessity, where it is liable to be taken for the purpose of advancing some great and paramount interest, which tends to promote the general welfare and prosperity of the state; and when it is understood that the exercise of this power, even for uses confessedly for the public benefit, can only be resorted to when the benefit which is to result to the public is of paramount importance compared with the individual loss or inconvenience, and then only

after an ample and certain provision has been made for a just, full, and adequate compensation to the citizen whose property is thus taken, none of the dangers of future legislation predicted by respondent's counsel is at all likely to happen."

But it is vigorously contended that the act does not authorize the condemnation of mining claims or mining ground, and that, if mining is a public use, the land in question was, at the time this proceeding was instituted, appropriated to such public use, and cannot be condemned by any other mining company, corporation, or individual. The argument upon these points extended over a wider range than it is necessary for the court to travel in deciding this case. The term "real estate," as used in the statute, was evidently intended to apply to all lands, whether agricultural, timber, or mineral. The language of section 2 of the act, heretofore quoted, is broad and comprehensive enough to include any interest in any lands. The question whether the general terms of this statute will authorize the taking of property that has already been dedicated to a public use depends upon the circumstances, conditions, surroundings, and necessities established by the facts of each particular case. The land in question has never been dedicated to the public use, except in the sense that the business of mining is of "public utility, benefit, and advantage" to the people of this state, as declared in *Mining Co. v. Seawell*. Upon the facts of this case, and under the provisions of the statute, it may safely be said that an easement may be acquired in invitum in lands held and occupied for a public use, when such easement may be enjoyed without detriment to the public or serious interference with the use to which the lands are devoted. *Mills*, Em. Dom. §§ 44, 45, 47; *Lewis*, Em. Dom. § 276; *In re Rochester Water Com'rs*, 66 N. Y. 413; *New York Cent. & H. R. R. Co. v. Metropolitan Gaslight Co.*, supra; *Morris & E. R. Co. v. Central R. Co.*, 31 N. J. Law, 213; *Peoria P. & J. R. Co. v. Peoria & S. R. Co.*, 66 Ill. 174; *In re New York L. & W. Ry. Co.*, 99 N. Y. 13, 1 N. E. 27.

This case does not come within any of the exceptions to this rule. In *Mills on Eminent Domain* it is said:

"Land already devoted to another public use cannot be taken, under general laws, where the effect would be to extinguish a franchise. If, however, the taking would not materially injure the prior holder, the condemnation may be sustained; or if the property sought to be condemned was not in use, or absolutely necessary to the enjoyment of the franchise." Section 47.

The general principles upon this subject are summed up in *Lewis on Eminent Domain*, (section 276) as follows:

"Fourth. Whether the power exists in any given case is a question of legislative intent, to be ascertained, in the first place, from the terms of the statute, and, in the second place, by the application of the statute to the subject-matter. If the language of the statute is explicit, as where a particular turnpike is authorized to be taken and laid out as an ordinary highway, the courts have nothing to do but to give effect to the express language of the statute; but, if the language of the statute is not explicit, then it is a question of reasonable intentment, in view of all the circumstances of the case. Authority to construct a railroad through a narrow gorge already occupied by a public way would authorize the use of the old way if the new road could not reasonably be built without it. The chief difficulty arises when authority to condemn property for any purpose is given in general

terms, as is usually the case in these latter years. In such case, the presumption is against the right to take property which is already devoted to public use. This presumption may be overcome by showing a reasonable necessity for the property desired, as compared with its necessity and importance to the use to which it is already devoted."

After a careful examination of the evidence it appears, to my satisfaction, that the appropriation of the right of way for the tunnel through the mining claims of defendants to the Goodman mine will be of great benefit and advantage to the mining industry of Lyon county, where the claims are situated; that it is necessary to condemn the lands asked for in the petition for the protection and advancement of said interests; and that the benefits arising therefrom are of paramount importance, as compared with the individual loss, damage, or inconvenience to the defendants. This conclusion brings the case within the provisions of the statute, and shows that a necessity exists for the exercise of the law of eminent domain. *Mining Co. v. Seawell*, supra; *Mining Co. v. Corcoran*, supra. In due time, after notice to parties, an order will be made appointing commissioners to ascertain and assess the damages.

PUGET MILL CO. v. BROWN et al.

(Circuit Court of Appeals, Ninth Circuit. November 14, 1893.)

No. 107.

1. PUBLIC LANDS—HOMESTEAD—FRAUDULENT ENTRY.

The purchaser of a fraudulent homestead entry, which is thereafter canceled by the land office for such fraud, is not within Act June 15, 1880, allowing a person to whom the right acquired by an entry for homestead has been attempted to be transferred bona fide to make a cash entry. 54 Fed. 987, affirmed.

2. SAME—BONA FIDE PURCHASE.

A purchase from persons claiming to represent the person making the homestead entry is not a bona fide purchase from the latter, within the act. 54 Fed. 987, affirmed.

Appeal from the Circuit Court of the United States for the Northern Division of the District of Washington.

In Equity. Suit by the Puget Mill Company against Thomas H. Brown and others to determine conflicting claims to lands, and for other relief. Bill dismissed. 54 Fed. 987. Complainant appeals. Affirmed.

E. C. Hughes, (Hughes, Hastings & Stedman, H. G. Struve, and Maurice McMicken, on the brief,) for appellants.

J. A. Stratton, (Stratton, Lewis & Gilman, on the brief,) for appellees.

Before McKENNA and GILBERT, Circuit Judges, and HAWLEY, District Judge.

McKENNA, Circuit Judge. This action was brought primarily for the purpose of enjoining defendants from cutting timber on the land in controversy. After the filing of the original bill, a

patent was issued to defendants, and the bill was amended to show the fact, and prayed that defendants be adjudged to hold the title for plaintiff. Both parties claim under the United States, and the case was submitted on an agreed statement of facts.

The plaintiff's title is based upon a cash entry made at Olympia land office February 10, 1885, pursuant to the second section of the act of congress entitled "An act relating to the public lands of the United States," approved June 15, 1880, (21 Stat. 238,) which reads as follows:

"That persons who have heretofore under any of the homestead laws entered land properly subject to such entry, or persons to whom the right of those having so entered for homesteads, may have been attempted to be transferred by bona fide instruments in writing, may entitle themselves to said lands by paying the government price therefor, and in no case less than one dollar and twenty-five cents per acre, and the amount heretofore paid the government upon said lands shall be taken as part payment of said price: provided, this shall in no wise interfere with the rights or claims of others who may have subsequently entered such lands under the homestead laws."

This entry was based on an entry made in the name of Susan King in the month of January, 1876, as the widow of a soldier entitled to an additional homestead under sections 2304 and 2306, Rev. St.; the latter enabling any one who had entered under the former less than 160 acres to enter as much more as would not exceed 160 acres. The entry was made in accordance with the custom and practice of the land office, which was well known. In pursuance of such custom and practice, plaintiff agreed with the parties claiming to act for said Susan King to purchase the rights of said Susan King, and to pay therefor, upon the entry of said land, and the execution of a deed to plaintiff, the sum of \$500, which was a fair market value of said land, and was paid on the execution of the deed, "and without any knowledge or notice of any fraud, irregularity, or illegality in the aforesaid alleged scrip or in the aforesaid entry."

In the application to enter the land, Susan King was described as the widow of Joshua King, deceased. Subsequently the department of the interior received the following letter:

"In reply to yours of the 2nd inst., would say that I homesteaded northwest of southeast, section 7, township 9 north, range 22 west, Johnson county, Arkansas, containing forty (40) acres, as the deed from the land office at Washington City, as well as the county records, will show. My husband, John Wesley King, did not serve in the U. S. army during the late war.

[Signed]

"Susan King."

On the 16th of January, 1885, the commissioner of the general land office sent the following letter to the register and receiver at Olympia:

"Gentlemen: Soldier's additional homestead entry 2410, final 577, dated February 10th, 1876, is in the name of Susan King, widow of Joshua S. King, deceased, and is held for cancellation as illegal and fraudulent, for the reason that Susan King, who made the original homestead entry upon which said additional homestead entry is based, informed me, in a letter dated 27th ulto., that her deceased husband was not named Joshua S. King, but was named John Wesley King, and that he never served in the U. S. army during the recent Rebellion. You will inform all parties in interest of this letter, and that 60 days from receipt of notice of same will be allowed within

which to show cause why said entry should not be canceled, or to file in your office an application (accompanied by the government price of land and the proofs specified on pages 16 and 17 of circular of March 1st, 1884) to purchase land under the act of June 15th, 1880. Report promptly to me the action taken in the matter."

Plaintiff accepted the alternative allowed by said letter, and filed in the land office at Olympia, in pursuance of said letter of the commissioner, an application to purchase the land under the act of June 15, 1880, accompanied by the government price and proofs required by the letter, and the receiver then and there issued and delivered to plaintiff a patent certificate, bearing date February 10, 1885. The money paid by plaintiff was paid into the treasury, and has since been retained by the United States. The order of the commissioner permitting the entry of the land under the act of June 15, 1880, was in accordance with, and in pursuance of, the prior decisions of the secretary of the interior.

On April 15, 1887, S. M. Stockslager, then assistant commissioner of the land office, pending application for a patent, by a letter dated on said day to the register and receiver, held the said entry for cancellation, on the ground that it was fraudulent or illegal. This action was taken on the same documents and proofs as the previous action of the department detailed above. On appeal the assistant secretary of the interior, after reviewing all the facts, sustained the decision of Stockslager, canceling the entry.

In addition to the stipulation of the parties of the foregoing facts, the testimony of Susan Nourse, formerly Susan King, the person in whose name the homestead entry was made, was taken. She testified that she did not make, or authorize any one to make, such entry, and that all the papers and affidavits, including the power of attorney or deed to Scott, plaintiff's grantor, were fictitious.

We do not consider it necessary to notice all the points made by plaintiff. It is very firmly established that if the officers of the land department, by mistake of law, or if fraud or imposition have been practiced upon them, have issued a patent to one not entitled to it, the party wronged can resort to a court of equity to correct the mistake, and compel the transfer of the legal title to him as the true owner; but he must show that, but for the error or fraud, he would be entitled to the patent. *Lee v. Johnson*, 116 U. S. 50, 6 Sup. Ct. 249.

It is very clear the plaintiff is not entitled to a patent. It is manifest that the cash entry was allowed by the land department under the supposition that the plaintiff was a bona fide purchaser under the act from Susan King; in other words, that Susan King had made the entry, though not having the qualifications to do so, and that she had conveyed, or attempted to convey, to plaintiff. This her testimony in this case shows was not true, and that the department was imposed upon. The entry and power of attorney to Scott were both fictitious. There was no person who entered the land, and no right, therefore, of such a person transferred, or attempted to be transferred, which in the most lax interpretation of the statute is necessary, and the defendants therefore were

not any of the persons to whom the act gave the right to purchase the land.

It is claimed, however, by plaintiff that the stipulation of facts between it and respondents shows that it was a bona fide purchaser. It appears from the stipulation that a custom existed in the land department to recognize affidavits and proofs similar to the exhibits in this case as soldiers' additional homestead scrip, upon which holders were permitted to enter public lands subject to like entry, and obtain final receipts, and patent certificates and patents therefor; that thereupon, and in pursuance of said custom and practice, which was well known, the plaintiff made an agreement with the persons holding the said alleged soldiers' additional scrip, and claiming to act for the said Susan King, to purchase the same, and the rights of the said Susan King thereunder, and to pay therefor, upon the entry of said land, and the execution of a deed to plaintiff therefor, the sum of \$500; that said sum was at all of said times the fair market value of said land, and was paid by plaintiff to the person claiming to represent the said Susan King, upon the execution and delivery of said deed, and without any knowledge or notice of any fraud, irregularity, or illegality in the aforesaid alleged scrip or in the aforesaid entry. This is not a stipulation that plaintiff bought from Susan King bona fide, but from persons claiming to represent her,—propositions entirely different.

Decree and judgment of the circuit court are affirmed.

MILES v. JOHNSON, Collector, (two cases.)

(Circuit Court, D. Kentucky. October 2, 1893.)

INTERNAL REVENUE—RESTRAINING COLLECTION—JURISDICTION OF COURTS.

A bill for a mandatory injunction requiring a collector to accept an export bond for certain spirits in a bonded warehouse after the bonded period has expired, and allow their withdrawal for export without requiring payment of the tax thereon, is in effect a bill to restrain the collection of internal revenue taxes, which the court is forbidden to entertain by Rev. St. § 3224.

In Equity. Two bills were filed by Edward L. Miles. In one it was alleged that he was doing business as a distiller in the name of E. L. Miles & Co., and in the other as the New Hope Distilling Company. The prayers were for mandatory injunctions against defendant, Johnson, collector of the fifth district of Kentucky, enjoining and restraining him from refusing to accept and approve complainant's bonds for the exportation of the 200 barrels of whisky described in the bills, and from doing all other acts necessary to be done for the exportation of the whisky, and commanding defendant to permit the withdrawal of said whisky from the bonded warehouses for exportation. Demurrers were filed to the bills, and sustained.

Noble & Sherley and Strother & Gordon, for complainant.
George W. Jolly, U. S. Atty., for defendant, Johnson.

BARR, District Judge. The complainant and the question are the same in both cases, and will be considered together. The complainant, Miles, is a distiller, and distilled the 200 barrels of whisky in this state in the spring of 1890. This whisky went into the bonded warehouses, and the usual bonds were executed about June 5, 1890. These bonds were conditioned for the payment of the tax on said whisky of 90 cents per gallon at the time of the withdrawal thereof from the warehouse, and not longer than three years after the date of said bonds. The three years having expired, the defendant, as collector of internal revenue for the fifth district of Kentucky, placed the whisky on an assessment list known as "Form No. 23," and the commissioner of internal revenue made an assessment of a tax of 90 cents on each gallon of said spirits. This assessment list is dated the 28th day of July, 1893, and the assessment was made by the commissioner of internal revenue on the 1st day of August, 1893, and received by the defendant on the 3d day of August, 1893.

The complainant, on the 4th day of August, 1893, and before any demand had been made upon him to pay the tax, delivered to the defendant, as collector of internal revenue, a notice on "Form A," which was a notice and declaration of his intention to withdraw this whisky for export to a foreign country and port. He at the time tendered to the defendant an export bond on "Form B," as required by the regulations, with good security, and requested the collector to have the whisky regauged for the purpose of exportation. The complainant also states that he tendered the stamp tax required in such cases, and did everything necessary under the law and regulations to be allowed to export this whisky. He alleges that defendant refused to accept said bond, or to take any of the steps to have said whisky withdrawn from the warehouse so that he might export it, and that this refusal was upon the ground that complainant's application was too late. The prayer of the bill is for a mandatory injunction restraining the defendant from refusing to accept from him a good and sufficient export bond, and requiring said defendant, as collector, to take the necessary steps to permit the export of said spirits, and that he permit complainant to withdraw the spirits from the bonded warehouse for exportation.

The defendant demurred to both bills, and the general questions presented are:

(1) Can the court grant the relief asked if the complainant had the right to execute a bond and export the whisky at the time of his demand?

(2) If the court can grant the relief asked, is complainant entitled to it upon the allegations of his bills?

Section 3224, Rev. St., declares that "no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court." In these suits the prayer is not to enjoin the assessment or collection of the tax on this whisky, but for a mandatory injunction restraining the collector from refusing to accept the export bonds offered, and allowing the withdrawal of the whisky without the payment of the tax. The inquiry is, whether these suits

are for the purpose of restraining the assessment or collection of a tax. The tax on this whisky attached the very instant it was distilled, and the warehousing and bonding by the complainant only gave him the right to postpone the payment of the tax for three years from the date of the bonds. It was at complainant's option, with certain limitations not necessary to state, to have paid this tax at any time within three years. Rev. St. §§ 3224, 3294. This he has not done, but has allowed the commissioner of internal revenue to assess this tax against him, and direct the proper demand to be made of him for payment. It is not necessary to determine whether this assessment of tax was complete without a demand on defendant, as section 3224, Rev. St., prohibits a suit for the purpose of restraining an assessment of a tax as well as the collection of a tax.

The necessary result of the relief sought by these bills will be to prevent defendant from completing the assessment of this tax if a demand on defendant is necessary, and, in any event, to prevent the collection of the tax. In view of the provision of section 3329, Rev. St., which allows a drawback to the full amount of the tax if distilled spirits are exported to a foreign country after the tax is paid, I must conclude the purpose of these suits is to restrain the collection of the taxes which are due. This would be the necessary effect of the relief if granted, and it must be the purpose, as the only contention is that no tax should be collected because of the declared intention to export this whisky. The supreme court, in *Snyder v. Marks*, 109 U. S. 189, 3 Sup. Ct. 157, had occasion to construe section 3224, Rev. St., and it was held that the word "tax" included taxes which had been illegally and wrongfully levied, as well as those which were regular and valid. See, also, *Kensett v. Stivers*, 18 Blatchf. 398, 10 Fed. 517, where the cases are reviewed. Here the taxes have been regularly levied, and are in every respect valid and lawful, so far as assessment and manner of levy can make them so; and the only contention of the complainant is that the collection of the tax after he had expressed a determination to export the whisky, and tendered a good export bond to the defendant, would be unconstitutional and invalid. This section 3224, Rev. St., was originally an amendment to what is now section 3221, and should be construed with it; and, being so construed, it seems evident that the court is prohibited from granting the relief sought. It is therefore unnecessary to decide whether the complainant would be entitled to the relief asked if the allegations of his bills were true.

The demurrers must be sustained, and it is so ordered.

BRIDGEWATER GAS CO. v. HOME GAS FUEL CO

(Circuit Court of Appeals, Sixth Circuit. November 27, 1893.)

No. 67.

1. CONTRACT—BREACH—EVIDENCE—MOTIVE.

In an action for breach of contract to supply natural gas, evidence of large expenditures in constructing the necessary pipe line is inadmissible to rebut an imputation of bad faith, although the complaint directly al

leges the same; for the motive of the breach is immaterial, and the allegation mere surplusage.

2. SAME—EVIDENCE OF DAMAGES.

In an action by a gas-distributing company against a natural gas company for breach of contract to supply gas under an arrangement for a division of the receipts, contemporaneous contracts by defendant to supply consumers at specified rates, being referred to in the contract sued on as one of the sources of such receipts, are admissible as a basis for computing damages.

3. SAME—CONSTRUCTION—NATURAL GAS COMPANIES.

A contract to supply natural gas, unless unable by "due energy and diligence" in maintaining existing wells and sinking new ones to obtain a sufficient supply from present or future acquired territory, requires reasonable effort and expenditure to connect newly acquired territory in a contiguous county with the old pipe line.

4. REVIEW—ESTOPPEL.

A party cannot take advantage of error in instructions given at his request, and stating the law too favorably to him.

In Error to the Circuit Court of the United States for the Eastern Division of the Northern District of Ohio.

At Law. Action by the Home Gas Fuel Company against the Bridgewater Gas Company for breach of contract. Verdict and judgment were given for plaintiff, and defendant brings error. Affirmed.

Statement by SEVERENS, District Judge:

This action was brought in the circuit court for the northern district of Ohio, in the eastern division thereof, to recover damages for the alleged breach of a contract entered into by the Bridgewater Gas Company, a Pennsylvania corporation, with Robert McCurdy and others, on 1st day of July, 1887, for the supply of natural gas to them or their assignee, to be distributed by the latter parties to various public and private buildings in the city and township of Youngstown, in that state. The case was tried by a jury, who rendered a verdict for the plaintiff in that court, and, after judgment thereon, comes here on a writ of error prosecuted by the defendant. The contract above mentioned, and which was admitted by the answer, contained a variety of stipulations, but the material parts upon which the controversy turned were the following:

"Whereas, the first party proposes to lay down a supply line of gas pipe, extending from its gas fields, located in Beaver county, in the state of Pennsylvania, to the city of Youngstown, Ohio, for the purpose of furnishing a supply of natural gas, for use as fuel in the manufacturing establishments and the public and private buildings of the city and township of Youngstown, Ohio; and whereas, said second parties propose to provide for the distribution of said gas, through the instrumentality of a gas fuel corporation, now organized or to be hereafter organized under the laws of Ohio; and whereas, the parties hereto mutually desire to enter into a contract under which said first party shall furnish such supply of gas, and under which said second parties shall make provision for its distribution from said supply line to the premises of consumers: Now, therefore, in consideration of the obligations entered into by said second parties, as hereinafter written, said first party hereby agrees to go forward and lay down and construct from its said gas fields in Beaver county, Pennsylvania, to the city of Youngstown, Ohio, a good and substantial line of wrought-iron gas pipe, about one-half of which line shall be constructed of pipe twelve inches in diameter, and the other half of pipe ten inches in diameter, or all of twelve-inch pipe. Said first party agrees to have said line completed and ready for operations by the tenth day of November, 1887, and for the period of ten years from and after that date said first party agrees to furnish said second parties, or their assigns, with a supply of natural gas sufficient for the supply of all such consumers within the city or township of Youngstown, Ohio, as

said second parties or their assigns may, from time to time, desire to supply with gas: provided, always, that said first party shall, by the exercise of due energy and diligence in maintaining existing wells in good working order, and in sinking new ones from time to time, as needed, be able to keep up and procure from its present or future acquired territory a sufficient supply of such gas."

A subsequent stipulation in the contract provided that the Bridgewater Company might furnish gas on its supply line to the American Tube & Iron Company at Haselton, which was near the city. Another provision was that the parties of the second part were to distribute gas from the supply line to the Mahoning Valley Iron Company, Brown, Bonnell & Co., Cartwright, McCurdy & Co., and the Youngstown Rolling Mill Company, with whom the Bridgewater Company, on the same day, and in connection with the same transaction, made other contracts for the supplying to them of natural gas at their several establishments.

It was also stipulated in the contract that if it should be ascertained that the volume of gas that should be furnished by such a line of supply pipe should be more than sufficient to supply the said rolling mills, the tube and iron company, and the patrons of the second parties, the first parties might sell all such surplus to other consumers along the line between Youngstown and its gas fields, but with the express understanding that the above-enumerated parties should be first fully supplied in preference.

By the terms of the contract the receipts for the gas thus supplied were to be divided between the parties thereto on the basis of a percentage therein fixed. It was recited that the contract was made in anticipation of the formation of a corporation, to which it was understood the second parties would assign. In pursuance of this understanding the Home Gas Fuel Company was organized, and in November, 1887, the second parties assigned their rights under the contract to it.

The Bridgewater Gas Company proceeded to lay down its supply line of pipe, and had completed the work and begun delivering the gas in November, at about the time of the above-mentioned assignment to the Home Gas Fuel Company, and that company distributed it by its pipes, which it had laid in the mean time, to the various parties above mentioned, according to the agreement. It was claimed by the latter company, which was the plaintiff below, that from the first the gas supplied was not in sufficient quantity to meet the requirements of the contract; and it was shown that the Bridgewater Company ceased altogether to supply gas on the 19th of August, 1889, and took up its line of pipes. It was also shown upon the trial that the Bridgewater Company, after the date of the contract, acquired other gas territory in the county of Allegheny, which lies adjoining to Beaver county; and the plaintiff contended that the Bridgewater Company was bound to use reasonable effort to bring that territory into contribution to supply gas under the contract if the doing so was fairly practicable. The Bridgewater Company claimed that, after having made all due exertion to furnish the gas, they were unable to provide it, by reason of the failure of the gas wells in their fields in Beaver county, and the absorption of their supply in meeting other obligations of prior date to this engagement, and that they were therefore excused by the stipulation of their contract in that regard for the breach complained of, having, as they claimed, made all the effort required by it.

The rulings of the court upon the questions of law arising at the trial are referred to in the opinion. The subject of damages was, by the consent of counsel and the direction of the court, divided into periods—First, from November 10, 1877, to the time of the trial; and second, from that date to the expiration of the contract, November 10, 1897. The jury rendered a verdict for the plaintiff, assessing the damages at \$27,000 for the first-named period and nothing for the second.

Thos. W. Sanderson and A. W. Jones, for plaintiff in error.

Hine & Clarke and George F. Arrel, for defendant in error.

Before TAFT and LURTON, Circuit Judges, and SEVERENS, District Judge.

SEVERENS, District Judge, having made the foregoing statement of the case, delivered the opinion of the court.

The leading questions in the case are involved in the construction of the contract upon which the action was founded, and will be dealt with in considering the instructions given by the court to the jury. We will first dispose of the allegations of error in the rulings of the court upon the rejection and reception of evidence. The defendant offered to prove by the witness Hice what was the expense of the pipe line to Youngstown which the defendant had laid down. This evidence, upon objection by the plaintiff, was excluded by the court, and we think properly. It is argued by counsel for the plaintiff in error that this proof was admissible to rebut the imputation of bad faith and improper motive on the part of the Bridgewater Company in failing to furnish the gas. But the action was founded upon contract, and the damages sought to be recovered were such as flow from the alleged fact of failure to perform its stipulations. The motive of defendant in performing or violating its agreement was wholly immaterial. The question in issue was whether it actually did the one or the other.

Reference is made to the allegation in the petition that the defendant's refusal was "with willful intent to violate the rights of this plaintiff." But this is mere superfluity, and adds nothing whatever to the substance of the pleading. Such an averment did not change the real issue which the court was required to try and determine. In cases of contract, as a general rule, the law takes no notice of the motives of the defaulting party. The intent cannot be averred in pleading, except as matter of form, nor evidence be given in regard to it. Sedg. Dam. (6th Ed.) pp. 36, 187, 188; 1 Greenl. Ev. § 51; Bromfield v. Jones, 4 Barn. & C. 380.

It is also urged that the proof offered would be persuasive evidence that the defendant, having so great an interest at stake, would not, without good reason, abandon the performance of the contract. But such evidence was too remote, and involved the necessity of considering too many other circumstances not relevant to the issue, to warrant its admission. 1 Greenl. Ev. § 448; Bank v. Stewart, 114 U. S. 224, 231, 5 Sup. Ct. 845.

It is next assigned as error that the court, against the objection of the plaintiff in error, admitted in evidence the contracts of July 1, 1887, between the Bridgewater Company and three of the rolling-mill companies mentioned in the principal contract. But those contracts, besides being contemporaneous with that in suit, and connected with it by mutual references, fixed the schedule of prices to be paid by the rolling-mill companies for the gas to be supplied them, and this furnished the basis for estimating the value of the receipts which were to be divided between the parties to the contract in suit, and were, therefore, competent evidence in respect to the damages sustained from the defendant's nonfulfillment. We see no reason to doubt that the ruling of the court in the reception of this evidence was right.

Upon the construction of the contract, on which the controversy mainly turned, the parties differed widely. The defendant, the

Bridgewater Company, contended that the contract was to be construed as if the prior obligations of the company, which were known to the second party, were recited in the agreement, and its stipulations then read as subject to them. The court, in its instructions to the jury, seems practically to have adopted this view, and the defendant's contention in that regard was satisfied. We are therefore not required to determine whether that construction was proper or not, the ruling being in the defendant's favor.

The question left open to review arises upon the provision in the contract that the defendant should not be held liable for the failure of gas if that result happened notwithstanding the exercise of due energy and diligence in maintaining existing wells in good working order and in sinking new ones from time to time, as needed, in its present or future acquired territory. The defendant below contended that it was not bound to acquire the new territory in Allegheny county, and that, if it did, such acquisition not being obligatory, it was not bound to turn the supply from that territory into the Youngstown line. The plaintiff insisted, on the contrary, that upon the acquisition of that territory, if it could, with a fairly reasonable effort and expense, having regard to all the circumstances, be brought into connection with the Youngstown line, it was brought under the operation of the contract, and the defendant was bound to exercise diligence and energy in sinking and maintaining its wells in that territory for the supply of the gas contracted for. The court agreed with the plaintiff in this construction, and instructed the jury accordingly. We think that this was right. There was nothing in the contract which restricted the area within which the after-acquired territory might be located to Beaver county. The business of the Bridgewater Company was the production of gas, and its supply to distant localities. Nothing appears from which it should be necessarily implied that it was in the contemplation of the parties that its operations for supply should be limited to Beaver county. It may be that the territory in the adjoining county of Allegheny was more nearly contiguous to, and even more conveniently operated in connection with, its fields in Beaver county, than other lands in the latter county which it might acquire. There is therefore no such limitation in the express terms of the contract, and there is nothing in the nature of the circumstances as shown by the proof, from which the court would be justified in interpolating it by implication. We think the limitations put by the court upon the liability of the defendant to use its gas fields in Allegheny county to contribute to the supply of gas under the contract were sufficiently favorable to the defendant.

The court, after giving full instructions to the jury upon this subject, and explaining the rights and obligations of the parties under the contract upon the construction which we hold to be the proper one, yielded to a request of the defendant to charge the jury as follows:

"If the jury shall find from the evidence that, after the parties entered into the written contract in question in this action, the defendant company found, procured, and developed a natural gas field or territory in

the county of Allegheny, no part thereof being in the county of Beaver, and did connect the same by pipes with its other natural gas field within Beaver county, in order to increase its supply of natural gas for general distribution, as well as the supply to the plaintiff company, then the court charges you that so doing would not change in any manner, in the absence of a new or additional contract or agreement between the parties, the obligations of defendant under the written contract originally entered into by the parties, so as to require defendant company to continue such supply from such natural gas field outside of Beaver county to plaintiff. The original contract being specific and unambiguous in its terms with respect to the fields to be drawn on for a supply of gas, its provisions cannot be changed by the acts of the parties under it, unless such acts amount to a new or different or subsequent agreement for some valid and new or additional consideration."

It is now insisted that the charge of the court was inconsistent, that the law was rightly stated in the request of defendant, and that the previous instruction of the court was therefore wrong. We do not agree to this, and, for the reasons already stated, think that the defendant was not entitled to this instruction. But though we think it was error to give it, it is clear that the defendant, having invited the court to do so, is not in position to complain of it, or allege for error any inconsistency produced thereby. Upon the whole record we are of the opinion that the defendant has no reason to complain either of the result or the rulings upon which it was reached.

The judgment must be affirmed, with costs.

CHICAGO, R. I. & P. RY. CO. v. LINNEY.¹

(Circuit Court of Appeals, Eighth Circuit. December 4, 1893.)

No. 333.

1. MASTER AND SERVANT—NEGLIGENCE—INSTRUCTIONS—RAILROAD COMPANIES.

The rule that a servant assumes, not only the ordinary risks known to him, but also those which could be known by the exercise of ordinary care and prudence, should be given to the jury in all cases where it is applicable; but the fact that the latter qualification is omitted in a general statement of the law is immaterial, when it is afterwards correctly given in its specific application to the facts of the case.

2. SAME.

An instruction that a railroad company is under obligation to its brakemen to provide and maintain reasonably and ordinarily safe coupling apparatus on the cars used by it is no ground for reversal, when immediately followed by further instructions clearly expressing the qualification that the duty is to use ordinary care in that regard.

In Error to the Circuit Court of the United States for the Western District of Missouri.

At Law. Action by Robert T. Linney against the Chicago, Rock Island & Pacific Railway Company for personal injuries. Verdict and judgment for plaintiff. Defendant brings error. Affirmed.

W. F. Evans and Frank P. Sebree, (M. A. Low and H. C. McDougal, on the brief,) for plaintiff in error.

E. H. Stiles, (E. M. Harber and G. A. Knight, on the brief,) for defendant in error.

¹ Rehearing denied January 29, 1894.

Before CALDWELL and SANBORN, Circuit Judges.

SANBORN, Circuit Judge. At Eldon, in the state of Iowa, between 3 and 4 o'clock in the morning of November 20, 1890, Robert T. Linney, the defendant in error, who was a brakeman in the employment of the plaintiff in error, the Chicago, Rock Island & Pacific Railway Company, was crushed between the tender of an engine and a box car, while attempting to couple them together. For this injury he recovered a verdict and judgment against the company for \$11,000, on the ground that the latter negligently furnished a box car, the stem of the drawhead of which was so short or so loose that, when the drawhead was struck by another car or engine, it would not project and hold the box car a sufficient distance apart from the approaching car or engine to enable the brakeman to stand between them to make the coupling, as such drawheads ought to and usually do, but that it would slide back until the approaching car or engine would crush the brakeman who attempted to couple them in the usual manner. The defenses pleaded in the answer were no negligence on the part of the company, full knowledge of the defect, and of the dangers and risks from it, and an assumption of these dangers and risks, by the defendant in error, and that his injuries were caused by his own carelessness. The box car on which this defective drawbar was found must have been hauled into Eldon by the Rock Island Company, for it appears from the record that no other company had or operated a railroad through that town. The car was a Merchants' Dispatch car,—such a car as requires, and is usually provided with, a longer stem for its drawhead than those used on the cars of the Rock Island Company. But the evidence tended to show that there was one of the short Rock Island stems of this company upon the drawhead of this car. Until the defendant in error had occasion to couple the engine to this car, he had not seen, or had any opportunity to see or examine, the car or its drawbar. He made the attempt to couple them in the darkness of the night, and testified that the drawhead looked right, and he saw no defect in it, as he stepped in to make the coupling. In fact, the stem of the drawhead was so short that it permitted the engine and car to come into such close proximity that they crushed the defendant in error, when, if the stem had been of proper length and properly fastened, it would have held them apart, and he would have made the coupling in safety. Two, or three of the trainmen testified that they discovered the defective condition of this drawbar, and gave notice of it to the defendant in error just before the accident; but he denied that he ever had any knowledge or notice of the defect from any of these witnesses, or otherwise, before the accident, and the jury have found in his favor upon this issue.

The first error assigned, and the one chiefly relied on in this case, is that the court below charged the jury as follows, without inserting in the charge the words inclosed in brackets, when it should have inserted them, and should have given to the jury the qualification of the charge they express:

"If you find from the evidence in the case that the coupling apparatus of the car in question was defective, as claimed by plaintiff's attorneys, and in the respects which I have just described, and if you furthermore find from the evidence that such defect in the coupling apparatus rendered the act of coupling an engine to the car in question more than ordinarily dangerous, and that such defect was the sole cause of the injury which plaintiff has sustained, and that the defect and the danger attending the coupling of the car was not known to, [and could not, by the exercise of ordinary care and prudence, have been discovered before the accident by,] the plaintiff when he attempted to make the coupling in question, then the plaintiff will be entitled to recover, provided you further believe and find from the evidence that such defect as existed in the coupling apparatus was either known to the defendant's car inspectors, whose duty it was to inspect the car in question before the accident happened, or that, in the exercise of ordinary care and diligence on their part, the defect in question ought to have been discovered by them, and to have been repaired, before the plaintiff was hurt."

It goes without saying that it is the general rule that the servant assumes the ordinary risks and dangers of the employment upon which he enters, not only so far as they are known to him, but also so far as they would have been known to one of ordinary prudence and sagacity in his situation, by the exercise of ordinary care. *Manufacturing Co. v. Erickson*, 5 C. C. A. 341, 55 Fed. 943, 946; *Fuel Co. v. Danielson*, 57 Fed. 915. Moreover, this rule should be carefully given to the jury in the charge of the court, in every case in which the issues and the evidence make it applicable, and the declaration of it is not rendered futile by more specific instructions, that clearly and properly guide the jury as to their findings upon the issues and evidence presented in the particular case on trial. In this case the defendant in error had never had an opportunity to discover the defect in question before the occasion on which he attempted to make the coupling and was injured. This was in the darkness of an autumn night. The record discloses no evidence that the defective car had ever been at Eldon, or at any other place where the defendant in error was, or where he had ever seen it, or had any opportunity to see or examine it, by the exercise of the greatest diligence, before the occasion on which he was injured. According to this record, there were two ways, and two ways only, in which he might have known or might have discovered the defect and the danger before he was crushed, and these were (1) by the notice which the trainmen testified they gave him before he attempted to make the coupling, and which he denied receiving; and (2) by more carefully and prudently examining the car on the occasion when he attempted to make the coupling. Regarding the first, the court charged the jury specifically that if they believed from the evidence that he was notified by the trainmen of the defect and danger before he undertook to make the coupling, and he afterwards undertook to make it in the usual way, by stepping between the cars, he voluntarily assumed the risk, and was not entitled to recover. Regarding the second, the court charged the jury as follows:

"If you believe and find from the evidence that the plaintiff, by his own want of ordinary care and prudence on the occasion of the injury, either in the manner in which he undertook to make the coupling, or in any other respect,

immediately contributed to bring about or occasion the injury of which he complains, then he was guilty of contributory negligence which will preclude him from recovering, and you will so find."

Here were complete and specific instructions to the jury that if the plaintiff, before or at the time of the accident, knew, or by the exercise of ordinary care and prudence could have discovered and avoided, this danger, in the only ways that, according to the evidence, he had any opportunity to know or discover it, he could not recover. In our opinion, these instructions supplemented and qualified the portion of the charge objected to, and left it without just ground for exception. They more clearly and appropriately presented to the jury the exact questions they were to decide, and the rules of law governing them, under the pleadings and evidence in this case, than any statement of the general rule could have done. They applied the general rule to the specific issues in this case, and gave the plaintiff in error every advantage of it that it was entitled to under the evidence.

That portion of the following charge which is inclosed in brackets is assigned as error:

"[But a railroad company is under an obligation to its brakemen to see that the cars in use upon its road, whether they are its own cars or cars received from some foreign road, are provided with coupling apparatus, such as draw-bars, buffers, and bumpers, that are reasonably and ordinarily safe to be used.] A railroad company is not bound to see that the coupling appliances in use upon all of its own cars, or the cars in its possession received from other roads, are the safest possible appliances, or of the latest and most improved pattern. It may use such coupling appliances as are in use at the time by other railroads, and such as are regarded by prudent railroad men as ordinarily safe and fit to be used, even though such appliances are not of the latest and most improved pattern; but, whatever may be the kind of coupling appliances in use on any of its cars, the railroad company is under an obligation to its brakemen to exercise ordinary care in seeing that the coupling appliances in use are free from any such defect as will render the act of coupling cars with that particular species of coupling appliance more than ordinarily dangerous; and if a railway company violates its duty in this respect, and by want of ordinary care on its part, or on the part of its car inspectors, it permits a coupling appliance to be used that is defective in any respect, and by reason of such defect the car is not in an ordinarily safe and fit condition to be coupled, then it is liable to a brakeman for any personal injury which he may sustain while in the discharge of his duty, which is occasioned solely by such defect."

The basis of this assignment is that the court declared that the railroad company was under an obligation to its brakemen to see that the cars in use upon its road were reasonably and ordinarily safe to be used, when it should have charged that its obligation was to exercise ordinary care to see that they were reasonably safe. Undoubtedly, the extent of the duty of the master to the servant in this respect is to exercise ordinary care to furnish reasonably safe machinery and appliances, and to use ordinary care and diligence to keep them in a reasonably safe condition. *Railway Co. v. Jarvi*, 3 C. C. A. 433, 53 Fed. 65, 67, 68. But no intelligent juror could, we think, have heard the charge on this subject which we have quoted, without clearly understanding that this was the exact extent of the master's duty. The portion of the charge excepted to is the statement that a duty rested upon the master in this re-

gard. The remainder of the charge on this subject clearly defines the extent and limits of that duty, in strict accordance with the established rule. An exception cannot be sustained to an isolated sentence of the charge of a court upon a particular subject, when the entire charge upon that subject fairly states the law. *Railroad Co. v. Gladmon*, 15 Wall. 401, 409; *Evanston v. Gunn*, 99 U. S. 660, 668; *Stewart v. Rancho Co.*, 128 U. S. 383, 385-388, 9 Sup. Ct. 101; *Spencer v. Tozer*, 15 Minn. 146, (Gil. 112); *Peterson v. Railway Co.*, 38 Minn. 511, 39 N. W. 485; *Simpson v. Krumdick*, 28 Minn. 352, 10 N. W. 18.

There are several other assignments of error, such as that the court refused to instruct the jury to return a verdict for the plaintiff in error; that the depositions of certain witnesses were improperly admitted; that the court erred in overruling the motion in arrest of judgment because the complaint did not state facts sufficient to constitute a cause of action; and that the court refused to grant a motion for a new trial. None of them are worthy of extended notice. It is sufficient to say that we have carefully examined the pleadings, the evidence, and each of the supposed errors assigned, and are of the opinion that no substantial error appears in the record of the trial of this case.

The judgment below is affirmed, with costs.

UNION STOCK-YARDS & TRANSIT CO. et al. v. WESTERN LAND & CATTLE CO., Limited.

(Circuit Court of Appeals, Seventh Circuit. December 1, 1893.)

No. 8.

1. **CONDITIONAL SALE—AGREEMENT FOR AGISTMENT AND SALE OF CATTLE.**

Defendant undertook to transport plaintiff's cattle to his farm at his expense, and there feed and care for them for a period of several weeks, for the purpose of their being profitably marketed by plaintiff, agreeing that they should not deteriorate in flesh or condition; that he would pay at an agreed valuation for all losses from any cause, and would employ at his own expense a herdsman selected by plaintiff; his compensation to be the money realized from the sale of the cattle, exceeding a stated sum per head, after deducting expenses of shipment and sale; and he waived any lien against the cattle. *Held*, that the transaction was not a conditional sale, but a bailment.

2. **SAME—RECORDING.**

Such transaction is not within the purview of Rev. St. Mo. § 2505, making conditional sales void as to creditors and purchasers, unless in writing and recorded.

3. **PAROL EVIDENCE TO VARY WRITING.**

Such agreement being in writing, parol evidence of previous negotiations by defendant with plaintiff to purchase the cattle on credit is inadmissible.

In Error to the Circuit Court of the United States for the Northern Division of the Northern District of Illinois.

At Law. Replevin by the Western Land & Cattle Company, Limited, against the Union Stock-Yards & Transit Company, Simeon F. Hall, Jefferson E. Greer, William Hall, and Daniel Hall. Ver-
v.59f.no.1—4

dict and judgment for plaintiff. Defendants bring error. Affirmed.

Statement by JENKINS, Circuit Judge:

The defendant in error brought suit in replevin to recover 300 head of Texas steers branded W. C. C. The declaration embraced three counts, one in the cepit, one in the detinet, and the third in trover. To the first and second counts, in addition to the usual pleas of non cepit and non detinet, there were pleas—First, of property in Simeon F. Hall, William Hall, and Jefferson E. Greer; and, second, of property in Daniel Hall. These pleas were filed by all the defendants to the suit, except Daniel Hall, who made default. The replication alleged property in the plaintiff, denying property in the parties named. At the trial a verdict passed for the plaintiff.

The bill of exceptions discloses that at the trial the plaintiff introduced three contracts between the cattle company (defendant in error) and Daniel Hall,—one dated September 6, 1884, one dated October 1, 1884, and one dated October 16, 1884. The first relates to 600 head of Texas steers, the second to 379 head, the third to 22 head, all branded W. C. C. The contracts are substantially alike in their terms. The following is a copy of the first: "This contract and agreement made and entered into this sixth day of September, 1884, by and between Daniel Hall, of Grundy county, Missouri, and the Western Land and Cattle Company, Limited, a corporation organized and existing under the laws of Great Britain, witnesseth, that the said Hall hereby agrees, within four days from this date, to receive, of the property of this said company, a number not to exceed six hundred (600) Texas steers, beef cattle, each and all of said steers being marked and branded with the brand W. C. C., from the said land and cattle company, near Lexington Junction, in Ray county, Missouri, where said cattle are now located and pasturing, for the following purposes and upon the following express conditions, only, to wit: The said Hall is to transport said cattle from their present location to his farm in Grundy and adjacent counties at his (Hall's) own charge and expense, and said Hall is there to properly feed, fatten, and care for said cattle for the purpose of their being profitably marketed by said company, and to that end said Hall agrees that said cattle shall not deteriorate in flesh or condition from their present state, and said Hall is to commence feeding said cattle corn by September 25, 1884, and keep it up while said cattle remain in his care; that said Hall shall be and is liable and agrees to pay for all losses of said cattle, arising from death, disease, escape, theft, or any cause whatsoever, at the agreed valuation of thirty-six (36) dollars per head. And it is further agreed by the parties hereto that the period of said pasturage and care of said cattle by said Hall shall extend to December 15, 1884, and that during said period, from time to time, the said cattle may and shall be shipped for sale, or sold where they may then be, by said company, by J. A. Forbes, its manager. And the said Hall further agrees to employ a competent herdsman, to be selected by said J. A. Forbes, whose sole duty shall be to attend to said cattle, and said Hall to pay said herdsman thirty dollars per month wages, and furnish board and lodging suitable for said herdsman. And, in full consideration for the full and faithful performance of all the acts and promises to be done and performed by said Hall as aforesaid, the said Hall agrees to receive in full compensation therefor all moneys that may be realized by said company from the sale of said cattle over and above the sum of thirty-six 05-100 dollars per head, after deducting all costs and expenses incurred by said company in and about the sales or shipments of said cattle. And the said Hall hereby, for himself, his heirs and assigns, expressly waives any lien, either as agister or of any other kind or character, or lien against said cattle which may arise during the performance of this contract, either by law or otherwise. And said Hall further agrees to keep and maintain said cattle while in his charge free from all claims, charges, liens, or liability whatever, from whatever source arising, except from the acts of said company or said J. A. Forbes." Delivery of 1,000 cattle under the several contracts was made. Of these cattle, 300 had been brought by Simeon F. Hall, William Hall, and Jefferson Greer, three of the plaintiffs in error, and composing the firm of

Hall, Greer & Co., from the farm of Daniel Hall, in Grundy county, Mo., and placed in the stock yards of the Union Stock-Yards & Transit Company, at Chicago. They were so taken and claimed by Hall, Greer & Co. under a chattel mortgage from Daniel Hall to them, dated December 13, 1884, of "three hundred (300) head of Colorado-Texan cattle, which are now being fed on my farm in Marion township, Grundy county, Missouri; said cattle being a part of the thousand cattle purchased by me of the Western Land and Cattle Company in September and October last. And I hereby certify that there are no other incumbrances against the 300 head of cattle hereby transferred. Said cattle being branded W. C. C. on the right side." The mortgage purports to be given to secure the sum of \$5,000, with interest, on the 13th day of January, 1885, and was on the day of its execution filed for record in the office of the register of deeds of Grundy county, Mo.

Hall, Greer & Co. also gave evidence that at the time of the giving and the recording of the chattel mortgage the 300 cattle described therein were on the farm of Daniel Hall in Grundy county, and in his possession; that they saw the cattle there in the possession of Daniel Hall, and that, at the time they so loaned and advanced the money to Daniel Hall, they caused an examination of the records in the office of the recorder of deeds of Grundy county, for the purpose of ascertaining whether there was of record any lien or incumbrance on the cattle by way of chattel mortgage, bill of sale, conditional sale, or otherwise, and whether there was anything on the records of that office to show that Daniel Hall was not the absolute and unconditional owner of the cattle, in his own right, free from all liens or incumbrances of any kind whatever; that upon such examination nothing was found of record, showing that Daniel Hall was not such owner, nor was there any record of any incumbrance or lien by way of mortgage, bill of sale, conditional sale, or otherwise, except one chattel mortgage by Daniel Hall to Keenan & Hancock, of Chicago, Ill., on 150 cattle of the 1,000 cattle, to secure the payment of \$1,000, and also a mortgage by Daniel Hall to Hall Bros., of Kansas City, on other of said 1,000 cattle, to secure the payment of \$1,287.85; that at the time they loaned the money, and took such chattel mortgage as security therefor, they believed that Daniel Hall was such owner, and had no notice, knowledge, information, or belief that the plaintiff had or claimed any right or title to the cattle, or any of them, but that they did believe, in good faith, that Daniel Hall was the absolute owner of the cattle; that, at the time of making the chattel mortgage, Daniel Hall pointed out to Hall, Greer & Co. 239 cattle that were separate and apart from all other cattle, in a lot by themselves, and designated them as a portion of the 300 cattle described in the mortgage, and also showed and pointed out to Hall, Greer & Co. other cattle on his farm, to a greater number than 61, as cattle from which the remainder of the 300 cattle described in the chattel mortgage were to be taken; that afterwards Daniel Hall, with Simeon F. Hall, separated from the cattle so pointed out 61 other cattle, to make up the number of 300 cattle described in the chattel mortgage; that said 239 cattle and said 61 cattle were afterwards, and before the commencement of this suit, taken by Hall, Greer & Co. on their chattel mortgage from the farm of Daniel Hall, in Grundy county, and were by them, with the consent of Daniel Hall, and with the knowledge of one Stevens, agent of the plaintiff, put on board of cars for shipment to Chicago, for sale on the market in Chicago, and were by them transported to Chicago, and placed in the possession of the Union Stock-Yards & Transit Company, where they were when they were taken on the writ of replevin in this case.

The defendants also gave evidence to the effect that, of the said \$5,000, there was appropriated enough to pay the debt owing by Daniel Hall to Keenan & Hancock; that there was left at the bank in Trenton, Mo., \$1,287.75, to pay the debt of Hall Bros., of Kansas City, upon their delivering to and surrendering to the bank their note against Daniel Hall, and a release of the chattel mortgage to Hall Bros.; that Hall Bros. did not comply with the conditions on which the money was left at the bank, and did not obtain the money, and that on December 13, 1884, Hall, Greer & Co. withdrew such money from the bank; and that there remained unpaid, of the \$5,000 secured by the chattel mortgage to Hall, Greer & Co., the sum of \$3,753.92, with interest from December 13, 1884, at 10 per cent. per annum.

At the trial Hall, Greer & Co. offered to prove certain facts. The court heard the evidence in the absence of the jury, the question of its materiality being reserved. Such evidence was to the effect that Daniel Hall, prior to the 6th day of September, 1884, and prior to the execution and delivery of the contracts, had negotiations with certain brokers or agents of the plaintiff (defendant in error) in regard to the purchase of the cattle from the plaintiff at the price of \$35 per head, for a term of credit, and interest on the purchase price at 12 per cent. per annum from that time until the time to be agreed upon between the parties for the payment of the purchase price for the cattle; that the cattle described in the contract of September 6, 1884, were none of them delivered to Hall until after the execution of the contract, and were delivered to Hall under and in pursuance of the contract, and that when the contract was prepared the sum of \$36.05, named therein, was arrived at by casting interest on the sum of \$35 at 12 per cent. for the time to elapse between the date of the contract and the time specified in the contract for shipping the cattle, and that the declared purpose of the contract, at the time it was so made and delivered, was that the cattle company should retain the title to the cattle, and should sell the same, giving Hall the benefit of any increase in the market value of the cattle, by reason of the feeding, above \$35 per head, and 12 per cent. per annum interest; and that the same state of facts existed in relation to the cattle described in the other two contracts, with the exception that the cattle described and mentioned in the two contracts dated October 1st and 16th, respectively, were actually delivered into the possession of Hall before the two contracts were signed. Thereupon the court decided that such evidence was not competent to be submitted to the jury; that the contracts must be held to be controlling and binding on the parties, as containing the whole transaction between them in relation to the cattle described therein, and refused to submit such evidence to the jury, or to permit the defendants to give evidence of any matters in relation to the negotiations between the parties in regard to the terms and conditions on which the cattle should be delivered to Hall, which were had before the contracts in writing were made; that the negotiations in regard to the proposed purchase of the cattle by Hall were between Hall and certain brokers of the plaintiff, who had no authority to make a sale of the cattle upon credit; and that when the proposition of Hall was submitted to Mr. Forbes, the manager of the plaintiff, he refused to make a sale to Hall on credit, but proposed to let Hall take the cattle on the terms of the contracts, and Hall acceded to the term so insisted upon by Forbes. To this ruling the defendants excepted.

The court directed a verdict for the plaintiff, to which ruling a proper exception was taken.

J. A. Sleeper, for plaintiffs in error.

Charles B. McCoy, (Charles E. Pope, of counsel,) for defendant in error.

Before WOODS and JENKINS, Circuit Judges, and BAKER, District Judge.

JENKINS, Circuit Judge, (after stating the facts.) If the contract constitutes a bailment of personal property, and Hall was an agister, the judgment is clearly right. If, on the other hand, the contract should be construed as a conditional sale of personal property, reserving title in the vendor until payment of the purchase price, then, by force of the statutes of Missouri, (Rev. St. c. 34, §§ 2505-2508,) the contract is void as to Hall, Greer & Co., who, for the purposes of this case, as presented to us, must be deemed purchasers for value, without notice of the rights of the cattle company. The purpose of that statute is to avoid, as against subsequent purchasers in good faith, and creditors, all secret liens upon personal property.

Hervey v. Locomotive Works, 93 U. S. 664; *Fosdick v. Schall*, 99 U. S. 235, 250; *Harkness v. Russell*, 118 U. S. 663, 7 Sup. Ct. 51; *Coover v. Johnson*, 86 Mo. 533; *Peet v. Spencer*, 90 Mo. 384, 2 S. W. 434.

The cause must therefore be determined by the construction to be placed upon the contracts under which possession of the cattle was delivered to Hall. In the solution of that question, we must search for the intention of the parties, as it may be gathered from a reading of the entire instrument, and not from any separate provision of it,—the real design of the contracting parties, as disclosed by the whole contract. We should not regard any mere formula of words, nor permit parties to avoid the statute by any cloaking of intent. If, as is asserted, the contract, as expressed, is a mere device to evade the law of Missouri, it undoubtedly becomes the duty of the court to tear away the mask, and declare the real nature of the transaction. The true intent and meaning of the contract does not depend upon “any name which the parties may have given to the instrument, and not alone on any particular provisions it contains, disconnected from all others, but on the ruling intentions of the parties, gathered from all the language they have used. It is the legal effect of the whole which is to be sought for. The form of the instrument is of little account.” *Heryford v. Davis*, 102 U. S. 235, 243.

It is of the essence of a contract of sale that there should be a buyer and a seller; a price to be given and taken; an agreement to pay, and an agreement to receive. “Sale” is a word of precise legal import. “It means, at all times, a contract between parties to give and to pass rights of property for money, which the buyer pays, or promises to pay, to the seller, for the thing bought and sold.” *Williamson v. Berry*, 8 How. 544. A conditional sale implies the delivery to the purchaser of the subject-matter, the title passing only upon the performance of a condition precedent, or becoming re-invested in the seller upon failure to perform a condition subsequent. It is not infrequently a matter of difficulty to accurately distinguish between a conditional sale and a bailment of property. The border line is somewhat obscure, at times. The difficulty must be solved by the ascertainment of the real intent of the contracting parties, as found in their agreement. There are, however, certain discriminating earmarks, so to speak, by which the two may be distinguished. It is an indelible incident to a bailment that the bailor may require restoration of the thing bailed. *Insurance Co. v. Randell*, L. R. 3 P. C. 101; *Jones, Bailm.*, (3d Ed.) pp. 64, 102; 2 Kent, Comm. § 589. If the identical thing, either in its original or in an altered form, is to be returned, it is a bailment. *Powder Co. v. Burkhardt*, 97 U. S. 116; *Sturm v. Boker*, 150 U. S. 312, 14 Sup. Ct. 99. In a contract of sale there is this distinguishing test, common to an absolute and to a conditional sale: that there must be an agreement, expressed or implied, to pay the purchase price. In a bailment, if a bailment for hire, there must be payment for the use of the thing let or bailed. *Heryford v. Davis*, *supra*. If service is to be rendered the subject-matter of the bailment, there must be

compensation for the service, unless the bailment be a mandate. In a contract of conditional sale the agreement to pay the purchase price may be masked so as to give it the appearance of an agreement to pay for use. In such case the court must ascertain the real intention of the contracting parties from the whole agreement, read in the light of the surrounding circumstances.

We must therefore subject the provisions of the contracts in question to the tests declared, to ascertain the real design of the contracting parties; to determine whether, under them, the cattle were bailed, or conditionally sold. Careful scrutiny of the agreements, in the light of legal principles, compels us to the conviction that they must be held to be contracts of bailment. Their essential terms are within narrow compass. Hall agreed to transport the cattle to his farm at his own expense, and there feed them, that they might be profitably marketed by the cattle company. He covenanted that they should not deteriorate in flesh or condition. He bound himself to pay, at an agreed valuation, for all losses of the cattle arising from "death, disease, escape, theft, or any cause whatever." He was to employ at his own expense a herdsman selected by the cattle company. The pasturage was to extend over a period of some 14 weeks, during which time the cattle company should ship the cattle to market, or sell them in pasturage. Hall was to receive, in full compensation for his services and expenditures, all moneys realized from the sale of the cattle by the cattle company in excess of \$36.05 per head, after deducting the expenses of shipment and sale. He also waived any lien upon the cattle for his own services. There is wanting here an essential element of a sale,—an agreement to pay a price. Hall took upon himself no obligation of that character. He assumed no debt to the cattle company. If the cattle, upon sale, should produce less than the stated amount per head above transportation and expense of sale, the loss would fall upon the cattle company, not upon Hall. The latter took no risk of the market, except as it might affect his compensation for care and feed of the cattle during the period of pasture. The value of the cattle would depend largely upon their condition when exhibited in market. That condition depended largely upon the character of their care and pasturage. This being within the peculiar duty of Hall, it was wisely provided, to stimulate him to diligent care of the cattle, that compensation for his service should be contingent upon the amount realized upon sale. So to that extent he took the risk of the market. But if, by reason of a general depreciation in the value of cattle, the stated sum per head should not be realized, Hall would lose compensation for his service, and the cattle company would suffer the decrease in value. So that each party assumed a hazard of the venture,—the one having at risk his property; the other, his compensation for service in the care of that property. Hall was a mere agister, with compensation for service contingent upon the price obtained upon sale of the cattle. He was under no obligation to purchase the cattle, nor to pay for them, nor did he warrant their market value. We perceive no suggestion in the writings that any conditional sale of the cattle

to Hall was contemplated. In no event was he to be invested with the title. He was in fact, in any event, to return these cattle to the cattle company. The company, not Hall, had the power of disposition. The company, not Hall, was to select the time of sale and the market. The company, not Hall, was to transport the cattle to market; and while in transit, and thereafter while awaiting sale, the cattle were to be in the possession of, and at the risk of, the company.

It cannot be denied that one stipulation of the contract, considered by itself, gives countenance to the suggestion of a conditional sale. We refer to the provision that Hall should be liable "for all losses of said cattle arising from death, disease, escape, theft, or any cause whatever." Standing alone, this clause would be strong to show that Hall assumed the burden of ownership. It would be most unfair, however, to judge the contract by a single clause disconnected from the other stipulations contained in it. We must have regard to the entire agreement to determine the meaning of any part of it. It may well comport with a bailment of property that the bailee assumes the character of insurer of the thing bailed while it remains in his possession, and as to those disasters which he, by the exercise of care, could largely guard against, and which would be greatly promoted by his negligence. It is competent for a bailee so to enlarge his responsibility. *Sturm v. Boker*, 150 U. S. 312, 14 Sup. Ct. 99. Such a clause, read in connection with the other stipulations of the contract, may well be held a wise provision, imposing upon the bailee, in the care of the cattle while in his custody, the liability of an insurer, stimulating the exercise of care for them. Nor are we able to place upon the language employed the construction contended for, which would impose upon Hall accountability for depreciation in market value. We find no warrant for such suggestion. The provision is limited to the period that the cattle remain in Hall's care, not after the redelivery of them to the company, when and when only they were to be sold. The provision comprehends "losses of said cattle" only, not loss by depreciation in market value; and that loss must arise from "death, disease, escape, theft, or any cause whatever." "*Noscitur a sociis*." We cannot indulge a strained construction of the stipulation to qualify the clear intent of the agreement considered in its entirety.

It may be, as suggested by counsel, that Hall could pay to the cattle company the stated sum per head, and so obtain title to the cattle. That would result, because he was entitled, as reward for his service, to the proceeds of the cattle in excess of the stated sum per head. He possibly had that option, but was under no obligation to pay. There was no debt to discharge. There can be no sale without an agreement, express or implied, to pay. An option is not a sale, (*Hunt v. Wyman*, 100 Mass. 200,) and possession of property under an option to purchase, when that possession is delivered, for service to be rendered the thing bailed, will not transmute into a conditional sale that which is otherwise a bailment.

Nor are we able to discover in these contracts, read in the light of surrounding circumstances, any design to avoid the law of the

state of Missouri. The statutes which are claimed to avoid the contracts are these:

"Sec. 2505. * * * No sale of goods and chattels when possession is delivered to the vendee shall be subject to any condition whatever as against creditors of the vendee, or subsequent purchasers from such vendee in good faith, unless such condition shall be evidenced by writing, executed and acknowledged by the vendee and recorded as now provided in cases of mortgages of personal property." Laws 1877, p. 320, § 1, (f.)

"Sec. 2507. Conditional Sales, Void as to Creditors unless Recorded. In all cases where any personal property shall be sold to any person, to be paid for in whole or in part in installments or be leased, rented, hired, or delivered to another on condition that the same shall belong to the person purchasing, leasing, renting, hiring, or receiving the same whenever the amount paid shall be a certain sum, or the value of such property, the title of the same to remain in the vendor, lessor, renter, hirer, or deliverer of the same, until such sum or the value of such property or any part thereof shall have been paid, such condition, in regard to the title so remaining until such payment, shall be void as to all subsequent purchasers in good faith, and creditors, unless such condition shall be evidenced by writing executed, acknowledged and recorded, as provided in cases of mortgages of personal property." Laws 1877, p. 321, § 1.

"Sec. 2508. Duty of Vendor, before Taking Possession of Property. Whenever such property is so sold or leased, rented, hired, or delivered, it shall be unlawful for the vendor, lessor, renter, hirer, or deliverer, or his or their agent or servant, to take possession of said property without tendering or refunding to the purchaser, lessee, renter, or hirer thereof, or any party receiving the same, the sum or sums of money so paid, after deducting therefrom a reasonable compensation for the use of such property, which shall in no case exceed twenty-five per cent. of the amount so paid, anything in the contract to the contrary notwithstanding, and whether such condition be expressed in such contract or not, unless such property has been broken or actually damaged, and then a reasonable compensation for such breakage or damage shall be allowed." Laws 1877, p. 321, § 2.

It is to be observed that the statute is directed to sales, not to bailments, of property. It sought to prevent, as against purchasers and creditors, the sale, leasing, hiring, or delivery of goods on condition that the title should pass on payment of the price or value of the property. *Peet v. Spencer*, 90 Mo. 384, 2 S. W. 434. It was aimed at such transactions as were under consideration in the cases to which we are referred, (*Hervey v. Locomotive Works*, 93 U. S. 664; *Heryford v. Davis*, 102 U. S. 235; *Sumner v. Cottey*, 71 Mo. 121; *Whitcomb v. Woodworth*, 54 Vt. 544; *Hine v. Roberts*, 48 Conn. 267; *Stadtfeld v. Huntsman*, 92 Pa. St. 53; *Greer v. Church*, 13 Bush, 430; *Murch v. Wright*, 46 Ill. 487; *Lucas v. Campbell*, 88 Ill. 447,) and others of that class, where an undoubted sale of property was thinly disguised under the mask of a lease, and the purchase price cloaked under the guise of rent. In all these cases there was the absolute undertaking of the vendee to pay the price, and there was the manifest intention to vest the title in the purchaser upon payment. But here there is no suggestion in the writing that the title should ever pass to Hall; the cattle were to be returned by him, and sold by the cattle company. There was no obligation on his part to pay any sum as the price of the cattle, or for their use. He was merely to fatten the cattle, and receive for their pasturage, and the care bestowed upon them, the amount over and above a stated sum per head, if the cattle company should realize so much upon

their sale in the market. Without further enlarging upon the subject, we are satisfied that the agreement was a bailment, not a conditional sale, and is not within the condemnation of the statute.

With respect to the ruling upon evidence offered at the trial, and rejected by the court, we think the ruling correct. It is elementary that in the absence of fraud, accident, or mistake, parol evidence of prior negotiations should not be allowed to contradict the terms of a written agreement. The written agreement speaks conclusively the conclusion to which the parties to it have arrived, and all prior negotiations are merged in it. *Willard v. Tayloe*, 8 Wall. 557; *Forsyth v. Kimball*, 91 U. S. 291; *Bast v. Bank*, 101 U. S. 93, 96. Resort may be had to proof of the circumstances out of which the contract grew, and which surrounded its adoption, to ascertain its subject-matter, and the standpoint of the parties in relation to it, but not to vary the contract by addition or substitution. Mr. Greenleaf thus announces the rule:

"The writing, it is true, may be read by the light of surrounding circumstances, in order to understand the intent and meaning of the parties; but, as they have constituted the writing to be the only outward and visible expression of their meaning, no other words are to be added to it, or substituted in its stead. The duty of the courts, in such cases, is to ascertain, not what the parties may have secretly intended, as contradistinguished from what their words express, but what is the meaning of the words they have used. It is merely a duty of interpretation (that is, to find out the true sense of the written words, as the parties used them) and of construction, (that is, when the true sense is ascertained, to subject the instrument, in its interpretation, to the established rules of law.) And, when the language of an instrument has a settled legal construction, parol evidence is not admissible to contradict that construction." *Greenl. Ev.* § 277.

But resort to surrounding circumstances is not allowed, for the purpose of adding a new and distinct undertaking, *Maryland v. Railroad Co.*, 22 Wall. 105. The circumstances surrounding the making of a contract is one thing. The parol negotiations leading up to the written agreement is another and a different thing. Parol evidence may be received of the existence of an independent oral agreement, not inconsistent with the stipulations of the written contract, in respect to a matter to which the writing does not speak, but not to contradict the contract. The cases of *Machine Co. v. Anderson*, 23 Minn. 57, and *Machine Co. v. Holcomb*, 40 Iowa, 33, which are urged upon our attention, if in opposition to the rule stated, cannot be followed. The one case is rested upon the ground that the sale and delivery were absolute and complete before the written instrument, and that the subsequent lease was repugnant to the contract of absolute sale, and void for want of consideration. In the latter case it was held that the writing did not contain the whole contract. It is unnecessary to consider whether those cases can be upheld. We do not consider them relevant here, for the reason that the evidence offered does not bring the matter here within the cases cited. The offer here, and the evidence adduced to the court thereunder, was only to the effect that Hall, previous to the contracts, had negotiations with certain agents of the

cattle company to purchase the cattle on credit. There is, however, no suggestion that the company agreed to sell upon credit; and if we may rest upon the statement of the trial judge in his opinion, the evidence not being preserved in the bill of exceptions, the agent of the company refused to sell to Hall upon credit, or to take chattel mortgage security upon the cattle, but was willing to intrust them to Hall under a feeding contract, and upon the terms stated in the writing. The offer of evidence expressly states that none of the cattle were delivered into the possession of Hall before execution and delivery of the contract of September 6, 1884, and were delivered under and in pursuance of the contract. This would seem to conclude the contention, and demonstrates that the writing speaks the actual and entire contract.

The further offer to prove "that the declared purpose of said contract, at the time it was so made and delivered, was that the cattle company should retain the title to said cattle, and should sell the same, giving Hall the benefit of any increase in the value of the cattle by reason of the feeding, in the market, above \$35 per head and twelve per cent. per annum interest," would throw no light upon the intention of the contracting parties, if it were admissible. The contract itself so speaks, giving the increase to Hall for his services as agister.

The judgment must be affirmed.

TRAVELERS' INS. CO. v. TOWNSHIP OF OSWEGO.

(Circuit Court of Appeals, Eighth Circuit. December 4, 1893.)

No. 334.

1. CONSTITUTIONAL LAW—SPECIAL LEGISLATION—TOWNSHIPS.

The provision of the constitution of Kansas, that "in all cases where a general law can be made applicable no special law shall be enacted," (article 2, § 17,) does not invalidate a subsequent special law authorizing a township to refund and scale down its indebtedness. *State v. Hitchcock*, 1 Kan. 178, applied. 55 Fed. 361, reversed.

2. SAME—CORPORATIONS—TOWNSHIP.

The provision of the constitution of Kansas that the legislature shall pass no special act conferring corporate powers (article 12, § 1) does not apply to quasi corporations, such as townships. *Beach v. Leahy*, 11 Kan. 28, followed.

3. STATUTES—TITLES OF ACTS—PROVISIONS GERMANE TO SUBJECT.

Under a constitutional provision that "no bill shall contain more than one subject, which shall be clearly expressed in its title," (Const. Kan. art. 2, § 16,) an act whose subject, so expressed, is the refunding of the indebtedness of a certain township, may contain provisions fixing the terms on which such indebtedness shall be refunded, naming persons authorized to refund it, authorizing the issuance of new bonds and coupons, and the levy of taxes to pay them, and enforcing the performance of the duties devolved upon the several agents selected, as such provisions are germane to the subject, naturally suggested by the title, and proper to the accomplishment of the purpose it discloses.

4. SAME—APPOINTMENT OF OFFICERS.

A constitutional provision that "all officers, whose election or appointment is not otherwise provided for, shall be chosen or appointed as may

be prescribed by law," (Const. Kan. art. 15, § 1,) gives to the legislature itself authority to make such appointments.

5. SAME—TOWNSHIP OFFICERS—WHO ARE.

Commissioners appointed by a special act to refund the bonded indebtedness of a township at not more than 30 per cent. of its face, and invest the sinking fund to be raised to pay the same, are mere financial agents, and not officers of the township, within the meaning of a constitutional provision for the election of such officers, nor are they charged with any judicial functions.

6. SAME—LEGISLATIVE POWERS—TOWNSHIPS.

The right to determine whether a township shall scale down its bonded indebtedness, and issue new bonds for the remainder, lies with the legislature, under the constitution of Kansas, and not with the people of the township.

7. SAME—TOWNSHIPS—REFUNDING DEBT.

The special acts of the Kansas legislature authorizing Oswego township, Labette county, to scale down and refund its bonded indebtedness, (Laws 1881, c. 170; Laws 1883, c. 157,) do not contravene any provisions of the state constitution, and are valid. 55 Fed. 361, reversed.

In Error to the Circuit Court of the United States for the District of Kansas.

At Law. Action by the Travelers' Insurance Company against the township of Oswego, Labette county, Kan., on interest coupons of bonds issued by defendant. Demurrer to the complaint sustained. 55 Fed. 361. Plaintiff brings error. Reversed.

Statement by SANBORN, Circuit Judge:

The Travelers' Insurance Company, the plaintiff in error, brought an action in the court below to recover upon certain interest coupons that had been detached from certain bonds issued by the township of Oswego, the defendant in error, to refund its bonded indebtedness. The complaint alleged that these bonds and coupons were issued in 1885 under the authority of an act of the legislature of the state of Kansas, entitled "An act to enable the township of Oswego, in the county of Labette, state of Kansas, to refund its indebtedness," approved March 3, 1881, (Sess. Laws Kan. 1881, c. 170,) and an amendatory act passed in 1883, (Sess. Laws Kan. 1883, c. 157); that these bonds had been duly registered under these acts; that the plaintiff was an innocent purchaser for value, before maturity, of these bonds and coupons, which were payable to bearer; and that the coupons were overdue. A demurrer to this complaint was sustained, and the action dismissed, on the ground that the acts of the legislature under which the bonds were issued were unconstitutional.

The act of March 3, 1881, as amended, provided substantially as follows:

Section 1. That the township of Oswego was authorized to issue funding bonds to fund and cancel its existing bonded indebtedness.

Sec. 2. That the bonds to be issued should bear 6 per cent. interest, and that the principal and interest should be payable at a certain place and at certain times, respectively.

Sec. 3. That the county clerk of Labette county, Kan., should register the bonds, and that no bond should be of any validity unless registered.

Sec. 4. That no bond should be signed by the commissioners until the bonds in payment of which it was to be issued had been delivered to the county clerk to be canceled, and that the clerk should cancel and destroy the latter.

Sec. 5. That the bonds issued under the act should be registered in the office of the auditor of state, and that he should certify to the board of county commissioners, the county treasurer, and the county clerk of Labette county the amount necessary to be levied in each year to pay the coupons, and to create a sinking fund.

Sec. 6. That "it shall be the duty of the board of county commissioners of Labette county, Kansas, annually and at the time it makes the general levy for state, county and other taxes to levy on all taxable property in

Oswego township a sum sufficient as shown by the said certificate of the auditor of state to pay the interest on said bonds adding not to exceed 10 per cent. for delinquencies provided that such levy shall be made on all such property as would under existing laws be holden for the payment of the bonds or judgments thereon that may be funded, taken up, satisfied or paid under and by virtue of the provisions of this act;" that in the eleventh year after the issuance of the bonds, and annually thereafter, the county commissioners shall levy a tax to create a sinking fund to pay the bonds; that the commissioners provided for in the act shall invest it; and that, if any of the county commissioners fail to vote for the levy of such a tax, they and their sureties shall be liable in a civil action to the owners of the coupons for the full amount that should have been, but was not, levied.

Sec. 7. That if the county commissioners fail to levy this tax in any year the county clerk shall add the proper amount to that levied by the commissioners, and distribute it ratably on all the taxable property of Oswego township; and, if he fails to do so, he and his sureties shall be liable in a civil action, to the owners of the coupons that should have been levied for, to the full amount thereof.

Sec. 8. That if, when the tax roll of Oswego township comes to the county treasurer, the tax provided for in the act has not been levied, or placed on the tax roll, he shall place it there, and shall collect it; and, if he fails to do so, he and his sureties shall be liable in a civil action, to the owners of the coupons that should have been paid from such levy, to the full amount thereof.

Sec. 9. "That for the purpose of compromising the bonded indebtedness and the judgments thereon of the said township of Oswego, and for the issuing of the bonds and coupons provided for by this act. C. M. Condon, J. B. Draper and Thomas ShROUT of the county of Labette are made and declared the commissioners and the agents of said township of Oswego;" that bonds issued under the act shall be signed by their chairman and attested by their clerk, "and in the compromising and funding of the said indebtedness of said township the said commissioners shall have full power to do all things needful; provided that no portion of said indebtedness shall be compromised by said commissioners at a higher rate than thirty cents on the dollar;" and that, for any violation of the provisions of the act by either of the commissioners, he shall be deemed guilty of a felony.

Sec. 10. That if any one of the commissioners fails to accept the position tendered him, or if, after accepting, he dies or resigns, the judge of the judicial district in which Labette county is situated shall fill the vacancy, and that the commissioners shall give bonds for the faithful discharge of their duties.

When this act was passed there was a general law in force in the state of Kansas, authorizing every county and township in that state, after a favorable vote of its electors, to compromise and refund its indebtedness, and to issue new bonds therefor, not exceeding its actual outstanding indebtedness in amount.

W. H. Rossington and Charles Blood Smith, (E. J. Dallas, on the brief,) for plaintiff in error.

W. F. Rightmire and F. H. Atchinson, for defendant in error.

Before CALDWELL and SANBORN, Circuit Judges.

SANBORN, Circuit Judge, after stating the facts as above, delivered the opinion of the court.

The only question in this case is the constitutionality of the act of the legislature of Kansas under which these bonds and coupons were issued. Before entering upon the discussion of this question, it is well to note the purpose and extent of the authority vested in the commissioners appointed by the act to issue these bonds. They were not empowered to contract for the purchase of any property, or for the performance of any work, on behalf of the township. They were not authorized to incur any new debt, or to increase any

old indebtedness of the township. The act did not provide for the payment of any salaries or compensation to these agents, even. It did not enable them to add one dollar to the burden of taxation which rested on the property of the township. Laying aside the authority to invest the sinking fund 12 years after the bonds were issued, which is immaterial here, the entire power given to these commissioners was to act as a board of auditors, to receive, calculate the amount due upon, and destroy, the old bonds of the township as fast as their owners would consent to cancel and surrender them for new bonds to be issued by the commissioners for only 30 per cent. of the amount justly due. In effect, the act empowered the commissioners to reduce the bonded debt of this township 70 per cent., and to certify that the remaining 30 per cent. of its debt, and no more, was still owing, with certain interest, and this is the sum and substance of its offending. We turn to the consideration of the objections to its validity.

The principal objection, and the one that was sustained by the court below, is that the passage of this act was a violation of section 17, art. 2, of the constitution of Kansas, which provides that:

"All laws of a general nature shall have a uniform operation throughout the state, and in all cases where a general law can be made applicable no special law shall be enacted."

This refunding act is, without question, a special law, and it is contended that it is void because a general law could have been made applicable to the case of this township, and also because it prevents the uniform operation throughout the state of the general laws for the refunding of debts; of the general laws fixing the number and names of township officers, and defining their duties, of the general law providing for the filling of vacancies in township offices; and of the laws establishing the courts, and prescribing their jurisdiction. We are spared the labor of examining this question. It was settled by the supreme court of Kansas, by a long line of unvarying decisions, before these bonds were issued. No provision of the national constitution, or of the national laws or treaties, is in question. In determining rights dependent entirely upon the interpretation of the constitution and laws of a state, the national courts uniformly follow the rules of construction and interpretation announced by the highest judicial tribunal of that state where such rules were established before the rights in question accrued. *Dempsey v. Township of Oswego*, 4 U. S. App. 416, 2 C. C. A. 110, 51 Fed. 97; *Rugan v. Sabin*, 10 U. S. App. 519, 3 C. C. A. 578, 53 Fed. 415, 416; *Norton v. Shelby Co.*, 118 U. S. 425, 439, 6 Sup. Ct. 1121; *Bolles v. Brimfield*, 120 U. S. 759, 763, 7 Sup. Ct. 736.

In *State v. Hitchcock*, (decided in 1862,) 1 Kan. 178, the highest judicial tribunal of that state held that a special law locating the county seat of Franklin county was constitutional and valid, notwithstanding the fact that it prevented the operation in that county of a general law of that state then in existence, providing for the location of county seats. Chief Justice Ewing, in delivering the opinion of the court, said:

"The legislature must necessarily determine whether their purpose can or cannot be expediently accomplished by a general law. Their discretion and sense of duty are the chief, if not the only, securities of the public for an intelligent compliance with that provision of the constitution. Whether we could, in any conceivable case presenting a flagrant abuse of that discretion, hold a private law invalid, as contrary to that provision of the constitution, we need not decide; but we would certainly not hold such a law invalid merely because it would, in our opinion, have been possible to frame a general law under which the same purpose could have been accomplished."

The rule thus announced in the first volume of the Kansas Reports has been affirmed and adhered to in that state ever since. It is true that in *Darling v. Rodgers*, 7 Kan. 592, and *Robinson v. Perry*, 17 Kan. 248, general laws which applied to certain counties, only, were held void because they did not have a uniform operation throughout the state; but the act in question here is not a general law, and no special law of the character here presented has ever been held invalid in that state, so far as we are aware, either because it prevented the uniform operation of a prior general law, or because a general law might have been made applicable to its subject-matter. On the other hand, every such special law that has been presented to the supreme court of that state has been sustained. In 1873, in *Beach v. Leahy*, 11 Kan. 28, a special law authorizing a school district to issue bonds to build a schoolhouse was sustained, although there was a general law in force, the operation of which in that district must have been prevented by the special act. Mr. Justice Brewer, then a judge of the supreme court of Kansas, in delivering the opinion of the court, said:

"It may be conceded that this is a special law; that it authorizes the issue of bonds in a manner and upon conditions different from those prescribed by the general statute therefor. It is evident, also, that the result could be accomplished by a general law, or, in the words of the constitution, that a general law could be made applicable, for a general law is on the statute book under which great numbers of school districts have issued bonds. Why this distinction was made, we do not know, and there is nothing in the record to enlighten us thereon. We may imagine many reasons, but it is useless to speculate. It is enough, in the absence of any showing as to the facts, that we can see that there may have been good and sufficient reasons."

In *Commissioners v. Shoemaker*, (decided in 1882,) 27 Kan. 77, a special act had been passed, excepting the county clerks and county treasurers of two counties from the operation of a general law then in force, fixing the salaries of county officers throughout the state, and it was sustained. In *Washburn v. Commissioners*, (decided in 1887,) 37 Kan. 217, 221, 15 Pac. 237, while there was a general law in force authorizing the county commissioners of any county in the state to build a jail and jailer's residence after a vote of the electors of the county approving the project, a special law had been passed, authorizing the county commissioners of Shawnee county to build a jail and jailer's residence, to levy a tax of six mills upon the taxable property of the county, and to issue scrip to pay for the buildings, without submitting the project to a vote of the electors, and this law was sustained by the supreme court of Kansas. In *State v. Sanders*, (decided in 1889,) 42 Kan. 228, 233, 21 Pac. 1073,

that court, in answer to the suggestion that the special law then before it prevented the uniform operation of a prior general law, and that there was a general law applicable to its subject-matter, cited the authorities to which we have referred, and declared that:

"The interpretation which was placed upon this provision of the constitution at an early day, and which has been accepted and acted upon by both the legislature and the courts since that time, must be regarded as settled, and binding upon the court, whatever the views of the present members might be."

See, also, *City of Wichita v. Burleigh*, 36 Kan. 34, 12 Pac. 332; *Elevator Co. v. Stewart*, 50 Kan. 378, 32 Pac. 33.

In view of this long-established and uniform interpretation by the highest judicial tribunal of Kansas of the provision contained in section 17, art. 2, of the constitution of that state, the objection to this law founded upon that provision ought not to be, and cannot be, sustained by the federal courts. The interpretation given by the state court must be followed, in the interest of a wise public policy, of uniformity of decision and harmony of action between the two systems of jurisprudence, and of stability and certainty in the rights of citizens. It would be intolerable that these bonds, issued and sold upon the faith of this uniform interpretation of the constitution by both the legislature and the courts of Kansas for 23 years before their issuance, should be held valid and enforced in the state courts, and should be declared void in the federal courts, when no impingement upon the federal constitution, laws, or treaties, and no question of commercial or general law, demands an independent examination and determination of this question by the latter.

The second objection interposed to this act is that it was passed in violation of section 1, art. 12, of the constitution of Kansas, which provides that:

"The legislature shall pass no special act conferring corporate powers. Corporations may be created under general laws; but all such laws may be amended or repealed."

This provision is found in the article of the constitution entitled "Corporations," and most of the provisions of that article relate to private corporations. Section 5 of the article, however, provides that:

"Provision shall be made by general law for the organization of cities, towns and villages; and their power of taxation, assessment, borrowing money, contracting debts, and loaning their credit shall be so restricted as to prevent the abuse of such power."

The perusal of these sections at once suggests the thought that the restriction of section 1 relates to corporations proper, only,—to private corporations, and cities, towns, and villages,—and that it in no way restricts or affects the legislative authority over counties, townships, and school districts. We are also relieved from a consideration of this question. The supreme court of Kansas decided it in 1873, and has constantly adhered to that decision. In *Beach v. Leahy*, 11 Kan. 28, 31, in which a special law was under consideration which conferred upon a school district authority to build a schoolhouse, and to issue bonds to pay for it, on terms different from those of a general law then in force, giving such authority,

this question was presented and determined. Mr. Justice Brewer, who delivered the opinion of the court, in speaking of the effect of section 5, said:

"On the other hand, in order that there might be no question whether this article was intended for other than private corporations, section 5 names certain public corporations to which its provisions extend. It was probably well that these were named, to avoid question, for all the sections other than the fifth have reference—principally, at least—to private corporations. Yet, as these are corporations proper, there would be weighty reasons for holding them included, even though not in terms named. But with reference to counties, townships, and school districts the case is different. True, they are called in the statute 'bodies corporate.' Gen. St. p. 253, § 1; Id. p. 1082, § 1; Id. p. 920, § 24. Yet they are denominated in the books, and known to the law, as 'quasi corporations,' rather than as corporations proper. They possess some corporate functions and attributes, but they are primarily political subdivisions,—agencies in the administration of civil government,—and their corporate functions are granted to enable them more readily to perform their public duties."

After an exhaustive examination of the authorities, he says:

"The conclusion to which these investigations have led us is that, among public corporations, only corporations proper are included within the scope of article 12 of the state constitution, and that a school district is only a quasi corporation, and not covered by its provisions."

This decision has been uniformly followed by the supreme court of Kansas, and it is decisive of this objection in this court. *State v. County of Pawnee*, 12 Kan. 426, 439; *Commissioners v. O'Sullivan*, 17 Kan. 58, 61; *Eikenberry v. Township of Bazaar*, 22 Kan. 556; *Marion Co. v. Riggs*, 24 Kan. 255, 258. In the two cases last cited, it is held that counties, townships, school districts, and road districts are not liable for neglect of public duty; that they exist only for the purposes of the general political government of the state; that all the powers with which they are intrusted are the powers of the state, and all the duties with which they are charged are the duties of the state; that in the performance of governmental duties the sovereign power is not amenable to individuals; and, therefore, that these organizations are not liable for such neglect, in the absence of a statute imposing such a liability.

The third objection to the constitutionality of this law is that its passage was in violation of section 16, art. 2, of the constitution of Kansas, which provides that:

"No bill shall contain more than one subject, which shall be clearly expressed in its title."

The title of this act is, "An act to enable the township of Oswego, county of Labette, to compromise and refund its present indebtedness." The provision here cited is common to the constitutions of many states, and it has frequently been the subject of judicial construction. The settled rule for its interpretation is that, where the subject of the bill is clearly stated in the title, the law will not be held obnoxious to this clause of the constitution on account of the presence in it of any provisions that are germane to the subject expressed in the title, or that would be naturally suggested by it as necessary or proper to the complete accomplishment of the purpose

it discloses. *State v. Barrett*, 27 Kan. 213, 218, and cases cited; *State v. Cassidy*, 22 Minn. 312, 322, 326, and cases cited.

The act before us is fully protected by this rule. Its subject was the refunding of the indebtedness of Oswego township, and the provisions fixing the terms on which its indebtedness should be refunded, naming the persons authorized to refund it, authorizing the issuance of new bonds and coupons, and providing for the levy of taxes to pay them, and enforcing by proper provisions the performance of the duties devolved upon the several agents selected, were all germane to this subject, naturally suggested by the title, and proper, if not necessary, to the accomplishment of the purpose that title disclosed. The object of the constitutional provision is to secure separate consideration of each subject by the legislature, and to this end this provision has been held to make void legislation on subjects foreign to that expressed in the title to a bill. But there is no subject mentioned in this act that is foreign to that expressed in its title, and it does not come within the terms or the purpose of the constitutional inhibition.

We have now considered all the provisions of the constitution of Kansas that it is claimed expressly prohibited the passage of this law. It is, however, argued that the act is void (1) because the appointment of the commissioners was an executive, and not a legislative, function; (2) because it is claimed that the commissioners were township officers, and that the constitution provides for the election of such officers; (3) because these commissioners were to determine the amount of the indebtedness of the township, and that is claimed to be a judicial function; and (4) because the enactment of this special law was not within the scope of legislative authority, and was a usurpation of the power of local self-government that is claimed to have been reserved to the electors of this township by the provision of section 20 of the bill of rights of the constitution of Kansas which declares that "all powers not herein delegated remain with the people."

The decisions of the supreme court of Kansas to which we have already adverted, and which must control this case, render extended notice of these objections unnecessary. There is nothing in the constitution of Kansas which declares the appointment of agents of the state, whose positions are created and duties prescribed by the legislature, to be an executive, rather than a legislative, power. Primarily, the appointment of such agents pertains no more to the functions of the executive than to that of the legislative department of the government, and it was competent for the people of the state to vest it in either the one or the other. Section 1, art. 15, of the Kansas constitution, provides that:

"All officers, whose election or appointment is not otherwise provided for, shall be chosen or appointed as may be prescribed by law."

The right to prescribe the method of appointment thus vested in the legislature necessarily carried with it the right to authorize that appointment to be made by the legislature itself. Moreover, these commissioners were named in the body of the act in question.

The governor—the chief executive officer of the state—had the veto power, under the constitution of the state, and he approved this law. They were therefore appointed by the exercise of both the legislative and the executive power of the state. These commissioners were not township officers, within the meaning of the constitution of Kansas, and hence they were not elective. They had no duties to discharge in the general management of the business of the township, or in the management of any general department of that business. They were mere fiscal agents, charged with the simple duties of refunding the bonded indebtedness of the township at not more than 30 per cent. of its face, and investing the sinking fund to be raised to pay the bonds. A banker who is appointed to pay the bonds of a town or city, or to exchange new bonds or notes for old ones, is not an officer of the town or of the city. He is a mere financial agent. And these commissioners took no higher rank. Nor were their duties judicial. The indebtedness of this township was evidenced by its bonds. The duty of the commissioners in determining their amount was of the same character as that of the banker, who determines before payment the amount of the bonds of a city which he has been directed to pay when presented at his counter. This was not the discharge of a judicial function.

But a single question remains: Was the right to determine whether or not this township would reduce its indebtedness 70 per cent., and issue new bonds for the remaining 30 per cent., and, if so, the right to determine the manner of issuing them, reserved by the constitution of Kansas to the people of this township, or was it vested in the legislature of Kansas? Undoubtedly, the legislative power of that state is not omnipotent. It is limited by the federal constitution, laws, and treaties; by the express restrictions of the constitution of the state; by the implied restrictions evidenced by certain provisions of that instrument, such as the grant of executive and judicial power to other departments of the government, which necessarily prohibits the exercise of executive and judicial functions by the legislature; and by its nature and purpose. A flagrant and outrageous abuse of its power, such as the attempted passage of an act authorizing the destruction of the life or property of the citizen without cause, or an act authorizing the commission of those very offenses against which it is the great purpose of every good government to protect its people, could not be sustained as a valid exercise of legislative power, even in the absence of any express prohibition in the constitution. There is, however, nothing of this character in the law we are considering; and, subject to the limitations we have suggested, the legislative power of a state is supreme, within the scope of its authority. The power to levy taxes upon any of the property in the state, to build schoolhouses, roads, courthouses, jails, and to make other public improvements at the expense of the people; the power to borrow money, to incur indebtedness, to make contracts, to issue bonds on behalf of the people of the state, or on behalf of any political subdivision of the state,—all these are essential legislative powers, and

depend for their exercise upon the will of the representatives of the people assembled in the legislature. If these and like powers are exercised in various political subdivisions of the state by school districts, road districts, townships, counties, villages, and cities, the latter are but the agents and instrumentalities of the legislature for the more convenient administration of the local government of the people within its jurisdiction. All the governmental powers and privileges these instrumentalities enjoy are derived from the legislature through the general or special laws that recognize their existence and limit their powers. It goes without saying that the power which established these agencies can destroy them, can revoke the whole or a part of the powers it delegated to them, and can delegate these powers, or any portion of them, to other agents, unless restrained by some of the limitations we have referred to. *Meriwether v. Garrett*, 102 U. S. 472, 511; *U. S. v. Baltimore & O. R. Co.*, 17 Wall. 322, 329; *State v. Hunter*, 38 Kan. 578, 582, 17 Pac. 177; *Philadelphia v. Fox*, 64 Pa. St. 169, 180; *People v. Draper*, 15 N. Y. 533, 545; *Mayor, etc., of Baltimore v. State*, 15 Md. 376; *People v. Langdon*, 8 Cal. 1, 16; *Ohio v. Covington*, 29 Ohio St. 102; *Jensen v. Board*, 47 Wis. 298, 309, 310, 2 N. W. 320; *Daley v. City of St. Paul*, 7 Minn. 390, (Gil. 311); *Bridges v. Shallcross*, 6 W. Va. 562; *Biggs v. McBride*, (Or.) 21 Pac. 878, 881; *People v. Freeman*, (Cal.) 22 Pac. 173; *State v. George*, (Or.) 29 Pac. 356; *President, etc., of Revenue v. State*, 45 Ala. 399.

Without a delegation of the legislative power of the state, the township of Oswego had no authority to issue the original bonds, or to refund them by the issuance of new bonds. In all that that township did or could do in this regard, it was but the instrumentality or agency through which the legislature was exercising its power of administering the local government of the township. It was in the discretion of the legislature to determine by what agents it would exercise that power. It might have delegated the power to audit and destroy the old bonds, and to issue the new ones, to the trustee or to the clerk of the township, but it had the like right and the same power, in its discretion, to delegate the performance of this duty to the commissioners named in the act; and it is not the province of the courts to review or restrict the exercise of that discretion, in a case clearly within the scope of legislative authority.

The judgment below is reversed, with costs, and the cause remanded, with directions for further proceedings in accordance with law.

FOLSOM v. TOWNSHIP OF NINETY-SIX.

(Circuit Court, D. South Carolina. December 7, 1893.)

1. FEDERAL COURTS—FOLLOWING STATE DECISIONS—TOWNSHIP BONDS.

When the only question in a suit on coupons of township bonds is the existence of authority to issue them under the state statutes

and constitution, a prior decision thereof by the state supreme court, in a suit by a taxpayer to recover taxes levied for interest on the bonds, is binding on the federal courts.

2. MUNICIPAL BONDS—VALIDITY.

Legislative recognition of the validity of township bonds can give them no binding force when issued under an unconstitutional statute.

At Law. Action by George W. Folsom against the township of Ninety-Six, Abbeville county, S. C., on certain bond coupons. On demurrer to complaint and amended complaint. Demurrer sustained, and said pleadings dismissed.

Shields & Shields and Haynsworth & Parker, for plaintiff.

E. B. Gary, for defendant.

SIMONTON, District Judge. The issue made by the demurrer to the complaint and amended complaint raises the question of the validity of the bonds, the coupons of which constitute the cause of action. The bonds were issued under authority of the act of assembly approved 24th December, 1885, entitled "An act to annul the charter of the Greenville & Port Royal Railroad Company. The township of Ninety-Six issued its bonds shortly after the passage of the act, and they were put on the market. On the 23d February, 1887, a taxpayer of the township began his suit against the county treasurer for repayment of the tax paid by him under a levy for the interest on these bonds. This is the course provided in section 268 of the general statutes of South Carolina whenever a tax has been illegally levied. The taxpayer pays the tax, and brings his suit for the amount of it. This was the earliest moment at which a taxpayer could pursue this course. The case went into the supreme court of South Carolina, its court of last resort, and is reported as *Floyd v. Perrin*, 30 S. C. 1, 8 S. E. 14. After a full hearing and long deliberation, the supreme court held that the issue of these bonds was not warranted by the eighth section of the ninth article of the constitution of the state; that the legislature could not authorize their issue; and that they were null and void. This construction of the constitution and statute of the state by its court of last resort is binding on this court. "We are bound to presume that when the question arose in the state court it was thoroughly considered by that tribunal, and that the decision rendered embodied its deliberate judgment." *Cross v. Allen*, 141 U. S. 539, 12 Sup. Ct. 67. *Norton v. Shelby Co.*, 118 U. S. 441, 6 Sup. Ct. 1121, controls this case. We are not discussing a question of irregularity in the issue of the bonds, or the existence of facts charged to the notice of the plaintiff, or any principle of the law merchant or of general law. It is a question of original authority in the making of these bonds. Did the county commissioners possess the lawful authority, in any shape or form, to make or to issue them? It goes to the very root of the matter. The supreme court of South Carolina say that they have not—never had—any such authority. This court follows the decisions of the highest court of a state in construing the constitution

of a state, unless they conflict with or impair the efficacy of the federal constitution, or of a federal statute, or of a rule of commercial or general law. No principle of the federal constitution is invaded. The decision does not impair the validity of a contract, for there was no contract. No rule of commercial law is impaired, for the first principle of the law merchant is that a principal is not responsible for the acts of one done without authority. No principle of general law is impaired, for it is universal law that a contract void *ab initio*, because unlawful, cannot be ratified or confirmed. It must be kept in mind that the question here is not as to the construction of the bonds, nor as to the effect of recitals therein, nor as to the right of bona fide holders of them, they being negotiable instruments. The only question is, does the constitution of South Carolina authorize townships to invest in stock exchangeable for these bonds? The answer to this question turns wholly upon the construction to be given to this constitution, and that construction has been settled in the case of *Floyd v. Perrin*, *supra*,—a construction made upon bonds of the same issue with these, indeed upon all the bonds of this issue, in a case between the taxpayer and the tax collector.

But it is said that the legislature, in the act of assembly of 1887, (19 Stat. 921,) has recognized these bonds. This may be true; but the distinction is this: When bonds of a municipal corporation can be issued if the legislature consent and authorize it, and any municipal corporation, without such consent and authority, have issued bonds, the legislature, having the power to permit it, can, by subsequent action, ratify and confirm the act validating the bonds; in other words, can give its permission *nunc pro tunc*. But where, as in this case, the courts decide that the legislature could not give permission to these small municipal corporations to issue bonds like these, it can by no act of recognition, ratification, or validation give life or vitality to them. This is the first decision of this supreme court on this question. In order to prevent any misconception of the scope of this opinion, it must be added that these bonds do not come within the operation of the act of assembly of 22d December, 1888,—“An act to provide for the payment of township bonds issued in aid of railroads in this state,”—discussed and explained in *State v. Whitesides*, 30 S. C. 581, 9 S. E. 661, and *State v. Neely*, 30 S. C. 591, 9 S. E. 664. The condition precedent of that act is that the railroad must have been completed through the township, and accepted by the railroad commissioners. There is no averment in the complaint that this condition has been fulfilled, and it is admitted in argument that it has not been fulfilled.

Let an order be entered sustaining the demurrer, and dismissing the complaint.

WALKER et al. v. COLLINS et al.

(Circuit Court of Appeals, Eighth Circuit. December 4, 1893.)

No. 325.

1. FOLLOWING PRACTICE IN STATE COURTS—DEPOSITIONS.

A state statute requiring every deposition intended to be read on the trial to be filed at least one day before the day of trial does not apply in the federal courts.

2. WRONGFUL ATTACHMENT—EVIDENCE—REPLEVIN.

A stock of goods purchased for \$6,000 was attached as the property of the seller, but, after some of them had been disposed of, the remainder were replevied by the purchaser, who made affidavit that they were worth \$6,000. *Held*, that in a subsequent action brought by him for wrongful attachment this affidavit was not admissible to show that he had lost nothing by the conversion of part of the goods.

3. APPEAL—OBJECTIONS NOT RAISED BELOW—DOCUMENTARY EVIDENCE.

A party who offered a document in evidence for a purpose for which it was incompetent cannot on appeal insist that the court erred in not admitting it for a different purpose. *Insurance Co. v. Frederick*, 58 Fed. 144, followed.

4. SAME—HARMLESS ERROR—INSTRUCTIONS.

In an action against a sheriff and his deputies, a statement in the charge that defendants admitted taking the goods and converting part of them to their own use is no ground for reversal, though one defendant denied having anything to do with the taking, when it appears that all were concerned therein, and that the case was tried on the theory that, if any of the defendants were liable, all were.

5. INSTRUCTIONS—MISTAKE OF FACT—EXCEPTIONS.

Mistake in a statement of fact should be called to the court's attention at the time, and, if not then corrected, exception should be taken directly to such statement, and not to the entire instruction in which it is included.

6. SAME—FRAUD.

There is no error in charging that fraud is never presumed, and must be shown by "satisfactory proof, i. e. proof to the satisfaction of the jury."

In Error to the Circuit Court of the United States for the District of Kansas.

At Law. Action by E. Collins and W. H. Bretch, trading as Collins & Bretch, against R. L. Walker, James McMurray, Charles Howard, and A. J. Partridge, to recover damages for wrongful attachment. A former trial resulted in a judgment for plaintiffs, which was reversed by this court. 1 C. C. A. 642, 50 Fed. 737, 4 U. S. App. 406. On the second trial verdict and judgment were again rendered for plaintiffs, and defendants bring error. Affirmed.

W. E. Brown, for plaintiffs in error.

C. S. Bowman and Charles Bucher, for defendants in error.

Before CALDWELL and SANBORN, Circuit Judges.

CALDWELL, Circuit Judge. This is the second appearance of this case in this court. It was before the court at the May term, 1892, and reference is made to the opinion then delivered (4 U. S. App. 406, 1 C. C. A. 642, 50 Fed. 737,) for a full statement of the case. Upon the second trial in the lower court, Collins & Bretch,

the plaintiffs in that court, recovered judgment, and the defendants thereupon sued out this writ of error.

It is assigned for error that the lower court permitted a deposition of a witness to be read in evidence which had not been on file one day before the day of trial. This assignment of error is rested on paragraph 4456, Gen. St., (section 361 of the Civil Code of Kansas,) which provides that "every deposition intended to be read in evidence on the trial must be filed at least one day before the day of trial." The deposition was taken and returned into court under the provisions of sections 863-865 of the Revised Statutes of the United States. A deposition taken under the provisions of these sections may be read at any time after it is filed and opened. The section of the Kansas Code quoted does not apply to depositions taken, under the act of congress, to be used in the federal courts. Moreover the time that must elapse before a deposition can be read which has been duly taken and filed in the federal court is so purely a matter relating to the orderly and convenient conduct of the business of the court that a rule established by a state statute regulating the practice on the subject in the state court can have no application to the federal courts, and the act of congress adopting the state practice "as near as may be" does not adopt such a rule. The codes of practice in some of the states descend into great detail, and prescribe the names and number of the court dockets, and direct how the cases shall be entered thereon, and prescribe the time and order in which the cases shall be called for trial, and require the court to devote a certain part of each day of the term to a particular kind of business, and contain other requirements of like character. See Mansf. Dig. Ark. §§ 5111-5124. The section of the Code of Kansas under consideration belongs to this class of rules. The constitution of the United States circuit court is such that the rules regulating in detail the time and mode of conducting the business in a state court are not applicable to that court. As to such rules and regulations the act of congress adopting the state practice is not mandatory. This section of the Kansas Code stands on the same footing with state statutes which prescribe the time and mode of charging juries, and the papers which shall be permitted to go to them in their retirement, and statutes which make it the duty of the court to require the jury to answer special interrogatories and other like requirements, all of which have been held to be inapplicable to the federal courts. *Nudd v. Burrows*, 91 U. S. 426; *Railroad Co. v. Horst*, 93 U. S. 291; *Association v. Barry*, 131 U. S. 100, 120, 9 Sup. Ct. 755; *O'Connell v. Reed*, 5 C. C. A. 536, 56 Fed. 531.

The defendants offered to introduce in evidence a copy of an affidavit made and filed in the state court by one of the plaintiffs to procure a writ of replevin for the goods in controversy. The court excluded the paper, and this ruling is assigned for error. Waiving any consideration of the question whether the copy offered in evidence was properly proved or authenticated, the ruling of the court was clearly right on other grounds. The plaintiffs purchased a stock of goods from one Cannon, for \$6,000. The defend-

ants afterward seized the goods on a writ of attachment as the property of Cannon. After a portion of the goods had been disposed of, the plaintiffs replevied the remainder, alleging in the affidavit to procure the writ of replevin that the goods were worth \$6,000. The defendants contended that, as the plaintiffs recovered the goods sued for in the replevin suit, and these goods were alleged to be worth \$6,000 in the affidavit filed to procure the writ of replevin, and the plaintiffs had only paid \$6,000 for the whole stock, they had lost nothing by the marshal taking and disposing of a part of their goods; and it was solely to support his contention that the affidavit was offered in evidence. The bill of exceptions states that the affidavit was offered in evidence "for the purpose of showing that in the replevin suit against the sheriff plaintiffs had recovered from the sheriff the goods left by the defendants in the store at Newton; that these goods were worth \$6,000, the full amount of the purchase price of the whole stock paid by plaintiffs to Cannon; that, therefore, plaintiffs had lost nothing by the defendants taking what they took in this case; and that, as against the attaching creditors whom the defendants represented in this case, the plaintiffs could not recover the goods in question in this action." It is scarcely necessary to say that the affidavit could not be received in evidence for any such purpose, and it was offered for no other. The plaintiffs were entitled to the benefit of their bargain, and, if the goods they purchased were worth more than \$6,000, it is not perceived upon what principle the marshal and his deputies could take the excess over \$6,000, and claim the plaintiffs were remediless because they only paid that sum for the whole stock of goods.

Other grounds for the admission of the affidavit are urged for the first time in this court. We held in the case of *Insurance Co. v. Frederick*, 58 Fed. 144, that when a party states to the trial court the purpose for which a document is offered in evidence, and it is incompetent for that purpose, the party will not be permitted to change his ground in the appellate court, and insist that the lower court erred in not admitting it for a purpose not disclosed to that court, and upon which its judgment was not invoked. We may add that an examination of the record shows that, even if the affidavit was admissible in evidence, it was, in view of other evidence, and the conceded facts in the case, not of sufficient importance to justify our reversing the judgment on account of its exclusion.

To an instruction comprising two-thirds of a printed page, and containing a statement of the pleadings and issues in the case, the defendants entered a general exception. The instruction excepted to begins with the statement that the "defendants admit that they took possession of the stock of goods, and appropriated and converted a portion thereof to their own use. * * *" In this court it is said that all of the defendants did not make this admission, but that one of them denied that he had anything to do with taking the goods. The defendants were the marshal and his deputies. They all had more or less to do with the service and execution of the writ of attachment upon which the goods were seized, and it

is obvious from an examination of the record that the case was tried upon the understanding and theory that all the defendants were liable, if any of them were. Furthermore, if the statement of the judge as to the admission of the defendants in the particular mentioned was not well founded in fact, they should have called the court's attention to the error at the time, and, if it was not corrected, should have leveled their exception distinctly at that statement in the charge. *Railway Co. v. Johnson*, 10 U. S. App. 629, 4 C. C. A. 447, 54 Fed. 474; *Railroad Co. v. Varnell*, 98 U. S. 479.

The court charged the jury that—

"Parties to a business transaction are not presumed, however, to deal with each other in bad faith, but, on the contrary, are presumed to deal honestly and in good faith until the opposite is shown by the evidence upon the trial; and any one who alleges that such acts are done in bad faith, or for a dishonest and fraudulent purpose, takes upon himself the burden of showing that such is the case. In other words, fraud is never presumed, and it devolves upon him who alleges fraud to show the same by satisfactory proof, i. e. proof to the satisfaction of the jury."

The defendants excepted generally to this charge, and in this court limit the exception to the last clause of the charge, which states that "it devolves upon him who alleges fraud to show the same by satisfactory proof, i. e. proof to the satisfaction of the jury." The objection to the charge is that the court should have told the jury that fraud may be established by a preponderance of the evidence, and not that it must be established by "satisfactory proof, i. e. proof to the satisfaction of the jury." The charge is taken almost literally from the opinion of the supreme court of the United States in the case of *Jones v. Simpson*, 116 U. S. 609, 615, 6 Sup. Ct. 538. In that case the court said: "It devolves on him who alleges fraud to show the same by satisfactory proof."

In *Hatch v. Bayley*, 12 Cush. 30, the trial court instructed the jury—

"That it was necessary that the defendant should adduce stronger proof, to establish fraud, etc., than is necessary to prove a debt or a sale; that the presumption was that every man conducted honestly without fraud; and when fraud was alleged the proof must not only be sufficient to establish an innocent act, but to overcome the presumption of honesty."

Considering an exception to these remarks of the trial judge, the supreme judicial court of Massachusetts, speaking by Chief Justice Shaw, said:

"As we understand them, the judge intended to say that he who alleges fraud against another is bound to prove it; that every man is presumed to act honestly until the contrary is proved; that he who charges another with an act involving moral turpitude or legal delinquency must prove it; that, as this is an allegation against a presumption of fact, it requires somewhat more evidence than if no presumption existed. It carried no direction as to the amount of evidence required, or as to the nature of the evidence, whether positive or circumstantial, but only that, on the whole, it must be somewhat stronger; and we cannot perceive that such a direction is incorrect. The ordinary direction to the jury is that he who charges fraud must prove it to the satisfaction of the jury. We think it not contrary to any rule or principle of law for the judge to inform the jury that, as the charge of fraud is a charge against a presumption of fact, perhaps often a slight one, yet the jury,

in order to be satisfied, might require somewhat stronger evidence than would suffice to prove the acknowledgment of an obligation, or the delivery of a chattel."

This case is cited approvingly by the supreme court of the United States in *Jones v. Simpson*, supra. And to the same effect are the following authorities: *Greer v. Caldwell*, 14 Ga. 207; *Bierer's Appeal*, 92 Pa. St. 265; *Babbitt v. Dotten*, 14 Fed. 19; *Lynn v. Railroad Co.*, 60 Md. 413; *Bigelow, Frauds*, pp. 123, 145; 2 *Rice*, Ev. p. 953; *Fick v. Mulholland*, (Wis.) 4 N. W. 528.

In *Bouvier's Law Dictionary* (14th Ed.) the term "satisfactory evidence" is defined to be "that evidence which is sufficient to produce a belief that the thing is true; in other words it is credible evidence." The *Century Dictionary* defines "satisfactory evidence or sufficient evidence" to be "such evidence as in amount is adequate to justify the court or jury in adopting the conclusion in support of which it is adduced." No better definition of these terms can be given, and it was in this sense, presumably, that the jury understood them.

A separate examination of the other exceptions is not necessary, as none of them is of any general importance. They have all been examined carefully, and we are satisfied that none of them has any merit.

Finding no error in the record, the judgment below is affirmed.

CRAMER v. SINGER MANUF'G CO. et al.

(Circuit Court, N. D. California. November 27, 1893.)

CIRCUIT COURTS—JURISDICTION—FEDERAL QUESTION—CORPORATIONS.

When federal jurisdiction depends upon the subject-matter, as in patent suits, a corporation cannot be sued, under the act of 1888, § 1, outside the state of its incorporation, although it has branch offices in other states.

At Law. Action by Herman Cramer against the Singer Manufacturing Company and Willis D. Fry for infringement of a patent. Heard on separate demurrers to the complaint. Demurrer of Singer Company sustained, and that of Fry overruled.

John L. Boone, for plaintiff.

Wheaton, Kalloch & Kierce, for defendants.

McKENNA, Circuit Judge, (orally.) This is a complaint for an infringement of a patent. The defendant is alleged to be a corporation created under the laws of New Jersey, but having a branch establishment in San Francisco. The defendant company demurs for want of jurisdiction, in this: that jurisdiction of the case in this court is on account of subject-matter, not residence of parties, and the defendant therefore not liable to be sued outside of New Jersey. The demurrer of Fry was on the ground of misjoinder, in this: he is joined with the Singer Manufacturing Company, and over the latter this court has no jurisdiction. The first section of the act of 1888 provides:

"When jurisdiction in the circuit court depends upon the subject-matter of the action the defendant must be sued in the district of which he was an inhabitant. When it depends on diversity of citizenship alone the suit may be brought in the district of residence of either party."

This section is fully considered by the supreme court in *Shaw v. Mining Co.*, 145 U. S. 444, 12 Sup. Ct. 935, and it was held that, (I quote syllabus:)

"Under the act of March 3, 1887, c. 373, § 1, corrected by the act of August 13, 1888, c. 866, a corporation incorporated in one state only cannot be compelled to answer, in a circuit court of the United States held in another state in which it has a usual place of business, to a civil suit at law or equity brought by a citizen of a different state."

See, also, to the same effect, *Southern Pac. Co. v. Denton*, 146 U. S. 202, 13 Sup. Ct. 44; also *Adriance Platt & Co. v. McCormick*, etc., *Mach. Co.*, 55 Fed. 288. In *Empire Coal & Transp. Co. v. Empire Coal & Min. Co.*, 14 Sup. Ct. 66, filed in the supreme court on the 6th of this month, the doctrine is again affirmed that a corporation is a citizen of the state in which it was incorporated.

The demurrer of the Singer Manufacturing Company is sustained: that of Fry is overruled.

BALTIMORE & O. R. CO. v. RAMBO.

(Circuit Court of Appeals, Sixth Circuit. November 6, 1893.)

No. 78.

1. OPINION EVIDENCE—TESTIMONY OF NONEXPERT—PHYSICAL CONDITION.

A nonprofessional witness, who has attended one suffering from personal injuries, and has had opportunity to observe his condition, may testify as to his apparent sufferings, and his expressions and acts in connection therewith.

2. SAME.

The conclusions of such a witness from facts which he observed are not incompetent where they are inferences from many minor details which could not be adequately presented to the jury except by the statement of such inference or opinion.

3. WITNESS—IMPEACHMENT—CONVICTION OF INFAMOUS CRIME.

In Ohio, in civil cases, though there is no express statutory provision concerning it, previous conviction of an infamous crime is relevant to impeach the credibility of a witness.

4. BEST AND SECONDARY EVIDENCE—CONVICTION OF CRIME.

The record of the indictment, trial, and judgment being the best evidence of a conviction for burglary, it is error to allow testimony of another that a witness pleaded guilty to such charge.

5. CARRIERS—INJURY TO PASSENGER—OPERATION OF LINE.

In an action by a passenger against a railroad company for personal injuries, where there is evidence tending to show the operation of the road by defendant at the time such injuries were sustained, defendant cannot escape liability by showing that its charter did not authorize it to operate such road, and that the ticket held by the passenger provided that defendant assumed no responsibility beyond its own line.

6. WITNESS—CONTRADICTING.

Where witnesses deny that they made statements that attempts had been made to bribe them, evidence to contradict such denials simply goes to the credibility of the witnesses, and is incompetent as substantive evidence tending to show the fact of such bribery.

In Error to the Circuit Court of the United States for the Eastern Division of the Northern District of Ohio.

At Law. Action by Byron O. Rambo against the Baltimore & Ohio Railroad Company for personal injuries. Verdict and judgment for plaintiff. Defendant brings error. Reversed.

J. H. Collins, for plaintiff in error.

Skiles & Skiles, for defendant in error.

Before JACKSON and TAFT, Circuit Judges, and BARR, District Judge.

TAFT, Circuit Judge. This was a writ of error to the judgment of the circuit court of the United States for the northern district of Ohio, eastern division, in favor of Rambo, the plaintiff below, against the Baltimore & Ohio Railroad Company. The plaintiff alleged in his petition that the Baltimore & Ohio Railroad Company was a corporation under the laws of the state of Maryland, owning and operating a line of railroad running through the county of Richland, and state of Ohio; that it was a common carrier of passengers for hire between Shelby, Ohio, in Richland county, and the city of Chicago, in Illinois; that on April 6, 1889, in consideration of fare paid, the defendant company received the plaintiff as a passenger at Shelby for passage to the city of Chicago; that by reason of the negligence of the defendant in the operation of the train, and in failing to keep its track in good repair, the car in which the plaintiff was, was thrown from the track into collision with an oil tank, thereby severely injuring the plaintiff. The Baltimore & Ohio Railroad Company, in its answer, admitted that it was a corporation organized under the laws of the state of Maryland, and that it was operating a line of railroad through the county of Richland, Ohio, but denied all other averments in the petition. On the trial, the chief issue of fact was the extent of the plaintiff's injuries. It was contended on his behalf that he was suffering from paralysis of his left leg and the muscles of his back, so as to permanently disable him, while the defendant company maintained that he was not suffering from paralysis, but was feigning disability for the purpose of increasing the amount of his recovery. There were called for the plaintiff medical and nonmedical witnesses, who testified to the suffering of the plaintiff, and the character of his injuries; while the company, in addition to medical experts, called many of the neighbors of the plaintiff, who testified to bodily movements and acts of the plaintiff subsequent to the accident, impossible if he in fact was suffering from paralysis. The case resulted in a verdict for the plaintiff in the sum of \$10,000.

The first assignment of error is that the court erred in overruling the objections of the defendant to testimony offered by plaintiff of nonprofessional witnesses upon the physical condition of the plaintiff after the accident. These witnesses were in attendance upon plaintiff during his illness, and had every opportunity to observe his condition. One of plaintiff's witnesses was interrogated as follows: "You may state from what you observed, being around

and about him, his condition and appearance, as to whether or not he suffered in any way." To which witness answered: "I would say, as far as I could see myself, that he suffered as much pain as any man I ever helped to attend." Again: "During the time you attended him, where did he complain that he was suffering; that is, in what portion of his body? Answer. His stomach, his left side right below the ribs, and right in the center of his back." Again: "In what way did he act or express himself with reference to his suffering pain, in your presence? Answer. His pain was in his back, and he could not move. His body he could not move, but turned his head from side to side; and if you would touch him he would holler, 'Oh, my back!'"

Such evidence was clearly admissible. This is expressly ruled in the case of *Insurance Co. v. Mosley*, 8 Wall. 397-405, where Mr. Justice Swayne, to illustrate how declarations may be evidence as verbal acts, uses this language:

"Upon the same ground the declarations of the party himself are received to prove his condition, ills, pain, and symptoms, whether arising from injuries, sickness, or accidents by violence. If made to a medical attendant, they are of more weight than if made to another person; but to whomsoever made they are competent evidence. Upon this point the leading text writers of evidence, both in England and in this country, are in accord."

It is objected also that some of the above statements are mere matter of opinion and conclusions of the witness from facts which he observed. This is true, but it does not render the statements incompetent. Where the statement of a witness is an inference from many minor details which it would be impossible for him to present in the form of a picture to the jury except by the statement of his inference or opinion, that opinion is generally competent. *Parker v. Steamboat Co.*, 109 Mass. 449. In *Village of Shelby v. Clagett*, 46 Ohio St. 549, 22 N. E. 407, it was held that a non-professional witness, who had had opportunities to observe a sick or injured person, might give in evidence his opinion of such person in respect of his being weak and helpless or not, and of the degree of suffering which he endured, provided such opinion was founded on his own observation of the person to whom his evidence related, and was limited to the time that the person was under his observation.

The second assignment of error is that the court erred in overruling the objection of the defendant to the testimony of the plaintiff in rebuttal, offered to impeach a witness of defendant,—Straub. Straub's evidence was very important. He had nursed the plaintiff gratuitously for a number of days and nights. He said that he saw the plaintiff walk about in his house without canes, with as much freedom as if he had suffered no injury, and that on this account he would not give a deposition for the plaintiff. For the purpose of breaking down Straub's evidence, counsel for the plaintiff asked the plaintiff in rebuttal, "Were you at the trial when Straub was arrested for burglary of the hardware store? Answer. Yes, sir. Question. You may state to the jury whether he pleaded guilty." Counsel for defendant then objected to the question on the ground

that no foundation had been laid for this evidence in the cross-examination of Straub; and, further, that this was not the best evidence of the fact, even if it were competent. The court held, if the witness could swear that he was in court, and heard Straub enter a plea of guilty, that fact could be proven independent of the record, and the witness was permitted to say that Straub had pleaded guilty.

Whether this ruling was erroneous or not depends upon two questions:

First. Was it competent in this, a civil, case, to impeach the credibility of a witness by proving he had been convicted of a felony?

Second. If competent, could it be shown otherwise than by the record of the conviction?

By section 858 of the Revised Statutes of the United States it is provided:

"In the courts of the United States no witness shall be excluded in any action on account of color, or in any civil action because he is a party to or interested in the issue tried; provided, that in actions by or against executors, administrators or guardians, in which judgment may be rendered for or against them, neither party shall be allowed to testify against the other as to any transaction with or statement by the testator, intestate or ward, unless called to testify thereto by the opposite party or required to testify thereto by the court. In all other respects the laws of the state in which the court is held shall be the rules of decision as to the competency of witnesses in the courts of the United States in trials at common law and in equity and admiralty."

The case at bar is a trial at common law, within the meaning of this section, and the question arises, what are the laws of Ohio governing the competency of witnesses in reference to convictions of crime?

By the laws of Ohio (section 5240, Rev. St.) "all persons are competent witnesses except those of unsound mind and children under ten years of age who appear incapable of receiving just impressions of the facts and transactions respecting which they are examined or of relating them truly." This section is a part of the Civil Code of Ohio, and relates only to civil cases. *Steen v. State*, 20 Ohio St. 333. Sections 5241 and 5242 contain exceptions as to the competency of witnesses, none of which is important here. By section 7284, a section of the Criminal Code of Procedure of Ohio, it is provided that:

"No person shall be disqualified as a witness in any criminal prosecution by reason of his interest in the event of the same, as a party or otherwise, or by reason of his conviction of any crime; and husband and wife shall be competent to testify on behalf of each other in all criminal prosecutions, but such interest, conviction or relationship may be shown for the purpose of affecting his or her credibility."

It is apparent, therefore, that while in criminal cases the statute of Ohio expressly declares that convictions of crime shall be relevant for the purpose of affecting the credibility of any witness, the section relating to witnesses in civil cases makes no such provision. At common law, conviction of a felony rendered a witness incompetent. *Logan v. U. S.*, 144 U. S. 263, 12 Sup. Ct. 617. In nearly all the states, this rule of the common law has been abolished, with the

express declaration, like that contained in section 7284, above quoted, that a conviction shall be competent evidence to affect the credibility of the witness. We have, however, found no case in Ohio or elsewhere in which the question of the relevancy of such evidence, when not expressly declared by the statute, has been raised and decided. In the case of *Logan v. U. S.*, 144 U. S. 263, 12 Sup. Ct. 617, the plaintiff in error complained because the court below permitted two witnesses to testify; one of whom had been convicted of crime in North Carolina, and the other of whom had been convicted in Texas, and subsequently pardoned. The court below, after holding the witnesses competent to testify, had allowed the records of their convictions to be introduced as evidence on the question of their credibility. The supreme court sustained the view of the court below that the witnesses were competent to testify under the rules of the common law which governed the trial of that case, on the ground that in the one case the conviction in a foreign jurisdiction was not a disqualification under the common law; and, in the other, that the disability arising from the conviction in Texas, where the case was tried, had been removed by a full pardon. After reaching this conclusion Mr. Justice Gray uses these words:

"Whether the conviction of either witness was admissible to affect his credibility is not before us, because the ruling on that question was in favor of the plaintiff in error."

It is difficult to see any reason why the legislature should permit the credibility of a witness in a criminal case to be attacked by proof of former conviction, but should withhold such permission in civil cases. If the court can, from analogies at common law, find the rule to be that in civil cases, also, the previous conviction of witnesses may be introduced to impeach their credibility, it is its duty to do so. It is decided in *Carpenter v. Nixon*, 5 Hill, 262, by the supreme court of New York, Chief Justice Nelson announcing the opinion, that the record of the conviction of a crime less than a felony was admissible at common law to impeach the credibility of witnesses; citing 2 Hale, P. C. 278; *King v. Crosby*, 5 Mod. 15; *Huxley v. Berg*, 1 Starkie, 98; 1 Phil. Ev. 35; Phil. Ev. (Cow. & H. Notes,) p. 66. Of course, the question whether a conviction of a felony was competent at common law to impeach the credibility of a witness could not arise, because the witness was absolutely disqualified. When this disqualification is removed, however, it would seem to follow that, as the conviction of a less crime than a felony had always been competent in impeachment, the conviction of a felony would, a fortiori, be relevant for the same purpose.

We therefore hold that in Ohio, in civil cases, though there is no express statutory provision concerning it, previous conviction of an infamous crime is relevant to impeach the credibility of a witness.

The second question is much freer from difficulty. Straub had not been asked, when on the stand, whether he had ever been convicted of burglary, and sent to the penitentiary. The question here objected to was put to another witness than Straub, and it was sought out of that witness' mouth to prove by oral evidence that Straub had pleaded guilty to the charge of burglary. This was

clearly incompetent. The best evidence of the conviction was the record of the indictment, of the trial, and the judgment of the court. So long as that evidence was available, nothing less was competent. Much discussion has arisen over the right on cross-examination to ask a witness whether he has been convicted of a felony. In some states it is held that such a question is improper, and that the conviction must be proved by the record. *Com. v. Quin*, 5 Gray, 478; *People v. Reinhart*, 39 Cal. 449; *Clement v. Brooks*, 13 N. H. 92; *Johnson v. State*, 48 Ga. 116; *King v. Inhabitants of Castell Careinion*, 8 East, 77. Contra, *Real v. People*, 42 N. Y. 270. However this may be on the cross-examination of the witness whose credibility is attacked, there is no authority anywhere to be found holding that the conviction of one witness may be proven by the oral testimony of another. It was therefore error for the court below to allow the plaintiff to testify that he had heard Straub plead guilty to burglary. *Greenl. Ev.* § 467; *Whart. Ev.* § 567; *Id.* § 63. The material character of this evidence can only be fully realized by an examination of the entire record. The witnesses who testified to the acts by the plaintiff, impossible in a paralytic, numbered 14. The claim on the part of the plaintiff was that these witnesses, or many of them, had been suborned by the claim agent of the railroad company. Evidence that one of the witnesses was a convicted felon reflected on the entire case made by their evidence.

For this reason the judgment must be reversed, and a new trial had. Before leaving the case, however, we shall consider certain questions arising on other assignments of error which will come again before the trial court for decision.

The fourth assignment of error is based on the court's refusal to give the following charge:

"The charters of the defendant in this case, and of the Baltimore & Ohio & Chicago Railroad Company, whose road runs from Chicago Junction across the states of Ohio and Indiana to the west line of the last-named state, and of the Baltimore & Ohio & Chicago Railroad Company, Illinois Division, whose line begins at the terminus of the last-named company and runs thence through a portion of the state of Illinois to and into the city of Chicago, are in evidence; and, as the accident of which the plaintiff complains in this case occurred on the line of the company last named, no recovery can be had by the plaintiff in this case."

The defendant introduced in evidence the charter of the Baltimore & Ohio Railroad Company, passed by the legislature of the state of Maryland in 1827. This charter authorizes the Baltimore & Ohio Railroad Company to build a railroad from Baltimore to the Ohio river. The defendant also introduced in evidence the charters of the Baltimore & Ohio & Chicago Railroad Company of Ohio, the Baltimore & Ohio & Chicago Railroad Company of Indiana, and the Baltimore & Ohio & Chicago Railroad Company of Illinois, together with the record proceedings of the consolidation of the Baltimore & Ohio & Chicago Railroad Company in Ohio and Indiana. The corporations thus formed were authorized to construct and operate a line of railroad running from Chicago Junction across the states of Ohio and Indiana and Illinois into Chi-

cago. The accident occurred on this line inside of the city of Chicago. The ticket upon which the plaintiff traveled was issued to him by the agent of the defendant company at Shelby, in the state of Ohio. The ticket was what is called a "limited ticket," with certain conditions incorporated in a contract which was signed by the plaintiff. Among the conditions were these:

"Issued by Baltimore & Ohio Railroad Trans., Ohio Div., subject to the following conditions: 'Good for one first-class passage to the point on the K. C. L. & S. K. R. R. printed in large type at the extreme top of this ticket.' Subject to the following conditions: 'In selling this ticket for passage over other roads, this company acts only as agent, and assumes no responsibility beyond its own line; and the holder, in accepting this ticket, agrees to the following conditions.'"

The ticket, it seems, entitled the plaintiff to passage from Shelby Junction, in Ohio, to Elk Falls, in Kansas, and contained a number of coupons, all of which were collected, except that coupon entitling the passenger to transportation from Kansas City to Elk Falls.

The argument for the defendant company is that the charters introduced show that the injuries were received on a railroad not belonging to it, and that could not be operated by it under its charter, and that it is not, therefore, liable to plaintiff under the condition of the ticket above quoted.

It was admitted in the answer that the defendant company owned and was operating a line of railroad in Richland county, Ohio, from which it may be presumed that the Maryland charter of 1827 has been so amended as to authorize its operation of lines west of the Ohio river. It also appeared in evidence that the car which the plaintiff took at Shelby Junction was a day car, running through from Shelby Junction to the city of Chicago. Moreover, a folder or time table issued by the Baltimore & Ohio Company was introduced in evidence, in which the line from Chicago Junction to Chicago is referred to as the Chicago Division of the Baltimore & Ohio Railway Company, and upon the map which appears on one side of the folder the line between Chicago Junction, Ohio, and the city of Chicago is marked the Baltimore & Ohio Railway. It is said that the folder contains the time tables, also, of the Baltimore & Ohio Southwestern system and the Pittsburgh & Western Railroad Company, and that these are notoriously not a part of the Baltimore & Ohio Railroad Company proper. This is true, but the lines referred to are designated on the folder by their proper names. In the absence of any evidence at all, it would doubtless be presumed that the train running over the road of the Baltimore & Ohio & Chicago Railroad was operated by the Baltimore & Ohio & Chicago Railroad Company, owning the line; but that presumption obtains only in the absence of other evidence. The only evidence worthy of consideration in the case tends to show that the train was operated by the Baltimore & Ohio Railroad Company, the defendant below. We are fortified in this conclusion by the failure of the defendant company to disprove its operation of the line into the city of Chicago, if in fact it was not responsible therefor. It could have shown by its own employees that at Chicago Junction the train was turned over by its

agents to the agents of another company. It could have produced the coupons on the ticket taken from the plaintiff entitling him to passage from Shelby to Chicago, upon which the name of the operating company appeared printed. It did none of these things; and its contention now, that its liability was not shown by the evidence, can hardly be received with patience.

The sixth assignment of error is based on the refusal of the court to give the jury this charge.

"The testimony of witnesses called to testify to conversations with witnesses Wort and son, or between Wort and son and Mrs. Wort, and with the witnesses Tucker, Cloran, Mrs. Kochendorfer, and Miss Kochendorfer was for the purpose of impeaching those witnesses, and cannot be considered by the jury for any purpose other than so far as it affects the credibility of such witnesses so contradicted, if they were contradicted."

This charge the court refused, and gave the charge which is made the basis of the seventh assignment of error. Without quoting what the court did say in reference to these conversations with the witnesses named, it is sufficient to state that the court did not clearly give, either in words or in substance, the charge set forth as requested in the sixth assignment. We think that the defendant was entitled to the charge as requested, and the injury to the defendant in the refusal by the court to give it is made to appear more plainly in the eighth assignment of error, as follows:

"Counsel for plaintiff argued and urged upon the jury that the testimony contradicting the witnesses Wort and son, Tucker, Cloran, Mrs. Kochendorfer, and Miss Kochendorfer, tended to show that J. E. Rankin, the special agent of the defendant, had offered the witness Cloran money to testify falsely, and that the testimony contradicting these witnesses proved that the defendant, through its agent, J. E. Rankin, had been guilty of bribery, or attempted bribery, in bringing the witness Cloran; and that the inference from this testimony was that all of the other witnesses had also been bribed by the defendant, through its special agent. To this argument counsel for the defendant objected, and called the attention of the court thereto at the time, and thereupon the court stated to counsel and the jury that there was testimony tending to support the claim of counsel that offers in form of money and clothing were made to witnesses to come and testify in this case, and that there was enough of such evidence to justify counsel in claiming to the jury that these charges of bribery were sustained, and the court declined to refuse counsel the right to argue upon this point."

The witnesses named in the foregoing assignment had been called by the defendant to testify to acts of the plaintiff after his injury, impossible if he were suffering from paralysis. To contradict these witnesses, inquiry was made of them by plaintiff's counsel as to whether they had not made statements that Rankin, the special agent of the Baltimore & Ohio Railroad Company, had offered them, in one case money, and in another clothing, to testify falsely in the case. These inquiries were answered by the witnesses in the negative. Witnesses were then called to contradict these denials, and the testimony referred to in the request to charge was this testimony of the contradicting witnesses. It is manifest that such evidence was competent only for the purpose of contradicting defendant's witnesses, and was wholly incompetent as substantive evidence tending to show that the agent of the defendant company had made the offers

which were the subject-matter of the conversations testified to by the contradicting witnesses. It is quite true that it was competent for the plaintiff to introduce evidence in rebuttal, tending to show that the authorized agent of the Baltimore & Ohio Railroad Company had been engaged in suborning witnesses to testify falsely. Such evidence was relevant on the main issue as tending to show an admission by its conduct that it had a bad case, needing false and perjured evidence to support it. *Moriarty v. Railroad Co.*, L. R. 5 Q. B. 314; and the cases cited under section 1265, Whart. Ev. It is also true that there was direct evidence in the case upon which an argument might fairly be made that the special agent of the Baltimore & Ohio Railroad Company had been guilty of the conduct charged, but the plaintiff's rebuttal witnesses who testified to conversations with the defendant's witnesses had no personal knowledge of the facts detailed in those conversations as related by them, and were wholly incompetent to testify to those facts as substantive evidence. It was the duty of the court, therefore, to caution the jury that evidence of these conversations with defendant's witnesses was only evidence to contradict them, and only affected the credibility of those witnesses, but that it did not tend to establish improper conduct on the part of the agent of the railroad company. It is very difficult, indeed, for a jury to discriminate between evidence which is only to impeach the credibility of witnesses and evidence which tends to establish facts material to the main issue. That difficulty makes it especially important that the court should emphatically caution the jury as to the use which they are entitled to make of evidence which simply goes to the credibility of witnesses.

We think, therefore, that the sixth and seventh assignments of error, and that part of the eighth assignment already referred to, are well taken, and on this ground, also, the judgment should be reversed.

Judgment reversed, with instructions to order a new trial.

FOSS-SCHNEIDER BREWING CO. v. BULLOCK et al.

(Circuit Court of Appeals, Sixth Circuit. November 6, 1893.)

No. 93.

1. LIMITATION OF ACTIONS—WHEN ACTION ACCRUES.

Where a seller refuses to acquiesce in the cancellation of a contract of sale by the purchaser, but delivers the goods, his right of action accrues, not at the time of such attempted cancellation, but at the time of the delivery.

2. SALE—ACCEPTANCE.

Purchasers of rice informed the seller that they canceled and repudiated the contract of sale, notwithstanding which the goods were shipped, and were received and stored by the purchasers, by mistake. After discovering their mistake, the purchasers failed to notify the seller for more than a month. *Held*, that the delay, in view of the fluctuating market price of the goods, was so unreasonable as to amount to an acceptance.

8. SECONDARY EVIDENCE—CONTENTS OF LETTER—EXISTENCE OF ORIGINAL.

Evidence of the contents of an alleged letter, not shown to have been written and lost, and which, from other correspondence, appears never to have been in fact written, is inadmissible.

In Error to the Circuit Court of the United States for the Western Division of the Southern District of Ohio.

At Law. Action by Thomas O. Bullock and Lydia P. Bullock against the Foss-Schneider Brewing Company to recover for goods sold and delivered. Verdict for plaintiffs directed by the court, and judgment for plaintiffs thereon. Defendant brings error. Affirmed.

Statement by TAFT, Circuit Judge:

This was an action begun in the circuit court for the southern district of Ohio November 12, 1891, to recover \$2,215.67, as the balance claimed to be due to T. O. Bullock and Lydia P. Bullock, partners as Bullock & Co., of the city of New York, the defendants in error and the plaintiffs below, from the Foss-Schneider Brewing Company, a corporation of Ohio, for two car loads or 350 bags of broken rice, weighing in all 84,612 pounds, at \$2.85 per hundred pounds, sold and delivered to the brewing company on the 21st day of November, 1885. A credit was given to the brewing company for \$195.78, the freight on the rice, which was paid by the brewing company at the time the rice was received.

The defendant, for answer, first pleaded that the cause of action stated did not accrue within six years before the filing of the petition. For a second defense the defendant denied that any contract of sale had ever been entered into for the purchase of the rice referred to in the petition, but alleged that some time prior to November 1, 1885, the plaintiffs had consigned to the defendant, at Cincinnati, two car loads of rice, without the consent or order of defendant; that at about the same time defendant had ordered two car loads of rice from other persons than the plaintiffs; that, when the defendant was notified by the railroad company that two car loads of rice had been received at the depot for it, it paid the freight upon the two car loads of rice sent by the plaintiffs, by mistake, supposing that it was paying the freight upon the rice which it had ordered; that, with the same mistaken idea, defendant received the rice, and stored it in its brewery at Cincinnati; and that, immediately upon the discovery of the mistake, defendant notified plaintiffs of it, and that the rice thus delivered and received was held subject to the order of plaintiffs, and not otherwise. By way of cross petition, defendant asked judgment for \$1,800 for the price of storing the rice for the plaintiffs since 1885.

The facts, as developed by the evidence, were as follows:

Bullock & Co. were a firm dealing in rice at New York city. The Foss-Schneider Brewing Company was a brewing corporation of Cincinnati using rice in its manufacture of beer. The brewing company gave to one Louis Burger, in November, 1884, an order for four car loads of rice, at the lowest price that he could get it for them. An agent of Bullock & Co. called upon the brewing company shortly after this, and asked to sell them rice. They referred him to Burger, to whom they had given their order. He went to Burger, and made a contract evidenced as follows: "November 22, 1884. Four cars best broken rice for Foss-Schneider Brewing Company, \$2.85 delivered. Commission on this lot, \$35, to Louis Burger. First car first week in December, others to follow when ordered, about two weeks apart. Send sample of all kinds." On December 8th, Bullock & Co. sent the following letter to Foss-Schneider Brewing Company. "We have shipped you, as per inclosed invoice and B. L., car best broken rice, November 29th, cash, \$1,042.04. Your order for rice given to Mr. Louis Burger was turned over to us for execution, and which we are pleased to fill for you. Please send us expense bill, when paid, and oblige." Two cars, under this order, were delivered to the Foss-Schneider Brewing Company. On the 20th of December following, and before any others were delivered, Bullock & Co. made another contract directly with the

Foss-Schneider Brewing Company, evidenced by the following: "Cincinnati, December 20, 1884. Sold to the above brewing company five (5) cars broken rice at \$2.80, delivered Cincinnati, to be shipped as ordered, with the privilege up to ten (10) cars more at the same price, to be shipped during the year 1885. Bullock & Co. The Foss-Schneider Brewing Company, by Frank Overbeck, President." This last sale was negotiated without the intervention of Burger. Burger felt very indignant at this course on the part of Bullock & Co., and by letter December 31, 1884, complained of their sale at a less price than that at which he (Burger) had sold their rice to the brewing company in the first contract, and used the following language: "Consequently, said brewery does not want any more rice upon the contract entered with me, but has canceled the same, on your action taken in the matter. * * * You had no right to interfere with the contract existing, the details of which you knew, and I now look upon you for your remitting me commission on four cars at \$35 each,—\$140." Answering this, Bullock & Co. by letter, January 23, 1885, said: "We have no desire to save the commission on the four cars, and will pay it to you, as agreed, after shipments are made, and acceptance of same. Please let us know at once when we shall ship the remaining two cars." Burger, later, in letter January 7, 1885, again announces the cancellation of the first contract, to which, by letter of January 10, 1885, Bullock & Co. replied: "We did not induce, wish, or request that they (F. S. B. Co.) cancel the order they gave you, nor have we canceled it, nor do we see any reason why we should, and are ready to ship the remaining two cars when you instruct us to, which instructions we await." On January 6, 1885, the Foss-Schneider Brewing Company, in response to a letter from Bullock & Co. offering to extend the payment for the two car loads of rice already sent, the brewing company declined to accept the favor, and denied the desire on their part for delay in the payment, and referred, presumably, to the shipment of the remaining two cars on the Burger contract, as follows: "Furthermore, as Mr. Burger did not, and said he could not, live up to the conditions upon which we agreed to take a certain number of cars of rice from him, we canceled and countermanded all our conditional orders for rice with Burger." In the letter of January 10, 1885, to the brewing company, Bullock & Co. make no response to this notice of cancellation, and simply use the expression: "Kindly inform us when we may ship you another car of rice." It should be noted, also, that on 23d December, 1884, the brewing company notified Bullock & Co. that they had learned that Bullock & Co. were offering rice at \$2.75. They close their letter with these words. "The contract, therefore, we made with you, we consider null and void, until we hear from you." This referred to the second contract. Subsequently, however, the brewing company did receive the five cars of rice on the second contract, and paid for them. They were delivered March 7th, April 17th, May 28th, July 6th, and August 27th, in the year 1885.

In June or July, 1885, Burger sued Bullock & Co. for the commission on the sale of the other two cars under the Burger contract, and garnished money of Bullock & Co. in the hands of Foss-Schneider Brewing Company, and recovered before a magistrate a judgment, which was deducted by the Foss-Schneider Brewing Company from their payment to Bullock & Co.

In September, Bullock & Co. asked the brewing company whether they needed any more rice. They replied that they did not. A similar request was made in October, to which a similar answer was given, and the same question and response occurred on November 7th. Upon November 10th Bullock & Co. sent a telegram to Mr. Douglass, who had been their attorney in the garnishee suit, as follows: "Shall we ship Foss-Schneider Brewing Company, or Burger?" To which Douglass, after seeing Overbeck, telegraphed: "Ship Foss-Schneider Brewing Company." Accordingly, on November 14th, Bullock & Co. shipped two car loads of rice to Foss-Schneider Brewing Company.

On November 14, 1885, Bullock & Co. wrote as follows: "The Foss-Schneider Brewing Company: We take pleasure in handing you in this invoice and bill of lading for two car loads best broken rice, November 10th, cash, \$2,411.44, less freight, as per order received through Mr. Louis Burger. Trust-

ing this lot will give the usual satisfaction, we remain." To which the brewing company responded by telegram of November 16th: "Bill lading two cars rice received. Will not accept same. Never ordered them through Burger." Thereupon, Bullock & Co. telegraphed their attorney, on the same day, as follows: "Foss & Schneider telegraph us they won't receive the two car loads shipped them. What shall we do?" To which their attorney responded, after seeing Mr. Overbeck: "Think can get Foss-Schneider to take rice, if they get four months' time. I advise acceptance." To the Foss-Schneider Brewing Company, Bullock & Co. telegraphed as follows, November 18, 1885: "You deducted from your remittance commission on these very two car loads just shipped. Our attorney, Howard Douglass, Cincinnati, telegraphed us to ship, and think Burger's attorney instructed shipment. Settle this matter with Burger, who ordered for you." November 21st, Bullock & Co., after repeating the correspondence by telegram, say: "We have been so very busy getting what rice we could off, as freight advanced 40 per cent. on the 18th, and yesterday the new rate of duty took effect,—that is, $2\frac{1}{4}$ cents pound on the same size grain we shipped you,—an advance of 185 per 100 pounds; the same duty as whole rice. We wanted to protect ourselves, and have shipped over seven thousand bags this week. We note that you say you never ordered this from Burger, and yet this is just what Burger brought his sham suit against us for, and you paid the money into court on the very two cars. Since your telegram, we have another one from Howard Douglass, who says he thinks you will take, if we give you four months' time, to which we replied that we were always willing to accommodate you; and if you would give us your four-months' note, adding interest from receipt of goods, we would accept it, and, as Burger was to have a good commission out of this, that you make him pay the interest that you add to the note." To which letter the brewing company responded on the 25th November: "Yours of the 21st received. Mr. Howard Douglass nor anybody else had any right to think that we would accept the rice if you gave us four months' time. None ever approached us on this subject, and consequently we never intimated anything of the kind. * * * As already informed you, we will not accept the rice under any terms. Hoping that this unpleasantness will soon cease, we are, etc."

During this correspondence, the two car loads of rice shipped by Bullock & Co. reached Cincinnati, and were weighed for the defendant,—one car upon November 21, 1885, and the other November 28, 1885,—and the freight was paid by the defendant upon the same days. The rice was hauled to the defendant's brewery by the brewery wagons. The defendant's agents supposed that this rice was rice ordered and shipped from Kuntz & Co., of New York. The Kuntz rice arrived on the 5th of December, at which time the mistake was discovered. The rice of Bullock & Co. was stored in the brewery warehouse until the 2d of January, 1886, when Bullock & Co. wrote the brewing company the following: "Our invoice November 10th, \$2,411.44, is now past due. Will you, on receipt of this, kindly send us exchange for the above amount, less freight? The freight bills, please send us. Should you want any extension of time, we would be very glad to accommodate you; you adding interest after thirty days, and sending us your note for such time as will suit you." To which the defendant replied, January 4, 1886: "Yours of the 2nd inst. received. We beg you to understand that we do not owe you anything. The rice you shipped here we will not accept, and, if Mr. Louis Burger ordered same, you must look to him." To which Bullock & Co. replied, January 6th: "We have your favor of the 4th all noted. We are a little staggered at your remark that you do not owe us anything, and will not accept the rice we shipped you, when we know that you have accepted the rice, and had one car since November 21st, the other car November 27th, and paid the freight on both cars November 25th. You have had this rice now, one car 46 days, the other car 40 days,—an average of 43 days. This should now be settled, and must confirm our letter January 2nd, requesting exchange for amount due us, or, if you want some longer time, your note adding interest after 30 days. The interest, and any difference in price, you must look to Mr. Burger for." To which the brewing company responded, January 9, 1886: "Yours of the 6th received. We again repeat

that we do not owe you anything. You also do not know that we accepted the rice, for whoever informed you so knows nothing about it. The rice you shipped is stored, and we will not use one grain of it. When the proper time comes, we will prove how, in mistake, we paid freight on the rice you shipped after having notified the railroad company that we would not accept same, since, at the same time, there was a shipment of rice in the depot for us, which we had bought from some other house. Let this end all unnecessary correspondence." There was a long subsequent correspondence, which throws no light upon the case, except that it states the claims of the parties.

Overbeck, the president of the brewing company, was ill, and not able to be present at the trial. By agreement, a statement of his was introduced as a deposition, in which he said: "On November 16, 1885, Bullock & Co. shipped us the two remaining cars rice countermanded with Burger Bros., whereupon, we telegraphed Bullock & Co. that we would not accept them, as we had never ordered them through Burger. On or about November 25th, two cars rice arrived in the depot here, at the same time together with two cars rice which we bought from Chas. Kuntz & Co., New York; and by mistake our secretary at the time, Mr. Chas. Klein, paid the freight on the two cars from Bullock & Co., instead of those from Chas. Kuntz & Co., and in that way the two cars from Bullock & Co. were taken into our house by mistake. But of all of this we notified Bullock & Co. at once by letter, stating the rice was stored at their expense, and that we refused acceptance of same."

Mr. Bullock testified that the letter of January 9th, received on January 12th, was the first letter written them by the brewing company, in which they had been notified that the rice had been received under mistake.

The market price of rice in Cincinnati from November, 1884, to November, 1885, was affected by the varying freights from New York to Cincinnati. There was a decline in the spring of 1885 of about \$70 a car. There was an advance early in November back to the March and April rates of \$60 or \$70 a car, and a still further advance, later in the same month, of \$50 or \$60 a car.

At the close of the evidence the court directed the jury to return a verdict for the plaintiffs, for the amount claimed in the petition, with interest.

Dawson & Overbeck and Follett & Kelley, for plaintiff in error.
Wilby & Wald, for defendants in error.

Before BROWN, Circuit Justice, and TAFT and LURTON, Circuit Judges.

TAFT, Circuit Judge, (after stating the facts.) The plea of the statutes of limitation was properly held bad. The argument on behalf of the defendant below was that, if the Burger contract was in force against the brewing company, that company had repudiated it early in the year 1885, so that Bullock & Co. might have brought an action for its breach in January or February of that year, more than six years before the filing of the petition. The fallacy of this argument is that the action is here for goods actually sold and delivered to the brewing company. Such an action accrued upon the delivery of the goods, and not before. It is true that, where a contracting party gives notice of his intention not to comply with the obligation of his contract, the other contracting party may accept this as an anticipatory breach of the contract, and sue for damages without waiting until the time mentioned for the completion and fulfillment of the contract by its terms; but, in order to enable the latter to sue on such an anticipatory breach, he must accept it as such, and consider the contract at an end. If he elects to consider the con-

tract still in force, he cannot recover thereafter without performing all the conditions of the contract by him to be performed. These principles are well settled, and there are decisions by the supreme court of the United States which leave no doubt upon the subject. *Rolling-Mill v. Rhodes*, 121 U. S. 255, 264, 7 Sup. Ct. 882; *Dingley v. Oler*, 117 U. S. 490, 6 Sup. Ct. 850; *Smoot's Case*, 15 Wall. 36; *Johnstone v. Milling*, 16 Q. B. Div. 467; *Elsas v. Meyer*, 21 Wkly. Cin. Law. Bul. 346; *Leake*, Cont. 872, and cases there cited. As *Bullock & Co.* did not elect to treat the attempted cancellation by *Burger* and the brewing company of the *Burger* contract as a repudiation of it, no right of action whatever accrued to *Bullock & Co.* until they had delivered the rice thereunder.

The second and important question for our consideration is whether, on the undisputed facts of the case, there was in law an acceptance by the brewing company of the two car loads of rice, for the price of which recovery is sought. We have no difficulty in reaching the conclusion that the contract of November, 1884, made through *Burger*, had been abrogated by the subsequent conduct of the parties. *Burger* had notified *Bullock & Co.* in several letters in January of 1885 that the contract made through him had been canceled by the brewing company because the condition of that contract had been that the price named therein was the bottom price, whereas, but a few weeks subsequent, rice was sold by *Bullock & Co.* directly to the brewing company at five cents per hundred less. The right to cancel this contract was denied by *Bullock & Co.* in their correspondence with *Burger*. But by letter of January 6th the brewing company notified *Bullock & Co.* that it had countermanded and canceled all orders through *Burger*, to which, in the letter of January 10th, no answer was made by *Bullock & Co.* More than this, under the *Burger* contract of November, 1884, of the four cars, the first was to be delivered the first week in December, and the others were to follow when ordered, about two weeks apart. It is quite clear in our minds that the brewing company insisted, and *Bullock & Co.* acquiesced in the view, that the contract of December 20th, by which five cars of rice were sold with the option of 10 cars more at \$2.80, was a substitute for so much of the contract through *Burger* as remained unperformed; and we feel quite certain that, had *Burger* not collected his commission through legal proceedings by garnishment from money of *Bullock & Co.* in the hands of the brewing company, *Bullock & Co.* would not have insisted upon delivering the other two cars under the *Burger* contract. *Bullock & Co.* assumed that the surrender of *Burger's* commissions to him by the brewing company had been with the acquiescence of the brewing company, though in the form of legal proceedings. Their position, evidently, was that the brewing company had recognized the existence of the *Burger* contract by paying *Burger's* commissions, and charging them to *Bullock & Co.* Communicating with their lawyer in Cincinnati who had charge of this garnishment proceedings, they were advised to ship the two carloads to the brewing company, which they did. Up to the time that the rice was received at Cincinnati, we are of the opinion that there was no obligation on the

part of the brewing company to accept it. It is also clear that the company's receipt of the rice, and the storing it in its warehouse, were under a mistake. It is just as clear, however, that by the 5th of December, or earlier, the company knew that the rice had been taken into the company's warehouse, and was then stored there. These facts, it knew, would be communicated through the agents of the railroad company to Bullock & Co.; and, unexplained, they constituted a clear acceptance of the rice, rendering the brewing company liable for it, under the contract upon which Bullock & Co. claimed to have the right to deliver the rice, namely, the Burger contract of November, 1884, at the price of \$2.85 per hundred. The company was under an obligation, if it did not intend to accept the rice, to notify Bullock & Co. of the mistake within a reasonable time. What was a reasonable time, under the circumstances? There was no excuse for delay. The facts were all known to the company. The company waited from December 5th until January 9th, when it wrote the letter, which did not reach Bullock & Co. until January 12th, in which Bullock & Co. were notified that the goods had been received under a mistake, and were held subject to their order. In the letter of January 4th the brewing company did not explain its acts, but simply asserted that it had not accepted the rice. For at least a month, then, it knowingly kept the rice in its storehouse without advising Bullock & Co. that it did not intend to receive and accept it, after it had acted with respect to the rice as only an owner could. It is true that the letter of November 25th, refusing to accept the rice, was written after one car load had been received in the storehouse; but it was written upon the same day upon which the freight was paid, and was written before the brewing company was aware that Bullock & Co.'s rice had been received. The brewing company had once before repudiated a contract, and then complied with it, so that its acceptance of the rice after its letter of November 25th was not surprising to Bullock & Co. The price of rice was fluctuating, and was affected by the change of freight rates between the seaboard and Cincinnati, and of this fact the brewing company had been advised by Bullock & Co. It was important, therefore, if the rice was to be rejected by the brewing company, that Bullock & Co. should know it at once. The brewing company could not lie by for a month, with the rice in its storehouse, after it apparently had accepted the rice, and then claim that the acceptance had been under a misapprehension of facts known to it for a month. It is well settled that receipt of goods will become an acceptance of them, if the right of rejection is not exercised within a reasonable time. *Benj. Sales*, (Corbin's Ed.) p. 916, § 1051, and cases cited. To the knowledge of the brewing company, the rice was delivered to it by Bullock & Co. under the claim of right to do so by virtue of the contract with Burger of November, 1884. Acceptance of it, therefore, or conduct equivalent to acceptance of it, implies, not only an agreement to pay for the rice, but to pay for it in accordance with the contract under which it was avowedly delivered.

In *Manufacturing Co. v. Hayes*, (Pa. Sup.) 26 Atl. 6, a consignee took goods consigned to him out of the possession of the carrier, and

had them hauled to his own place of business. He sent his check to the consignor for other goods purchased by him, without any reference to the goods so taken possession of by him. It was held by the supreme court of Pennsylvania that even if it was conceded that he had not ordered the goods in question, yet because he took possession of them from the railroad company, and had them hauled to his own place of business, and failed to notify the consignor of the mistake, he accepted the goods, and the instruction of the court below to find a verdict for the plaintiff for the full amount of the claim was sustained.

It is objected to the action of the court below in directing a verdict, that the facts were not so clearly proven that the case should not have been left to the jury, upon proper instructions. It is said that there was evidence tending to show that the brewing company had advised Bullock & Co. as soon as they became aware of the mistake under which these car loads of rice had been received by them into their custody. The argument is based on the statement of Overbeck that the two cars from Bullock & Co. were taken into the company's house by mistake, and that of all this the company notified Bullock & Co. at once by letter, stating that the rice was stored at their expense, and that the company refused acceptance of same. Such a statement, of course, was not competent, without showing that the letter had been lost. All of the letters of either party were introduced in evidence. The correspondence is complete. There is no room in it for a letter between that of November 25th from the brewing company to Bullock & Co., and that of Bullock & Co.'s letter of January 2d to the brewing company. Overbeck's statement can only be explained on the theory that he had forgotten when the letter first advising Bullock & Co. of the mistaken receipt of the goods was written. This was not evidence sufficient to go to the jury, because it was neither competent, nor of any weight.

Nor do we think that, under the circumstances of this case, the question of reasonable time was one for the jury. There was no excuse for any delay, after the brewing company learned of its mistaken action in regard to the rice, in notifying Bullock & Co. of it; and we have no hesitation, as a matter of law, in holding that 30 days' delay in the rejection of rice—a commodity fluctuating in its market price—was altogether unreasonable. *Wiggins v. Burkham*, 10 Wall. 127.

The conclusions thus reached make it unnecessary for us to consider the other assignments of error. They are founded on the action of the court in the admission and rejection of evidence relating to the cancellation of the Burger contract. Whether the contract was in fact canceled or not could not, as the case turned out, affect the brewing company's liability, because its conduct in accepting the rice under the contract was a waiver of any cancellation, if it had taken place. Objection is made to the testimony as to the fluctuation of prices in rice. This was competent to make clear the obligation upon the brewing company of promptly notifying Bullock & Co. of the rejection of the rice.

An examination of the whole record satisfies us that the judgment must be affirmed.

MAYSVILLE STREET RAILROAD & TRANSFER CO. v. MARVIN.¹

(Circuit Court of Appeals, Sixth Circuit. October 2, 1893.)

No. 80.

1. DEATH BY WRONGFUL ACT—WHO MAY SUE—FOREIGN ADMINISTRATORS.

A statute giving foreign administrators a right to sue for the recovery of "debts due their decedents" (Gen. St. Ky. c. 39, art. 2, § 43) confers no capacity to sue for the wrongful death of such decedent, although such power has been given to domestic administrators.

2. SAME.

An act giving the "personal representative" a right of action for the wrongful death of his decedent (Gen. St. Ky. c. 57, § 1) will not be construed to confer such right upon a foreign administrator, contrary to the common-law rule and the established policy of the state. *Dennick v. Railroad Co.*, 103 U. S. 11, distinguished.

3. SAME—STATE AND FEDERAL COURTS.

A foreign administrator cannot sue in a federal court for the wrongful death of his decedent when the state laws have given him no capacity to maintain such a suit in the state courts.

In Error to the Circuit Court of the United States for the District of Kentucky. Reversed.

Statement by LURTON, Circuit Judge:

The deceased, Marion Wilson, was killed at Maysville, Ky., by being run over by a street car operated by one of the servants of the appellant company. He was a citizen and resident of the state of Ohio, in which state the appellee, Marvin, was appointed administrator. The appellant company is a Kentucky corporation, exclusively engaged in operating a street-car line in the city of Maysville. The Ohio administrator brought this suit in the United States circuit court for the district of Kentucky, at Covington. There was a demurrer to the petition, on the ground that an Ohio administrator could not maintain a suit in the courts of Kentucky. This demurrer was overruled. Thereupon issue was joined, and a trial had by jury, resulting in a verdict and judgment against the railroad company.

A. M. J. Cochran, (Wadsworth & Son and W. H. Mackoy, of counsel,) for plaintiff in error.

G. Bambach, L. W. Robertson, and Wm. M. Tugman, for defendant in error.

Before BROWN, Circuit Justice, LURTON, Circuit Judge, and SWAN, District Judge.

LURTON, Circuit Judge, after stating the facts as above, delivered the opinion of the court.

The vital question involved in this appeal is as to the capacity of an administrator appointed in one state to recover damages for the death of his intestate in the courts and under a statute of another state. The capacity conferred by letters of administration is limited to the state within which they are granted, and, in the absence of a statute giving effect to a foreign appointment, no suit can be maintained in the courts of another state by such an administrator. This is the well-settled rule of the common law. *Schouler, Ex'rs*, § 164, and authorities cited.

¹ Rehearing denied December 4, 1893.

In *Noonan v. Bradley*, 9 Wall. 400, Mr. Justice Field says:

"In the absence of any statute giving effect to the foreign appointment, all the authorities deny any efficiency to the appointment outside of the territorial jurisdiction of the state within which it was granted. All hold that, in the absence of such a statute, no suit can be maintained by an administrator in his official capacity, except within the limits of the state from which he derives his authority. If he desires to prosecute a suit in another state, he must first obtain a grant of administration therein in accordance with its laws."

This rule is well recognized in the state of Kentucky, and the ground upon which it rests is well stated by Robertson, C. J., who, speaking for the court, said:

"It is a well-settled doctrine that letters of administration granted by one nation or state can have no operation per se within the jurisdiction of another nation or state, and that, therefore, such authority, being local, can, de jure, vest no right of suit in any other country than that in which it was granted; for, as it is the duty of every government to secure to its own citizens a just participation in the distribution of the assets within its protection and control, belonging to every deceased debtor of any of those citizens, wherever he may have lived or died, it is an established rule of international law that assets shall be administered under authority of the local sovereign. And, consequently, as every administrator must also account to the proper tribunal of the country from which he derived all his authority, he is responsible to no foreign government for the administration of assets received under the authority, and cannot either sue or be sued in his representative character in a foreign state." *Fletcher's Adm'r v. Sanders*, 7 Dana, 348.

The conditions and circumstances under which nonresident administrators of nonresident decedents may sue in the courts of Kentucky are found in sections 43 and 44 of article 2 of chapter 39 of the General Statutes of Kentucky, which chapter is entitled "Executors and Administrators." These sections are as follows, to wit:

"Sec. 43. By giving bond with surety resident of the county in which action is brought, non-resident executors and administrators of persons, who at the time of their deaths were non-residents of the commonwealth, may prosecute actions for the recovery of debts due to such decedents. Sec. 44. In such actions the plaintiff's letters testamentary or of administration, granted by a proper tribunal properly authenticated must be filed; and no judgment shall be rendered until the plaintiff executes bond, with good surety resident of the county, to the commonwealth, conditioned to pay any debt due by his decedent to any resident of the state to the extent assets shall come to his hands. Actions may be brought on this bond for the use of any creditor of said decedent for three years after the date of such receipt of assets by such executor or administrator in the state, but not after."

Foreign appointments are recognized, and authority given to such foreign administrators to sue in the instances named in the statute, and upon compliance with the conditions prescribed. To this extent, and to this extent only, do the statutes of Kentucky modify or alter the common law which limits the official character of an administrator to the state of his appointment. This statute, upon compliance with the provisions contained in section 44, empowers foreign executors and administrators to "prosecute actions for the recovery of debts due to such decedent."

Now, this action is obviously not brought to recover a "debt" due to the decedent Wilson. A claim for a tort, not reduced to judg-

ment, has never been held to be a debt. The supreme court of Massachusetts, in *Gray v. Bennett*, 2 Metc. 526, in defining the legal meaning of the term "debt," said:

"The word 'debt' is of large import, including not only debts of record or judgment and debts by specialty, but also obligations arising under simple contracts, to a very wide extent, and, in its popular sense, includes all that is due to a man under any form of obligation or promise."

A claim arising out of the official neglect of a county court clerk was held not to be a "debt," within the meaning of the statute authorizing an attachment for "debt." *Dunlop v. Keith*, 1 Leigh, 430.

A claim against a corporation for damages for the negligent loss of a steamboat was held not to be a "debt," within the meaning of an act making stockholders liable for all the "existing debts" of the corporation. *Cable v. McCune*, 26 Mo. 371.

In *Tribune Co. v. Reilly*, 46 Mich. 459, 9 N. W. 492, it was held that a claim for damages sounding in tort is not a debt before it has been prosecuted to judgment.

In *Zimmer v. Schleeauf*, 115 Mass. 52, it was held that a claim for damages for a tort does not become a debt by verdict before judgment; but if a claim for a tortious killing could be said to be a "debt," within the meaning of this statute, yet it was never a "debt due the decedent." The cause of action arose only upon the death of the decedent, and as a consequence of his death. It was not a right of action belonging to the decedent, and surviving to his administrator. The statute gives the right of action to the representative. It is not a preservation of a right of action, but the creation of a totally new right of action.

Referring to the statute conferring this right of action, the supreme court of Kentucky, in *Railroad Co. v. Case's Adm'r*, 9 Bush, 728, said:

"The right of action allowed by the first section is not identical with those growing out of personal injuries, and which, under the tenth chapter of Revised Statutes, survive to the personal representative."

See, also, *Railroad Co. v. Sanders*, 86 Ky. 263, 5 S. W. 563, where the third section of the same act is construed as conferring a new and original right of action in the persons authorized to sue.

It is clear, therefore, that this statute does not empower a foreign representative to sue in the courts of Kentucky for the death of his decedent.

But counsel contend that, under the act authorizing a suit for the wrongful death of another, this suit may be instituted by a foreign, as well as by a domestic, administrator. This suit is instituted by virtue of the first section of chapter 57 of the General Statutes of Kentucky. It is as follows, to wit:

"If the life of any person not in the employment of a railroad company shall be lost in this commonwealth by reason of the negligence or carelessness of the proprietor or proprietors of any railroads, or by the unfitness, or negligence, or carelessness of their servants or agents, the personal representative of the person whose life is so lost may institute suit and recover damages in the same manner that the person himself might have done for any injury where death did not ensue."

The contention of counsel is that under this section the power is given to the "personal representative" of the decedent "to institute suit and recover damages in the same manner that the person himself might have done for any injury where death did not occur," and that no distinction is recognized between a domestic and foreign administrator. The argument is that the appellee was the "personal representative" of the decedent, and the only personal representative, and that, by the letter of the statute, he is authorized to sue. The policy underlying the rule which refuses recognition of letters of administration in a state other than that in which they were granted is founded upon the inconvenience of allowing assets to be taken from one state into another, until domestic creditors are satisfied. The recovery under the section authorizing this suit will be for the benefit of the general estate of the decedent. Creditors have an interest, and may reach the funds as a general asset of the estate. In this respect this statute differs widely from those of most of the states. Speaking of the recovery under this statute, Pryor, J., said:

"The legislature intended to confine the right of recovery to the personal representative, and, as there is no direction as to the disposition of the fund recovered under that section, the personal representative would hold it like other assets left by the intestate." *Givens v. Railway Co.*, 89 Ky. 234, 12 S. W. 257.

The act relating to suits by foreign administrators carefully guards and protects the rights of domestic creditors. Is it to be presumed that, by the use of the general designation "personal representative," the legislature intended to so radically change the whole policy of the state as to permit this class of claims to be prosecuted by foreign administrators, without any protection to domestic creditors? What authority is there to require a bond conditioned as required by section 44 of chapter 39? We know of none. If the suit is to be maintained at all, it must be by assuming that the legislature intended to confer the right of suit equally upon domestic and foreign representatives of the deceased. But suppose there are two administrations,—one foreign and the other domestic; which is vested with the right under the construction contended for? The section now under consideration makes no reference to the act relating to the subject of suits by foreign administrators. The two acts, in so far as they relate to the same subject, should be construed together. But this relation is a forced one, and only arises by including a foreign personal representative within the general designation of "personal representative." Did the legislature intend to enlarge the powers of foreign representatives? We think not. That was not the subject with which it was dealing. The matter in hand was to create a right of action for the wrongful death of another. It might have given this action to a widow or next of kin. It might have conferred it only on the personal representative. The recovery might be for the exclusive benefit of the next of kin or widow, or both, or it might be made an asset for general administration. The lawmaking power chose, in its discretion, to confer this new right of action

only upon the "personal representative" of the decedent, and, in making no special disposition of the recovery, it thereby constituted the claim an asset for general administration. Why should it be assumed that the legislative intention was that this asset might be recovered by a foreign administrator, and the recovery removed to the state of administration? With reference to other assets—such as debts due to the decedent—a very different policy was enforced, and domestic creditors fully protected against the effect of recognizing foreign appointments. Why such a discrimination? If this recovery was for the exclusive benefit of the widow and next of kin, there would be more reason to assume that a foreign administrator was within the legislative intent.

The status of foreign administrator was fully and accurately defined by the legislation on that subject. Under the law of Kentucky, no one was entitled to recognition as the "personal representative" of a decedent who was not appointed by the courts of that state, or who could not bring himself within the terms of the act relating to the suits of foreign representatives. It would be a great stretch of reasoning to assume, in view of the common law on this subject and of the statutory modifications of that law by the state of Kentucky, that a foreign administrator was included in every act conferring power or prescribing the duties and privileges of "personal representatives."

But it is suggested in argument that where an act is capable of two constructions, one of which will make it obnoxious to some constitutional objection, while the other will avoid such objection, the latter construction should be put on the act in order to uphold it. The argument is that a construction of the statute conferring a right of action for the wrongful death of decedent, whereby the remedy is confined to a representative appointed by the state of Kentucky, would deprive nonresidents, having no personal estate within the state, of all remedy, inasmuch as there could be no administration in Kentucky upon such estates, and that the act would then be void, as in contravention of section 2, art. 4, of the federal constitution, which provides "that citizens of each state shall be entitled to all the privileges and immunities of citizens of the several states." It is not clear that there could not be an administration in Kentucky on the estate of such a nonresident decedent. It would rather seem that such a claim would be an "asset" for administration. That there cannot be administration on the estate of a nonresident who has no estate for administration may be admitted. But this claim, although it arose after the death of the decedent, was an asset for administration. It became, when realized, a part of the general estate, and might be subjected by creditors. It was a property interest, available for the payment of debts of the decedent, and, as such, was an asset. But, however this may be, the act is not equally capable of two constructions, one rendering it unconstitutional, and the other obviating such objection. It is not a case of doubt, and, whatever the fate of the act, we are content to hold that it does not authorize a suit in the courts of Kentucky by a foreign administrator.

The case of *Dennick v. Railroad Co.*, 103 U. S. 11, has no application whatever. The question now decided was not there presented. Mr. Justice Miller, in concluding the opinion in that case, said:

"Let it be remembered that this is not a case of an administrator appointed in one state, suing in that character in another state, without any authority from the latter. It is the general rule that this cannot be done. The suit here was brought by an administratrix in a court of the state which had appointed her, and of course no such question could be made."

If the appellant company had been sued in the courts of Ohio, a very different question would have arisen. The question we have to decide is as to whether, under the law of Kentucky, the Ohio administrator of the decedent could maintain a suit in the courts of Kentucky for the death of his decedent. If he could, then the diverse citizenship of the parties gave the federal courts jurisdiction. If he could maintain no suit in the courts of Kentucky by reason of the terms of the act creating the right, then he cannot have a status in a federal court, for no statute has vested in him any right of action in any court.

The demurrer should have been sustained, and the suit dismissed, because the plaintiff stated no cause of action, either at common law or under the statute. The judgment will be reversed, and the cause remanded for further proceedings in accordance with this opinion.

BOARD OF COM'RS OF MAHONING COUNTY et al. v. YOUNG.

(Circuit Court of Appeals, Sixth Circuit. October 26, 1893.)

No. 89.

1. DEDICATION—ABANDONMENT OF PUBLIC USE.

Where land is dedicated for a burying ground, whether by a common-law dedication, under which the fee remains in the owner, or pursuant to Acts Ohio, Dec. 6, 1800, and March 3, 1831, under which the fee is vested in the county in trust for the purposes named only, the lawful and effectual abandonment of the land as a burying ground restores the former owner to his right of possession.

2. DEED—ESTATE CONVEYED—REFERENCE TO STATUTE.

A quitclaim deed to an incorporated village, for a valuable consideration, of all the grantor's right and title to lands previously dedicated for a burying ground by a common-law dedication, only the naked legal title remaining in the grantor, with a possibility that his right of possession might be restored, contained absolute words of conveyance, followed by a declaration that the land was to be under the control of the municipal authority, "in conformity with" a certain act of the state legislature, which purported to vest in incorporated cities and villages the title to public burial grounds therein dedicated as such, but not according to the requirements of law for a statutory dedication, by which the fee would have been vested in the municipality in trust for the public use. *Held*, that such declaration was only declarative of the use, and directory as to the administration of the trust; and the fee conveyed was not thereby rendered a mere qualified fee, or subject to be defeated by the happening of a condition subsequent, but was an absolute fee, subject to the trust. 51 Fed. 585, reversed.

3. SAME—CONVEYANCE TO MUNICIPALITY FOR PUBLIC USE — ABANDONMENT OF USE.

Where land has been conveyed to a village for use as a public burying ground, the village council, in their character as trustees, cannot abandon the use, and thereby defeat the beneficial interest of the public.

4. SAME—CONDITION SUBSEQUENT—USE PREVENTED BY ACT OF LAW.

Even though such conveyance be subject to forfeiture for breach of a condition subsequent as to such use, the breach is excused when the act of the law has prevented such further use of the land. 51 Fed. 585, reversed.

In Error to the Circuit Court of the United States for the Eastern Division of the Northern District of Ohio.

At Law. Action by Charles C. Young against the board of commissioners of Mahoning county, Ohio, the city of Youngstown, Ohio, and others, to recover lands. Judgment for plaintiff. 51 Fed. 585. Defendants bring error. Reversed.

Statement by LURTON, Circuit Judge:

This is an action of ejectment. The plaintiff was Charles C. Young, a citizen of the state of New York. The defendant was the county of Mahoning, one of the counties of the state of Ohio. The property involved is lot No. 96 of John Young's original plat of the village of Youngstown, upon which now stand the courthouse, jail, and county offices of Mahoning county. A jury was waived, and the cause submitted to the Honorable W. H. Taft, circuit judge, who rendered judgment for the plaintiff. Subsequently, a jury was impaneled, under the statute of Ohio, to ascertain the value of the improvements. Upon final judgment there was an appeal by the defendant to this court.

The facts necessary to be stated for the purpose of this opinion are these:

John Young, the ancestor of the plaintiff below, and the common source of title for plaintiff and defendants, signed and recorded, in 1802, a town plat of 100 lots in the township of Youngstown, then in the county of Trumbull, but now in that of Mahoning. This plat was defectively acknowledged under the Ohio statute regulating the acknowledgment and registration of town plats. The result was that the legal title to the streets, alleys, and other open public places was not vested in the village authorities, but remained in Young. Lots Nos. 95 and 96 on this plot were each marked with the words, "Burying ground." From the date of this dedication, down to 1868, these lots were used as a burying ground. In 1865 an adjoining lot owner fenced in a part of lot 95. Suit was brought against him in the name of the county commissioners, but failed upon the ground that the title was not in them. Another suit was instituted in the name of certain citizens of Youngstown for the benefit of the public. One B. F. Hoffman was counsel in this second suit for the plaintiffs. To meet the supposed difficulty about the title, Hoffman procured the passage by the legislature (April 3, 1867) of an act entitled "An act for the protection of certain graveyards and burial grounds." The first section of this act is the only one important to this contention. It was in these words:

"That the title, right of possession and control to and in and of all public graveyards and burial grounds located within incorporated cities and dedicated by the owners, and dedicated as graveyards and burial grounds, but which have not been dedicated according to the forms and requirements of law, be and the same are hereby vested in the cities, towns and villages respectively, where any such graveyards and burial grounds may be located; and the council of such towns, cities and villages are hereby authorized and required to take possession, control and charge of all such grounds within their respective limits and protect and preserve the same, and make such ordinances, sales and regulations as may be necessary and proper for said purposes and consistent with the health and welfare of the inhabitants; and they are also authorized and required, when necessary, to institute suits in the names of said municipal corporations to recover possession of said grave-

yards and burial grounds, remove trespassers therefrom and recover damages for injuries thereto for any part thereof, or to any tomb or monument therein."

Pending that suit, and after the passage of this act, Hoffman procured from the plaintiff, Charles C. Young, who was then living in Whitestown, N. Y., and in whom was vested the legal title by descent from his father, John Young, and by deeds from his brothers and sisters, a quitclaim deed to both lots 95 and 96. This deed is in these words:

"C. C. Young to Village of Youngstown.

"Quitclaim Deed.

"To all to whom these presents shall come, greeting: Know ye, that I, C. C. Young, of Geneva, in the state of New York, for divers good causes and considerations thereunto moving, especially for one dollar received to my full satisfaction of the incorporated village of Youngstown, in the county of Mahoning, in the state of Ohio, have given, granted, remised, released, and forever quitclaim, and do by these presents absolutely give, grant, remise, release, and forever quitclaim, unto the said incorporated village of Youngstown and its successors forever, to be under the authority and control of its proper council and municipal authority, in conformity with the act of the legislature of Ohio in that behalf, all such right and title as I, the said C. C. Young, as one of the heirs, and as the assignee and grantee of the other heirs and devisees, of John Young, the original proprietor of said township and village lands, have or ought to have in and to the following described lands: Situate in the said village, and known and designated on the original plat of said village made by said John Young and recorded in Trumbull County Records of Deeds, Book A, p. 118, as burial grounds, and being inlots numbers ninety-five and ninety-six, and used as burial grounds by the citizens of said village and township since about the year 1799. Said inlot No. 95 lies on the west side of Market street, and extends westerly to inlot No. 94, and covers all the ground inclosed and used as a burial ground for over fifty years; and said inlot No. 96 lies on the east side of said Market street, and includes the grounds inclosed and used as a burial ground for a like period. To have and to hold the premises aforesaid unto the said grantee, said incorporated village of Youngstown, and its successors, forever. In witness whereof I have set my hand and seal this 10th day of July, A. D. 1867.

G. C. Young. [L. S.]

"Signed, sealed, and executed in the presence of

"John W. Smith.

"Samuel Louthrop."

The city council of Youngstown accepted this deed, and the suit against the trespasser was thereafter conducted in its name and in its behalf. The consideration for this deed was the sum of \$15, paid to Hoffman on account of Charles Young, being a debt due from Young to Hoffman about other matters. Young required the city of Youngstown to assume this debt to Hoffman, and pay the same as a consideration for the conveyance.

In 1868 the council of Youngstown, which had then ceased to be a village and become a city, passed an ordinance by which all interments in the old burying ground were thereafter forbidden, and the remains of those already interred there, which should not be removed by friends and relatives before April 1, 1869, were ordered removed at public expense. This ordinance was executed, and all bodies removed. From that time until 1874 the lots lay open and unused. In 1874 the legislature provided that the county site of Mahoning county should be removed from Canfield to Youngstown, on condition that Youngstown should donate a lot, and erect thereon the county courthouse, jail, and offices at a cost of not less than \$100,000, free of expense to the county. This condition was accepted, and by ordinance passed in 1875 it was directed that a deed in fee to said lots 95 and 96 be made to a committee of five citizens, who were constituted a building committee, charged with the duty of erecting the courthouse and other public buildings, and then making conveyance, when completed, to the county commissioners

of Mahoning county. The buildings were duly erected, and in August, 1876, the lot on which they stood was conveyed to the county commissioners, and since that date have been occupied by the courts and county officers of Mahoning county. Lot No. 95 was not used by the building committee, and the title remains in that committee. The present suit involves only lot No. 96, and was begun in December, 1891.

Disney Rogers, A. W. Jones, and Geo. F. Arrel, for plaintiffs in error.

F. E. Hutchins, T. W. Sanderson, and M. A. Norris, for defendant in error.

Before BROWN, Circuit Justice, LURTON, Circuit Judge, and SEVERENS, District Judge.

LURTON, Circuit Judge, (after stating the facts.) We quite agree, upon the facts of this record, that the plaintiff's title is good, and that he is entitled to recover, if the case is to turn alone upon the effect of the common-law dedication made by John Young in 1802. The dedication under the unacknowledged plat of that year was good only as a common-law dedication. The plat was only evidence of the purpose of the dedicator with regard to lots 95 and 96. The acceptance and use by the public of them as a burying ground, taken in connection with the plat, operated as a dedication for burying purposes. This sort of dedication operated only by estoppel. The acquiescence of the owner, and that use by the public, estopped him from asserting any right of possession hostile to such use. The public acquired an easement for that purpose, and that only. This seems to be the well-settled ground upon which a common-law dedication becomes operative and effective. *Fulton v. Mehrenfield*, 8 Ohio St. 440; *Wisby v. Bonte*, 19 Ohio St. 238. The right of the public being a mere easement, the owner of the fee may resume possession whenever there has been a full and lawful abandonment of the use for which the dedication was made. The estoppel ceases to operate when the use ceases. "The dedication," as forcibly put by the circuit judge, "has spent its force" whenever the use becomes impossible. This is the well-settled rule concerning public roads, streets, and alleys, when the fee remains in the owner of land over which a public road has been established. *Barclay v. Howell's Lessee*, 6 Pet. 498.

The result would be the same under the construction placed upon the Ohio acts of December 6, 1800, and March 3, 1831, by the court of that state. The acts referred to provide that the due acknowledgment and proper registration of a town plat "should be deemed a sufficient conveyance to vest the fee of such parcels of ground as are therein expressly named and intended to be for public uses in the county in which such town lies, in trust to and for the uses and purposes therein named, expressed or intended, and for no other uses or purposes whatever." Under this statute the Ohio court held this statutory title and dedication conferred "no power of alienation discharged of the use by which the purpose of the dedication might be defeated," and that, "should the sole uses to which the property has been dedicated become impossible of execution, the property

would revert to the dedicators or their representatives." *Board of Education v. Edson*, 18 Ohio St. 226. The case of *Zinc Co. v. City of La Salle*, 117 Ill. 411, 8 N. E. 81, was under a like statute, and is in accord with the Ohio case. It follows, under the law of Ohio, that whether the fee be in the dedicator, or be in the town or county, by virtue of the statute concerning properly registered town plats, the dedicator, or his heirs, may repossess himself whenever it is no longer possible to use the property for the purposes indicated by the dedication, or whenever there has been a full and lawful abandonment of the easement by the beneficiaries. The lawful and effectual abandonment of these lots as a burying ground would therefore operate to restore the owner to his right of possession by the termination of the easement.

The case of *Campbell v. City of Kansas*, 102 Mo. 326, 13 S. W. 897, goes to this extent, and no further. The parcel of land involved in that suit had been marked upon a town plat as donated for burying purposes. The city council afterwards, by ordinance, caused the bodies there buried to be removed, and converted the plot into a public park. The plat was never properly acknowledged or registered, and the title therefore remained in the dedicator. The heirs of the original owner sued in ejectment, and recovered; the Missouri court holding that the public had only an easement for burial purposes, and that the lawful abandonment of this easement reverted the dedicator with the right of possession. It was not a case of an estate upon condition, but a case of a mere easement for a specified use.

This brings us to a consideration of the effect of the deed made in 1868 by the plaintiff to the village of Youngstown. Is this deed equivalent only to a statutory dedication? Is it a grant subject to be defeated by any subsequent event? To entitle the plaintiff to recover, he must show that the estate conveyed by him has terminated, and that he now is entitled to re-enter. The construction put upon this deed by the circuit judge was governed by his view of the act of 1867, and, by treating it as a part of the deed, he thought that that act only undertook "to confer upon the village the power and control over the burying ground which the public would have in such grounds, dedicated for burial purposes, at common law;" that it fixed "the trustee to preserve the rights of the public in a common-law dedication," and that "the authority and control of the council is limited by the act to the preservation of such rights, and, by reading the act into the deed, the same limitation upon the fee therein conveyed is created." The result of this construction of the act of 1867, when read into the deed, he sums up in his conclusion thus: "The effect of the deed here was to put the parties in exactly the same situation that they would have been in had the dedication of John Young, in 1802, been in accordance with the statute then in force." This is a strong position. Its error seems to lie in confounding the distinction between the effect of a grant by deed for a public use and a common-law or statutory dedication for a like purpose. To say that, by reading the act of 1867 into the deed, the effect is to cut it down into an instrument operating only as if the

grantees held under a statutory or common-law dedication, is to assume the whole point in controversy.

We shall not antagonize the soundness of the construction put on the act of 1867. If it had been possible, by retrospective legislation, to divest a legal title out of one and vest it in another, the result, after all, would have been but a statutory dedication. Under the Edson Case, such a dedication, though operating to pass the title for the uses and purposes specified in the instrument, would terminate when the use became impossible. That case may be treated as recognizing no distinction between the duration of a common-law dedication and a statutory dedication operating to pass the legal title. The well-settled distinction between a grant by deed and a dedication for a particular use is not touched upon in the Edson Case. Subsequently, the same court, in *Taylor v. Binford*, 37 Ohio St. 262, expressly treated the question as undecided, and reserved its consideration. The circuit judge, whose opinion we are now considering, clearly recognized this distinction, and undertook to take this case without the rule affecting grants by deed.

On this subject he said:

"Counsel for the defendants contend that there is a distinction between a grant by deed and a dedication for a particular or specific use, and that a condition subsequent cannot be created in a deed by limiting the use, unless there be a clause of re-entry for forfeiture; and several strong cases are cited to sustain the claim with respect to a deed. *Raley v. Umatilla Co.*, 15 Or. 180, 13 Pac. 890; *Packard v. Ames*, 16 Gray, 327; *Ayer v. Emery*, 14 Allen, 67; *Brown v. Caldwell*, 23 W. Va. 187; *First M. E. Church of Columbia v. Old Columbia Public Ground Co.*, 103 Pa. St. 608. In *Taylor v. Binford*, 37 Ohio St. 262, the supreme court of Ohio declined to decide whether the law of Ohio was in accordance with these authorities, and the question is an open one in this state. But these cases do not apply to the construction of the deed at bar. Here the conveyance is in fee to the village to exercise certain defined possession and control over the land, namely, that possession and control exercised by the public over an easement acquired by common-law dedication. The fee reverts, not by entry after condition broken, but by a simple termination of the estate on the impossibility of exercising the possession and control for which it was given."

What is the character of the fee conveyed by this deed? Three solutions are possible:

(1) That it operated, as held by the circuit court, only to pass such qualified fee "as would pass under a statutory dedication," and that the fee reverts, "not by entry after condition broken, but by a simple termination of the estate on the impossibility of exercising the possession and control for which it was given."

(2) That it conveyed the fee, subject to be defeated by the happening of a condition subsequent.

(3) That it conveyed an absolute fee, subject to a trust that it should be preserved as a burial ground.

Let us take these solutions up in the order stated. At the outset it may be confidently said that the cases relied upon as supporting the first solution were not cases of voluntary grants by deed. They were, with one exception, all cases under statutory dedications, and the court only considered the effect of an abandonment of the public use to which the property had been devoted by statutory dedication. The cases were: Board of Education

v. Edson, 18 Ohio St. 221; Gebhardt v. Reeves, 75 Ill. 301; Zinc Co. v. City of La Salle, 117 Ill. 411, 8 N. E. 81; Hooker v. Utica, etc., Road Co., 12 Wend. 371; Slegal's Executors v. Herbine, decided by the supreme court of Pennsylvania, but reported only in 25 Atlantic Reporter, 996.

The latter was a case of a qualified or base fee, subject to be defeated by the abandonment of the use. It was not a mere conveyance subject to a trust for a public use, for the grantor reserved to himself "the free use of the premises so granted for an open yard, garden, or grass plot, with the rents, issues, and profits." The land adjoined a prison wall, and the object of the public was to secure an open space adjoining the walls to prevent escapes. This object was accomplished by a conveyance which, though it vested the fee, yet was so specific in defining the purpose for which the fee was conveyed, and so clear in reserving to the grantor the use of the premises, subject to the space being kept open, that although the deed contained no express clause of re-entry upon abandonment by the grantee, yet it was clear that the fee was a base or determinable one. The case is authority only for the proposition that technical words importing an estate determinable upon a condition subsequent are not always essential, if the clear intent of the parties is shown by the whole scope of the instrument to be that the estate shall determine upon the cessation of the use defined. The reservation by the grantor of an interest in the use has long been regarded as a circumstance of great moment in construing such deeds. Rawson v. Uxbridge, 7 Allen, 125.

In the case last quoted, Bigelow, C. J., said:

"We believe there is no authoritative sanction for the doctrine that a deed is to be construed as a grant on a condition subsequent solely for the reason that it contains a clause declaring the purpose for which it is intended the granted premises shall be used, where such purpose will not inure specially to the benefit of the grantor and his assigns, but is in its nature general and public, and where there are no other words indicating an intent that the grant is to be void if the declared purpose is not fulfilled."

The Pennsylvania court has always adhered to the rule that "the mere expression of a purpose will not, of and by itself, debase a fee." Kirk v. King, 3 Pa. St. 436; Scheetz v. Fitzwater, 5 Pa. St. 126; First M. E. Church of Columbia v. Old Columbia Public Ground Co., 103 Pa. St. 613. This very principle is announced and adhered to in Slegal's Case. The defendants here are not holding under a mere common-law dedication. Neither are they holding under a statutory dedication. No statute operates in their favor, or affects their rights. They hold under a grant by deed. The character of the fee conveyed must be ascertained by a construction of the words of that deed. If the conveyance is less than an absolute fee simple, it must be because the deed has so limited and qualified the fee conveyed as to make it dependent upon conditions either precedent or subsequent. To determine this, we may look to the whole deed, and search its four corners, to ascertain the intent of the grantor. If the deed refers to some other paper as containing the boundaries or as defining

the objects and purposes of the grant, we may look to this paper thus, by reference, made a part of the grant. If by apt words the quantity of estate to be conveyed is measured and defined in another instrument, then we may look to that other instrument to see how far the estate is a qualified one. This is all that we understand by "reading into this deed the act of 1867." We are, however, to bear in mind that the instrument we are construing is a deed. That it purports on its face to be a grant "absolute" and in fee. If it is less than this, it is because by necessary implication these words are qualified by the reference made to another instrument, to wit, the void act of 1867. If this is less than a fee absolute, —if this is a deed subject to be defeated by a condition,—that condition must clearly and unambiguously appear from the words of the instrument. "Conditions are not to be raised readily by inference or argument." Co. Litt, 205b, 219b; 4 Kent, Comm. (6th Ed.) 129-132.

On this subject, Mr. Washburn says:

"But conditions subsequent, especially when relied on to work a forfeiture, must be created by express terms or clear implication, and are construed strictly." 2 Washb. Real Prop. (6th Ed.) p. 6.

Starting out with the fact that this is a grant by deed, and that it conveys a fee, we are to inquire whether this fee has been divested or defeated by the occurrence of any event subsequent to the execution of the deed. Conditions subsequent are, as the term implies, such as, "when they do happen, defeat an estate already vested." What are these conditions which have operated to defeat the estate conveyed? The insistence is that the legal impossibility of the future use of this lot as a burying ground operates to determine the fee. Does the deed, either expressly or by strong and clear implication, provide that the estate shall be forfeited when this lot shall cease to be used for burial purposes? It is to be observed at the outset that the deed does not in terms provide for any such contingency. There is no reservation of a right of re-entry, and none of the words are used which, according to the cases, ordinarily imply a condition. These words or forms of expression are usually found where the grantor intended to qualify his conveyance. Among the forms of expression which imply a condition in a grant, "the writers," says Mr. Washburn, "give the following: 'On condition;' 'provided always;' 'if it shall so happen;' or 'so that he the grantee pay,' etc.; * * * and grants made upon any of these terms vest a conditional estate in the grantee." The same author says: "And it is said other words make a condition, if there be added a conclusion with a clause of re-entry, or, without such clause, if they declare that, if the feoffee does or does not do such an act, his estate shall cease or be void. * * * But it is said 'that if one makes a feoffment in fee,' 'ea intentione,' 'ad effectum,' * * * that the feoffor shall do or not do such an act, these words do not make the estate conditional, but it is absolute notwithstanding. * * * And yet these words may create a condition if a right of re-entry is reserved in favor of the grantor in case of failure to carry out the intention thus expressed." 2 Washb. Real Prop. (5th Ed.) 3.

As stated, none of the words which technically imply a conditional estate are found, and there is no clause of re-entry. Yet a condition subsequent may be so strongly and clearly implied from the whole tenor of the deed as to demand recognition, though not expressed in technical language. This is the contention upon which counsel for appellee has planted this case. Let us look at the circumstances under which this deed was made.

(1) The lots had been dedicated by a good common-law dedication, as far back as 1802, by the ancestor of plaintiff, as a public burying ground.

(2) In consequence of a trespass, a suit had been brought, the progress of which was embarrassed because the common-law dedication had not operated to pass title.

(3) To obviate this difficulty, the legislature had passed the act of 1867.

(4) This act was absolutely void. Its object was to divest the legal title out of the heirs of John Young, and vest it in the council, and thus turn a mere easement into a legal estate. The act was inoperative because it was not in the power of the legislature to thus divest the title out of the legal owners, or enlarge the estate which had been granted. It was not "due process of law," and was a taking of property without compensation. *Le Clerq v. Gallipolis*, 7 Ohio, 217; *Board of Education v. Edson*, 18 Ohio St. 221. So far as the act undertook to vest power in the councils to manage and preserve such burial grounds, it was likewise inoperative, because it was applicable only to such burial places as were described in the act, to wit, grounds, the title to which should vest under the act. The whole act was then void.

(5) At the date of the act of 1867 the legal title reserved by John Young was in Charles Young, partly by descent, and partly as a result of conveyances to him by the other heirs of John Young. These lots had been exclusively used for burial purposes, and had been so used for some 65 years. This use seemed likely to be perpetual, and the naked legal title outstanding in Young could not have been regarded as of any considerable value. That the time would ever come when, by abandonment, his right of possession should be restored, was one of these improbable events hardly worth serious consideration.

(6) The "right, title, claim, and interest" of Charles Young consisted in a naked legal title, coupled with a possibility that at some time the public use might become impossible, and his right of possession be restored.

(7) This act being at least of doubtful value, Charles Young was applied to to convey the title and interest vested in him to the village of Youngstown. As the result of this application, the deed now under consideration was executed. It was not a gift or donation. He required the payment of \$15 as a consideration, and only permitted a delivery of the deed upon the assumption by the city of a debt he owed of that amount. Looking to the situation as it stood then, this was probably an adequate consideration for the quit-claim he then executed.

(8) He used words fully adequate to convey absolutely any interest or possibility of interest. These words were: "Do by these presents absolutely give, grant, remise, release, and forever quitclaim." These words are followed by the declaration that the lots so conveyed were "to be under the authority and control of its proper council and municipal authority, in conformity with the act of the legislature of Ohio in that behalf, all such right and title as I, the said C. C. Young, as one of the heirs, and as the assignee and grantee of the other heirs, of John Young, the original proprietor of said township and village lands, have, or ought to have, in and to the following lands. * * * To have and to hold the premises aforesaid unto the said grantee, said incorporated village of Youngstown, and its successors, forever."

Construing this deed in the light of all the circumstances, giving due and proper weight to all the words of the deed, and bearing in mind the rule that conditions subsequent, when relied upon to work the forfeiture of a vested estate, must be created in expressions or by implication so clear and unambiguous that there can be no doubt as to the intent of the grantor, we reach the conclusion that the declaration that these lots were to be under the control of the municipal authority, "in conformity with the act of the legislature of Ohio in that behalf," is only declarative of the use, and directory as to the administration, of the property, by the council as trustee. The power of the council comes from the deed and the general law concerning trusts, and does not spring from the void act of 1867.

That the grantor ever contemplated a reverter is not to be presumed, in the light of the presence of absolute words of conveyance and quitclaim, and the absence of any provision for a reverter or re-entry. If it had been intended that the conveyance should terminate on an abandonment of the public use, it is strange that some language was not used indicative of such purpose. Too much weight was attached to the circumstance that the city wished the title in order to maintain a suit against a trespasser. Such suit could have been maintained without the title. Too little weight has been given to the fact that the deed was upon a valuable consideration; to the fact that it was a quitclaim of all right, title, and interest; to the fact of a previous common-law dedication; and to the failure, under such circumstances, to make the title subject to an express right of re-entry. The minuteness of direction concerning the administration of property conveyed to a public use is insufficient to take the case out of the rule, supported by an overwhelming weight of authority, that the mere expression of a purpose or particular use to which property is to be appropriated will not make the estate a conditional one. *Rawson v. Uxbridge*, 7 Allen, 125; *Raley v. Umatilla Co.*, 15 Or. 180, 13 Pac. 890; *Packard v. Ames*, 16 Gray, 327; *Ayer v. Emery*, 14 Allen, 67; *Brown v. Caldwell*, 23 W. Va. 187; *First M. E. Church of Columbia v. Old Columbia Public Ground Co.*, 103 Pa. St. 608; *Thornton v. Trammell*, 39 Ga. 202; *Sohier v. Trinity Church*, 109 Mass. 1; *Congregational Soc. v. Stark*, 34 Vt. 243; *Strong v. Doty*, 32 Wis. 381; *Farnham v. Thompson*, 34 Minn. 330, 26 N. W. 9; *Episcopal Mission v. Appleton*, 117 Mass.

326; *Kerlin v. Campbell*, 15 Pa. St. 500; *Baldwin v. Atwood*, 23 Conn. 367; *Graves v. Deterling*, 120 N. Y. 447, 24 N. E. 655; *Stanley v. Colt*, 5 Wall. 119.

"Words more often create a condition in a will, which would not, if used in a deed; as, when, in a deed, an intention is expressed in devising the land that the devisee should or should not do certain things with respect to it, it may be construed as creating a conditional estate in him." 2 Washb. Real Prop. 3.

But, as illustrating the strong leaning of the court against the forfeiture of estate once vested, the case of *Stanley v. Colt*, supra, may be cited. In that case the devise was to the Second Ecclesiastical Society of Hartford of the real estate of the testator, "to be and to remain to the use and benefit of said society and their successors, forever." Then followed this: "Provided, that said real estate be not ever hereafter sold or disposed of, but the same may be leased or let, and the annual rents or profits applied to the use and benefit of the society;" and in connection were added numerous directions for the management of the property and guidance of the trustees. The property was sold. The heir at law sued the purchasers, and contended that the estate was upon condition, and had been forfeited by the sale. The case was elaborately argued, and the unanimous opinion of the court was that the estate was not a conditional one. Mr. Justice Nelson, speaking of the purpose of the testator, as expressed in the will, said:

"The heirs cannot recover unless they can show that the devise was upon some condition, or that there was some limitation made in the will in their favor. It is not sufficient to show that the lands have been diverted from the use for which they were devised, or that they had not been enjoyed by the beneficiaries in the particular manner described by the testator; for, where lands have been devised to a charitable use in fee simple, the heir has no more interest in, and no more right to, the lands, than he has when they are devised to an individual in fee simple, either directly or in trust. The public have an interest in the execution of public charities, and the beneficiaries have an interest; and if the directions contained in the will of the testator, either as to the manner of enjoyment or the objects who are to be benefited by his bounty, are departed from, either the public or the beneficiaries, if they are sufficiently certain and have a sufficient vested interest, may have a remedy. * * * That although the law allows testators to impose conditions subsequent, a breach of which will create a forfeiture, yet the law deems it improbable that the testator will do so, and therefore leans against any construction which would result in such a condition. Courts will not give it that effect by construction."

The court concluded that the estate was not a conditional one, though there occurred the word "provided," and the supposed conditions were to be regarded as mere "limitations in trust," and not as conditions subsequent.

Baldwin v. Atwood, supra, is another case much in point, and illustrating the tendency of the courts to construe directions concerning the administration of property conveyed for a particular use as simply creating a trust cognizable in equity, and not constituting a conditional grant. The reporter's headnote is a concise abstract of the case, and is as follows:

"Where a deed of land stated, in the premises, that the land was 'conveyed in trust for the use and purposes hereinafter mentioned,' and, in the habendum, that the grantees were 'to have and to hold said land in trust that they shall at all times forever hereafter permit such ministers and teachers belonging to the Methodist Episcopal Church in the United States of America as shall be duly authorized, from time to time, by the general conference of the ministers and teachers of said church, or by the annual conference authorized by the general conference, to preach and expound God's holy word in the house or place of worship which has been erected on said land for the use of the members of said church,' and said deed subsequently prescribed the mode of supplying trustees in the place of the grantees who might die or cease to be members of the church for whose benefit the grant was made, in further trust and confidence, it was held that such deed was not to be construed as a deed on condition, in which case a breach of it would be followed by a forfeiture of the estate, but as a deed in trust, cognizable in chancery. Therefore, where the land described in such deed was afterwards conveyed, with the consent of the cestuis que trustent, and sold by the trustees for other purposes, it was held that such disposition did not operate as a forfeiture of the estate to the heirs of the grantor."

In *Thornton v. Trammell*, *supra*, the deed was a conveyance in fee, and contained the following words:

"It being expressly understood by the parties that the said tract or parcel of land is not to be put to any other use than that of a depot square, and that no business or improvements are to be put on the said tract but that which is immediately connected with the Western & Atlantic Railroad."

Held, that these words in the deed were words of covenant, and not words of condition, and that the plaintiff's remedy for a breach thereof was an action thereon for damages, and not a forfeiture of the estate for condition broken.

In *Rawson v. Uxbridge*, *supra*, the grant was of land which had been used as a burying ground, in consideration of love and affection, "for a burying place forever." Held, that it was not a grant on condition subsequent.

Hayden v. Stoughton, 5 Pick. 528, and *Austin v. Cambridgeport Parish*, 21 Pick. 215, were both cases arising on deeds containing technical words creating a conditional estate, and are in entire accord with the Massachusetts cases before cited.

Hunt v. Beeson, 18 Ind. 380, was a donation of land to a town for the purpose of erecting a tanyard thereon. This was held to create a condition. The case was wrongly decided on the authority of *Hayden v. Stoughton*, *supra*, in which case there were technical words of condition,—a fact which the Indiana court undoubtedly overlooked.

But if we are wrong in the conclusion that we have announced, that the fee conveyed was not a base fee, and not subject to forfeiture for condition broken, still, the plaintiff ought not to recover, because the forfeiture is excused when the act of the law has prevented the further use of the estate for the public purposes intended by the grantor.

These lots were used for burial purposes so long as such use was permitted by law. The cessation was the direct result of the law which prohibited a longer use. The council of the village of Youngstown were the trustees holding the legal title and protect-

ing the use. The people of Youngstown were the beneficiaries under the trust. The council, in their character as trustees, could do no act to defeat the beneficial interest of the public. A court of equity would take cognizance, and restrain any act calculated to defeat the use. *Barclay v. Howell's Lessee*, 6 Pet. 498. As trustees the council could not, without the voluntary acquiescence of the cestui que trust, abandon the use or defeat the estate. *Id.*

The double character of the council is well illustrated in the case of *Corporation of the Brick Presbyterian Church v. City of New York*, 5 Cow. 538. The city of New York conveyed to the plaintiffs, in 1766, a tract of land. The lessees covenanted to pay forever an annual rent; that a brick church should be built thereon, or the premises used as a cemetery; also, that the premises should never be used for any secular purposes. The city covenanted that the lessees should forever quietly enjoy, use, and occupy the premises without let or hindrance. The city council, in 1823, by ordinance prohibited the use of the premises as a cemetery. The action was for a breach of the covenant. The city justified its ordinance under its charter. The question was whether the covenant for quiet enjoyment had been breached by the city. The court said:

"The principal question, and the only one which is necessary to decide, is whether by the law of October, 1823, it is per se a violation of the covenant for quiet enjoyment contained in the deed of the 25th of February, 1766, for which the defendants are liable to pay damages. The validity of the by-law is asserted by both parties. We are relieved, therefore, from any inquiry on that point. The defendants are a corporation, and in that capacity are authorized, by their charter and by-law, to purchase and hold, sell, and convey real estate in the same manner as individuals. They are considered a person in law, within the scope of their corporate powers, and are subject to the same liabilities, and entitled to the same remedies, for the violation of contracts, as natural persons. They are also clothed, as well by their charter as by subsequent statutes of the state, with legislative powers, and, in the capacity of a local legislature, are particularly charged with the care of the public morals and the public health within their jurisdiction. In ascertaining their rights and liabilities as a corporation or as an individual, we must not consider their legislative character. They had no power, as a party, to make a contract which should control or embarrass their legislative powers and duties. Their enactments in their legislative capacity are to have the same effect upon their individual acts as upon those of any other persons or the public at large, and no other effect. The liability of the defendants, therefore, upon the covenant in question, must be the same as if it had been entered into by an individual, and the effect of the by-law upon it the same as if that by-law had been an act of the state legislature,—is expressly authorized by the legislature; and whether it be their act, or an act of the local city legislature, makes no difference. *Dartmouth College v. Woodward*, 4 Wheat. 652. The plaintiffs, then, are entitled to the same remedy as if the premises had been conveyed to them by an individual, under the like conditions and covenants. This being so, the defendant's proposition is that, the act of the legislature rendering the covenant unlawful, the covenant itself becomes inoperative. There are but few authorities on this question, and those few are at variance. The case of *Brason v. Dean*, 3 Mod. 39, decided in 1683, was covenant upon a charter party for the freight of a ship. The defendant pleaded that the ship was loaded with French goods prohibited by law to be imported; and, upon demurrer, judgment was given for the plaintiff, for the court were all of opinion that if the thing to be done was lawful at the time when the defendant entered into the covenant, though it was afterwards prohibited

by act of parliament, yet the covenant was binding. But in the case of *Brewster v. Kitchin*, 1 Ld. Raym. 317, 321, A. D. 1698, a different and a more rational doctrine is established. It is there said: 'For the difference, when an act of parliament will amount to a repeal of a covenant, and when not, is this: When a man covenants not to do a thing which was lawful for him to do, and an act of parliament comes after, and compels him to do it, then the act repeals the covenant, and vice versa; but when a man covenants not to do a thing which was unlawful at the time of the covenant, and afterwards an act makes it lawful, the act does not repeal the covenant.' In 1 Salk. 198, where the same case is reported, the proposition is thus stated: 'Where H. covenants not to do an act or thing which was lawful to do, and an act of parliament comes after, and compels him to do it, the statute repeals the covenant. So, if H. covenants to do a thing which is lawful, and an act of parliament comes in and hinders him from doing it, the covenant is repealed; but if a man covenants not to do a thing which then was unlawful, and an act comes and makes it lawful to do it, such act of parliament does not repeal the covenant.' That such is the correct rule, as between individuals, seems to be admitted by counsel for the plaintiffs. But it is contended that the rule is not applicable to a case where the same party makes the covenant, and afterwards makes the legislative act which abrogates the covenant. There is indeed a seeming inconsistency; but the solution has already been given, viz. that the defendants had no power to limit their legislative discretion by covenant; and they are not estopped from giving this answer."

The case was followed and approved in *Coates v. Mayor, etc.*, 7 Cow. 585.

But, as an arm of the civil government, the council were vested with public power, and, in the interest of the public health, might by law prohibit the further use of the property for burial purposes. This power of the city council as a lawmaking body is to be distinguished from its power as trustee under the deed. The same body had two characters and two functions. In that of trustee, its power proceeded from the deed. The trust thus vested could not be abandoned effectually without concurrence of the cestui que trust. In their character as an arm of the state government, it could not be restrained by the trusts imposed by the deed. Neither could the cestui que trust be said to have voluntarily abandoned the use, when the law stepped in and forbade, by its its penalties, a further use.

These principles are as well settled in the law as are those principles relied upon by the plaintiff as producing a reverter. Mr. Washburn, in speaking of what will excuse a forfeiture, says:

"As a condition subsequent may be excused when its performance becomes impossible by the act of God, or by the act of the party for whose benefit it was created, or is prohibited or prevented by act of the law, so it may be waived by the one who has a right to enforce it." 2 Washb. Real Prop. 15.

The case of *Marquis of Anglesea v. Rugeley*, 6 Q. B. 107, is in point. Land was demised to trustees for the benefit of the poor of a parish, the trustees covenanting to build a workhouse thereon, and to use, occupy, possess, and enjoy the premises for the sole use, maintenance, and support of the poor of R., and not to convert the building or the land, or employ the profits thereof, to any other use, intent, or purpose whatever. There was a proviso for re-entry on breach of the covenant. The house was built, and the land was used for many years as required by the deed. After-

wards, an act of parliament was passed, and parish R. incorporated, with others, and a union poorhouse provided, to which the act required all paupers should be removed. The heirs of the grantor brought suit in ejectment, claiming the right of re-entry for breach of the condition. The court held that, "even if the condition was not performed, it appears to us that the nonperformance would in this case be excused, as being by act of law, and involuntary on the part of the lessees." The court cited Bac. Abr. tit. "Condition;" Com. Dig. tit. "Condition;" and the case of Brewster v. Kitchell, 1 Salk. 198. The case of Lord Grantley v. Butcher, reported in 51 E. C. L. 115, is to the same effect.

We are therefore led to the conclusion that if the title was a base or conditional one, yet the breach of condition relied upon as creating a right of re-entry is excused, because the breach was the act of the law.

The judgment should be reversed, and the cause remanded, with directions to render judgment for the defendants.

UNITED STATES v. SHAW.

(District Court, D. Kentucky. November 27, 1893.)

CRIMINAL LAW—NEW TRIAL—DISCHARGE OF JUROR.

While one charged with a misdemeanor may by consent waive a full jury, yet the discharge of a juror by consent of counsel in defendant's absence, of which he is not informed, and which he fails to notice at the trial until the polling of the jury after the verdict, gives him a right to a new trial.

At Law. Indictment of W. P. Shaw for violation of section 11 of the act of January 16, 1883, forbidding the solicitation of contributions for political purposes from government employes. Supp. Rev. St. (2d. Ed.) p. 395. The defendant, having been tried and convicted, entered a motion for a new trial. Motion sustained, and new trial granted.

George W. Jolly, U. S. Atty.

A. E. Willson, C. H. Gibson, and B. Vance, for defendant.

BARR, District Judge. We have considered with care the 21 grounds filed November 4th by defendant for a new trial, but do not think they present any good reason for the granting of a new trial. The additional ground tendered by the defendant, through his original counsel, on the 11th instant, and allowed to be filed on the 17th instant, with the affidavit of defendant, is important, and needs to be carefully considered and determined. That ground is as follows, viz.:

"United States, Plaintiff, vs. W. P. Shaw, Defendant.

"Motion of Defendant for a New Trial.

"Defendant files his affidavit, and moves the court and prays the court to grant him a new trial because of the discharge of Theophilus Pendleton, one of the jury, before the verdict, and during the trial, and moves

the court to arrest judgment, and not to pronounce nor enter judgment against defendant upon the verdict of eleven jurors herein.

"Augustus E. Willson, of Counsel for Defendant."

The affidavit of defendant states, in substance, that the written consent which his counsel gave the court for the discharge of Mr. Pendleton, one of the jury, was without his knowledge or consent, and that he had no information or knowledge of the fact that the jury only consisted of 11 men until the trial was finished and the verdict rendered, and that the first knowledge or information of the fact was when the jury was polled after the return of the verdict of "Guilty." This statement was of such a character that the court thought it proper to hear further evidence upon the question of the defendant's want of knowledge or information of the absence of the juror Pendleton, and both sides were invited to introduce oral evidence upon the subject, and did so. On this investigation it was shown substantially as follows, viz.:

A jury of 12 men were selected and sworn to try defendant on Saturday, October 21, 1893. The selection was completed about 2 o'clock P. M. of that day, and some evidence heard, when the jury was excused until Monday morning, October 23d. On the morning of Sunday, October 22d, Mr. Pendleton, one of the jury, received a telegram from home stating that his wife's mother was dying, and that he should come home. He, upon the receipt of this telegram, made application to the judge to be excused and discharged, and this application was submitted to the counsel of the defendant by Judge Barr, and resulted in this written consent being handed to him, viz.:

"4,664.

District Court of the United States, District of Kentucky.

"United States vs. W. P. Shaw.

"We hereby consent and agree that the court may discharge Theophilus Pendleton, one of the jurors in this action, and that the trial now pending may proceed before the remaining eleven jurors with the same force and effect as if said juror had not been discharged: provided, however, that this consent, made for humanity, because of the news that said juror's wife's mother is dying, shall not be construed nor treated as a waiver of any other objection, exception, or other matter of defense which may or might be made, had, or taken if this consent had not been made or given, or if the trial had proceeded with the complete jury.

"Charles H. Gibson,

"Augustus E. Willson,

"Burton Vance,

"Attorneys for Defendant."

Mr. Willson, when he delivered this writing to the judge, stated he desired to see Mr. Shaw, and had been unable to find him. Mr. Jolly was absent from the city, and hence his consent could not be obtained; but, as the matter was pressing, Judge Barr assumed to act for him, and discharged the juror Pendleton in the presence of Mr. Willson. The next morning, Monday, after court had been opened, the judge informed the district attorney that one of the jurors had been excused, and the reason therefor, and he approved it. This was done while the court was in session, and immediately after the opening, but not publicly. About the same time, and im-

mediately after, Mr. Willson came up to the bench, and suggested to the court that no record be made of the absent juror, and that the case proceed as if the 12 jurors were present. This plan was accepted by the court, and the trial proceeded without any formal consent being entered, or, indeed, any record at all being made of the absence of Mr. Pendleton.

The district attorney proved by the deputy marshal and others that the jury sat in twelve chairs to the left of the bench, in two rows,—six in each,—and that they sat separate and apart from all others, and that one of these chairs remained vacant all of Monday, during the trial, within eight or ten feet from the defendant, who remained in court during the entire trial, which continued three days, seated from the jury about that distance. He also proved by several witnesses they noticed as soon as they came in the court room the absence of one of the jury, and made inquiry about it. The defendant swore that he did not observe the vacant chair, nor that there were only eleven jurors, and that he had no knowledge or information that one juror had been excused, or that there were only eleven jurors trying him; that his counsel did not tell him of the agreement or consent they had made, nor did they give him any information upon the subject; and that his first information or knowledge upon the subject was when the jury was polled after the verdict, and one of the jurors did not answer to the rolloall of the clerk. Both Mr. Willson and Mr. Vance state they did not inform the defendant of the agreement which was made to excuse one of the jury, nor did they inform him that one of the jurors had been excused, or that there were only eleven jurors trying him; and, as far as they knew, he had no information upon the subject. Mr. Gibson was out of the city when this matter was investigated, and did not testify, but we should not draw any inference from this against defendant. Mr. Willson not only confirmed defendant in his statement that his counsel did not inform him of the consent they had given, but stated his reasons therefor, as will be seen from these extracts from his statement, viz.:

"We came here, and I told the judge, frankly, that we had not been able to find our client, and suggested that the matter go on, and the absence of the juror be ignored; that would be the best way. My idea was not to pay any attention to it. I did intend to speak to Shaw the next day about it. There was no question of bad legal faith. I did not think of the Goldsmith Case at the time. The court had begun when I came in. I am not positive of that. But I know it didn't occur for me to speak to Shaw the next morning, and it didn't occur for me to speak to him the next day, or the next day; and I finally decided not to mention it, because I had suggested the policy of ignoring the absent juror. If Shaw had asked me anything about it, I would have told him the whole circumstances. My conviction was that probably the trial would go through without the absence of the juror being noticed. I was very much worried about the matter, and made a great many resolutions to myself never to make agreements without seeing my client. I felt that I had made a mistake, which was an injustice to Shaw. I had acted according to the light I had at the time, with no possible purpose or thought. At the time of the agreement, I had no idea of it being grounds for a new trial. The question was whether it was best for Shaw to run the risk of having one less juror to have to agree against him. I didn't mention the matter to Shaw until after the poll of

the jury developed the fact that one did not answer, and he asked me about it, and I hurriedly explained it to him. * * * Question by the Court: You said on Sunday, and then on Monday, that it was not worth while to make a note of it? A. I know that was my idea of the best way to reach it. Q. In that connection, did it not occur to you,—the propriety of your calling Shaw's attention to the matter? Shaw was here when you made the suggestion on Monday? A. I really did not notice about Shaw. It seemed to me this: that if I mentioned the matter to Shaw, and he asked me the legal effect, I would have to look the whole matter up and tell him, and I was in doubt and worried about the matter. I was not afraid or ashamed of his criticism, but the question in my mind was this: that it is very difficult for a lawyer to explain offhand the effect of a thing like this, and I thought, if I told Shaw, he would want to know all about it, and I should have to study up the whole thing. We had taken more liberty in signing the paper than I thought we ought. I was not dead sure that a lawyer should do that, but the humanity of the case had governed me, and it was very likely I brought that matter up again before your honor Monday morning; that is, the matter of ignoring the absence of the juror entirely. I know I thought that was the best thing not to mention it. I know I did not mention matters to Shaw, and I know I deliberated whether it was best to mention it to him or not. By Mr. Jolly: Do I understand that you mentioned this matter Monday morning to the court? A. I did. I made the suggestion Sunday, possibly, and then Monday, that the absence should be ignored; that the paper should be preserved. I don't remember how much I reasoned about telling Shaw, but I know I thought telling Shaw would not bring it back. I had made no examination of the authority, except that I knew generally about that New York case—Cancemi Case. I do not know that I remember that now. Of course, I had heard of the Goldsmith Case."

Although it would seem to be most probable, from the defendant's close proximity to the jury, continued for three days, and the strong professional obligation of his counsel to inform him of so important a fact as the excusing of a juror who was trying him for a serious offense, yet this probability—strong as it should be in the minds of all intelligent men familiar with court trials—is, we think, more than counterbalanced by the sworn, direct statements of the defendant himself, and that of his counsel, Messrs. Willson and Vance. Hence, his motion for a new trial should be considered as if Mr. Pendleton, the juror, had been excused by order of court, and with the consent of district attorney and the defendant's counsel only, and without defendant's knowledge, consent, or subsequent ratification.

The sixth amendment to the federal constitution declares that "in all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury of the state and district wherein the crime shall have been committed;" and, in the seventh amendment, that "in suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved."

These provisions are limitations upon the power of the United States, and a guaranty to the citizen of the right to a jury trial, but it is not an abridgement of, or a limitation of, the right of a citizen to waive a jury trial. It is conceded that by jury is meant a common-law jury, of 12 qualified persons, and it may also be admitted that, in crimes where the punishment might be death, the accused could not, at common law, waive a jury of 12 persons, and

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try with a less number. This was, we think, because, at common law, and under the present law, life, being the immediate gift of the Creator, could not legally be disposed of or destroyed by any individual, neither by himself nor by any other of his fellow creatures, merely upon their own authority. 1 Bl. Comm. p. 133. Many of the cases where the right of the accused to consent to the discharge of a juror is denied were those where the accused was being tried for murder, and there might be capital punishment. See *Cancemi v. People*, 18 N. Y. 128; *Territory v. Ah Wah*, 4 Mont. 149, 1 Pac. 732; *Hill v. People*, 16 Mich. 354.

In the case under consideration, the offense charged, of which the defendant has been convicted, is declared by the statute to be a misdemeanor; and had the juror Pendleton been discharged by the court with the consent of the defendant, we are of the opinion that both reason and the weight of authority would have sustained the action of the court, and the discharge would not have been a legal ground for a new trial. See *Tyra v. Com.*, 2 Metc. (Ky.) 1; *State v. Kaufman*, 51 Iowa, 578, 2 N. W. 275; *Com. v. Dailey*, 12 Cush. 80.

The case of *Com. v. Dailey*, 12 Cush. 80, was decided by Chief Justice Shaw, and is an able and elaborate opinion, and successfully answers all the arguments against the right of a person charged with a misdemeanor from waiving a jury of 12 persons, and trying with 11 jurors. In that case the juror was withdrawn at the request and by the consent of defendant's counsel, on account of the illness of the juror's father. The defendant was present at the time, but said nothing, nor did his counsel consult with him, but after the verdict he filed a motion in arrest of judgment. This case, seemingly, is an authority to sustain the right of counsel to give the consent which was given here; but a careful reading of the opinion satisfies me the court assumed that as the accused was present, and remained silent, he consented to the action of his counsel.

Here the consent was given, not in open court, in the presence of the accused, but in his absence, and, according to the weight of the evidence, without his consent or knowledge then or thereafter. The right to bind the defendant by this consent must therefore exist, if at all, by reason of the relation of that of attorneys employed to defend him. I have seen only two cases upon this point, and they are against such an authority. See *State v. Wamire*, 16 Ind. 357, and *Brown v. State*, Id. 496. In case of *State v. Wamire*, the accused was not present in court when his counsel gave consent to the discharge of the jury without a verdict, when there was no imperious necessity therefor. The court stated that this could not be done by the counsel alone, without giving any reason. In the case of *Brown v. State*, reported in same volume, (page 496,) the counsel waived a trial by a jury of 12 men, and agreed to a trial with a less number. The defendant was present in court, but it appeared by his affidavit that he was not consulted, and did not know he could object to the act of his attorney. The court held that this waiver was not sufficient, and did not bind the defendant. The court, in this case, as in the other, gave no reason for its decision.

It seems to me the question is one of agency, and that while the attorney may be presumed to have, and does have, authority to act for his client in many matters pertaining to a trial, in criminal trials he does not have authority to waive a trial by a jury of 12 men, and accept a less number, especially when it is affirmatively shown the client was without any knowledge or information of the action of his attorneys, and was kept in ignorance of it until the verdict was rendered against him. It does not at all affect defendant's legal right that the court was misled, and that, had his counsel informed him of their consent, and he had objected, and his objection been made known to the court on Monday morning, the jury could have been legally discharged, and the case continued, because of illness in this juror's family, or the trial been delayed until the absent juror had been sent for and returned. Nor does it matter, on this motion, that the defendant's counsel seem to have forgotten their professional duty to him, in thus keeping him in ignorance of this consent during his entire trial. Their sense of duty, however, revived at an opportune time, and we think they have succeeded in presenting for their client a valid ground for a new trial.

I conclude that, upon a preponderance of the evidence, the defendant did not know of or ratify the change which was made in his trial jury, and is entitled to a new trial; and his motion for a new trial will be granted, and it is so ordered.

Ex parte EDGERTON.

(Circuit Court, D. South Carolina. December 11, 1893.)

CONSTITUTIONAL LAW—INTERSTATE COMMERCE—INTOXICATING LIQUORS.

There is no power in a state to forbid the importation of intoxicating liquors, either under the Wilson act of 1890, or independently thereof, and one who merely brings barrels of liquor into a port of South Carolina, and unloads them on the dock, cannot be punished under the state "dispensary" law. *Leisy v. Hardin*, 10 Sup. Ct. 681, 135 U. S. 100, and *In re Rahrer*, 11 Sup. Ct. 865, 140 U. S. 564, followed.

Habeas Corpus. Prisoner discharged.

Bryan & Bryan, for petitioner.

W. St. J. Jervey, for respondent.

SIMONTON, District Judge. This case comes up on a petition for habeas corpus, the rule thereon, and the return thereto. James E. Edgerton, the petitioner, is the general freight and passenger agent of the Clyde Line of steamships, and its general manager in the port of Charleston. These steamships ply between New York, Charleston, and Jacksonville over the high seas. Their business is that of common carriers engaged in foreign commerce and in commerce between the states.

On the 19th of September, 1893, there were brought to this port in the steamship *Seminole*, and unloaded at the dock of the line, along with other freight of a miscellaneous character, 12 barrels.

Each barrel had its mark,—nine of them were lettered; three had on them the name of the consignee in full. On each barrel was a statement of its supposed contents,—two were marked "Soda Water;" five, "Ginger Ale;" one, "Sarsaparilla;" one, "Mineral Water;" one, "B Cider." The manifest showed that all of the barrels were shipped in due course at New York, for delivery at the port of Charleston. On reaching the dock they were discharged with, and as a part of, the ship's cargo. On that day one R. H. Pepper obtained a warrant from a trial justice in Charleston, which, after reciting that complaint had been made before him by said Pepper that "James E. Edgerton, general freight agent of the Clyde Steamship Company, has brought into this state 12 barrels of intoxicating liquors, in violation of sections 2 and 25 of an act approved December 24, 1892," commands the arrest of Edgerton, to be brought before the justice, to be dealt with according to law. The affidavit with the warrant alleges that "Edgerton did unlawfully bring into this state the intoxicating liquors, contrary to the act of assembly in such case made and provided, and that Edgerton is not a licensed dispenser, and is without any permission or license to bring in the same." The petitioner was arrested, carried before the trial justice, released on bail, was afterwards surrendered by his sureties, and is now in custody of the sheriff of Charleston county under this warrant. He prays his discharge, for that his arrest, and the act of assembly upon which it is based, are in contravention of the interstate commerce law, of which he seeks the protection. The return of the sheriff gives as the cause of detention that Edgerton has been under recognizance to answer for a violation of the law of the state, and was surrendered by his sureties. The barrels in question were opened, and were found to contain beer,—an intoxicating liquor.

Looking to the warrant as stating the cause and ground of arrest, and assuming that the act of assembly which it quotes as its authority does in fact forbid the bringing of intoxicating liquors into this state, the question is, can any state forbid the importation of intoxicating liquors into its territory by a common carrier engaged in interstate and foreign commerce? The authority to regulate commerce with foreign countries and between the states is exclusively in the congress of the United States. When congress has not legislated on any part of this subject, such commerce is free. *Bowman v. Railway Co.*, 125 U. S. 465, 8 Sup. Ct. 689, 1062. *Mr. Justice Field, in County of Mobile v. Kimball*, 102 U. S. 696, says:

"That power [to regulate commerce] is without limitation. It authorizes congress to prescribe the conditions upon which commerce in all its forms shall be conducted between our citizens and the citizens or subjects of other countries, and between citizens of the states, and to adopt measures to promote its growth and insure its safety. * * * Some of the subjects of commerce are national in their character, and admit and require uniformity of regulation, affecting alike all the states. * * * Of this class is that portion of commerce with foreign countries or between the states which consists in the transportation, purchase, sale, and exchange of commodities. Here, then, can be of necessity only one system or plan of regulations, and that congress alone can prescribe."

Mr. Justice Lamar, in *Kidd v. Pearson*, 128 U. S. 17, 9 Sup. Ct. 6, says:

"The power expressly conferred on congress to regulate commerce is absolute and complete in itself, with no limitations other than are prescribed in the constitution; is to a certain extent exclusively vested in congress, so far free from state action; is coextensive with the subject on which it acts, and cannot stop at the external boundary of a state, but must enter into the territory of every state whenever required by the interests of commerce with foreign nations or among the several states."

In *Bowman v. Railway Co.*, 125 U. S. 465, 8 Sup. Ct. 689, 1062, a statute of Iowa forbidding common carriers to bring intoxicating liquors into the state from any state or territory without being first furnished with a certificate under the seal of the auditor of the county to which it is to be transported or consigned, certifying that the consignee, or the person to whom it is to be transported or delivered, is authorized to sell intoxicating liquors in the county, although adopted without a purpose of affecting interstate commerce, but as a part of a general system designed to protect the health and morals of the people against the evils resulting from the unrestricted manufacture and sale of intoxicating liquors within the state, is neither an inspection law nor a quarantine law, but is essentially a regulation of commerce among the states, affecting interstate commerce in an essential and vital part, and, not being sanctioned by the authority, express or implied, of congress, is repugnant to the constitution of the United States.

In *Leisy v. Hardin*, 135 U. S. 100, 10 Sup. Ct. 681, the supreme court of the United States, speaking through the chief justice, distinctly recognize intoxicating liquors as an article of commerce:

"They are subjects of exchange, barter, and traffic, like any other commodity in which a right of traffic exists, and are so recognized by the usages of the commercial world, the laws of congress, and the decisions of the courts."

The precise question we are discussing was decided in that case. It was held that, in the absence of legislation on the part of congress, no state can prohibit the importation of intoxicating liquors from abroad or from a sister state; and, further, that the police power of the state over the imported article does not commence the instant when the article enters the country, but only when it has become incorporated in and mixed up with the mass of property in the country. The effect of this decision was to protect an imported article while in the original package, and, inasmuch as the right to sell followed the right to import, the original package could be sold if unbroken, notwithstanding that the law of the state into which it was imported absolutely forbade the manufacture or sale of intoxicating liquors. To meet this last conclusion, congress passed the act of 1890 commonly known as the "Wilson Act." Its title is "An act to limit the effect of the regulations of commerce between the several states and with foreign countries in certain cases." Its provisions are:

"That all fermented, distilled, or other intoxicating liquors or liquids transported into any state or territory, or remaining therein for use, consumption, sale or storage therein, shall, upon arrival in such state or ter-

ritory be subject to the operation and effect of the laws of such state or territory enacted in the exercise of its police powers to the same extent and in the same manner as though such liquids or liquors had been produced in such state or territory, and shall not be exempt therefrom by reason of being introduced therein in original packages or otherwise." 26 Stat. 313.

It will be noticed that this act does not in any way forbid the importation of intoxicating liquors; indeed, it deals with such liquors after having been transported into any state. In this connection it is well to compare the provisions of the act of congress extending the police power of the states over nitroglycerin:

"The two preceding sections shall not be so construed as to prevent any state, territory, district, city or town within the United States from regulating or prohibiting the traffic in or transportation of those substances between persons and places lying or being within their respective territorial limits or from prohibiting the introduction thereof into such limits for sale, use or consumption therein." Rev. St. § 4280.

It will also be noted that the act proceeds at once to remedy the mischief it was intended to meet. The regulations of commerce protected the original package. Under this protection, the laws of the state against the sale of intoxicating liquors were evaded, and the laws forbidding the manufacture made nugatory. Congress placed the original package under the state police power. It cautiously went no further. But we are not left to general reasoning. The construction of this act of congress came up in *Re Rahrer*, 140 U. S. 564, 11 Sup. Ct. 865. Of it, the chief justice, delivering the opinion of the court, says:

"Congress did not use terms of permission to the state to act, but simply removed an impediment to the enforcement of the state laws in respect to imported packages in their original condition, created by the absence of a specific utterance on its part. It imparted no power to the state not then possessed, but allowed imported property to fall at once on arrival within the local jurisdiction."

The decisions of the supreme court distinctly declare that before the passage of the Wilson act no state could forbid the importation of intoxicating liquors. This last case declares that the Wilson act gave no new power to the states. All that it did was to remove a protection from the imported package, and place it under state jurisdiction. The liquors in this case without doubt come within the police powers of the state as soon as they become part of the property of the state. The commission of any act done in and about them, under such circumstances, can lawfully be punished. It is no offense on the part of this general agent of the Clyde Line that the liquors were imported as stated.

Let the prisoner be discharged.

UNITED STATES v. MAYFIELD.

(Circuit Court, E. D. Louisiana. December 11, 1893.)

CRIMINAL LAW—CONFESSIONS—CORROBORATION.

A conviction of taking a letter from a letter box, and extracting money therefrom, cannot be sustained, when denied by a plea of not guilty,

upon the mere confession of defendant to a police officer, unsupported by any evidence, that such a letter was deposited in the box, or other corroborative evidence, direct or circumstantial, of the corpus delicti.

Indictment for taking, from a letter depository box, a letter containing money. On motion for a new trial. Granted.

F. Earhart, for the United States.

Morris Marks, for defendant.

BOARMAN, District Judge. The defendant was tried and found guilty, a few days ago, under an indictment, substantially, for feloniously taking a letter from one of the letter depository boxes in this city, containing certain obligations, securities of the United States, in violation of Rev. St. § 5469. Defendant pleaded not guilty, and offered no evidence on the trial. The government relied for a conviction alone on the confessions made by defendant after his arrest to the police officers. It seems that he confessed that he had fished a letter from one of the mail depository boxes with a piece of "wire," and that the letter contained \$10 in United States currency, which he appropriated to himself. The corpus delicti was not shown by any circumstantial or direct evidence, independent of defendant's confession to the effect that he did extract the letter from the mail box. There was no offer of evidence by the government, aside from the confession, to show that such a letter as defendant admitted that he took had ever been placed in the mail box. The letter, as shown by his confession, was destroyed by defendant. No one else seems ever to have seen it at any time.

The defendant made this confession out of court. His plea of not guilty operates in law as a denial of all the charges in the indictment, and puts the government on proof to make out its case on fact and law. The jurisprudence on the matter of extrajudicial confessions, when denied by a plea of not guilty, as in this case, as shown by a large number of cases cited in 3 Amer. & Eng. Enc. Law, p. 447, seems to be substantially uniform to the effect that while such confessions of guilt should be received with great caution, and will not alone justify a conviction, yet, if they should be corroborated by circumstances, they would be sufficient for that purpose. Among the large number of cases cited, there does not seem to be any decisions cited from the Louisiana courts. It may be that the jurisprudence of Louisiana is not in line with the decisions of the many state courts cited herein; yet the court is persuaded by the view uniformly announced in those cases that, before a conviction is justified, the government should be required to establish the corpus delicti by some degree of circumstantial or other evidence independent of the defendant's extrajudicial confessions. No such evidence was offered by the government. The court, at the moment of the trial, was not willing to direct an acquittal of the accused, but is now of the opinion that a new trial should be granted.

MERROW v. SHOEMAKER et al.

(Circuit Court, E. D. Pennsylvania. December 5, 1893.)

No. 13.

1. PATENTS—ANTICIPATION—CROCHETING MACHINES.

An invention of intermittent feeding mechanism, combined with a crocheting machine, to produce an ornamental scalloped border, is not anticipated by sewing machines having intermittent feed mechanism, which could not be made available for the purpose accomplished by the crocheting machine.

2. SAME—ESTOPPEL—INTERFERENCE PROCEEDINGS—STIPULATION.

A stipulation in an interference proceeding that the preliminary statement of one of the parties thereto should be accepted as evidence on the issue of priority, that no additional evidence should be received, and that the matter should be decided upon this evidence alone, without argument, is not an admission by the other party; and the matter having been decided against him, the claim involved stricken out, and a patent issued for what remained, he was not estopped from claiming priority therefor.

3. SAME—INFRINGEMENT.

In a crocheting machine, in which several stitches are to be taken in the same place, a construction which avoids useless horizontal reciprocations of the feed dog during the formation of each group of stitches, without affecting its function of advancing the material after the group is completed, does not avoid infringement.

4. SAME—PARTICULAR PATENT.

The Merrow patent, No. 428,508, for a crocheting and overseaming machine, is not anticipated, and is entitled to a liberal construction.

In Equity. Suit by Joseph M. Merrow against John Shoemaker and others for infringement of a patent. Decree dismissing certain defendants, and for complainant as to others.

Church & Church, for complainant.

Joseph C. Fraley, for defendants.

DALLAS, Circuit Judge. This is a suit in equity brought by Joseph M. Merrow against the several defendants named, for alleged infringement of letters patent No. 428,508, dated May 20, 1890, issued to the complainant, for "crocheting or overseaming machine." The object of the invention, as stated in the specification, "is to produce new and improved ornamental crocheted finish or border by machinery upon fabrics in general, but particularly upon knitted fabrics, which have heretofore been ornamentally finished by hand, * * * by means of the improvements, * * * consisting in new mechanism and new combinations of mechanism." The invention "relates to feeding mechanism, and new and useful combinations therewith." The only claims involved are as follows:

"(1) In a machine of the character specified, the combination of the following mechanisms: A stitch-forming mechanism provided with a thread carrier and a looper, the latter co-operating with the thread carrier to engage the thread on alternately opposite sides of the fabric, and draw loops thereof to or beyond the edge of the fabric, and interloop the ends of said loops, and an intermitting feed mechanism engaging the fabric to advance the latter only after the formation of two or more complete stitches by the stitch-forming mechanism, substantially as described. (2) The combination, in a machine such as described, and with a reciprocating thread-carrying

needle, a looper engaging the needle thread alternately on opposite sides of the fabric to draw and interloop said thread along the edge of the fabric, and a fabric-feeding device operating upon the fabric to advance the latter only after several reciprocations of the needle, of a system of driving mechanism, substantially such as described, connecting the needle looper and feeding mechanism in a manner to cause the feeding devices to operate upon the fabric to advance the latter after a series of stitches have been formed, and while the needle is withdrawn from the fabric, and a loop of the thread held by the looper. (3) In a machine such as described, and in combination with a stitch-forming mechanism comprising a thread carrier and a looper co-operating to form stitches around the edge of the fabric, a reciprocating feed dog held in inoperative relation to the stitch-forming mechanism during the formation of a series of stitches, and brought into operative relation with the fabric at intervals occurring between successive series of stitches, substantially as described. (4) The combination, in a machine such as described, and with a thread carrier and a looper co-operating therewith to form loops around the edge of the fabric and interloop said loops, of a reciprocating feed dog held normally from contact with the fabric during the formation of a series of loops by the thread carrier and looper, with mechanism for elevating said feed dog into contact with the fabric to feed the latter after a cluster of loops has been formed."

These claims are free from ambiguity. They are all combination claims. Stitch-forming mechanism adapted to form stitches around the edge of the fabric, and feeding mechanism adapted to advance the fabric only between successive groups of two or more stitches, are elements of each of them. In the first, the function of the intermitting feed is stated, in general terms, to be "engaging the fabric to advance the latter only after the formation of two or more complete stitches by the stitch-forming mechanism;" the second includes the first, and adds "a system of driving mechanism * * * connecting the needle looper and feeding mechanism in a manner to cause the feeding devices to operate upon the fabric to advance the latter after a series of stitches has been formed, and while the needle is withdrawn from the fabric, and a loop of the thread held by the looper;" the third limits the feeding mechanism to "a reciprocating feed dog held in inoperative relation to the stitch-forming mechanism during the formation of a series of stitches, and brought into operative relation with the fabric at intervals occurring between successive series of stitches;" and the fourth claim is limited to the combination with the stitch-forming mechanism of a feed dog reciprocating both horizontally and vertically.

In support of the defense of anticipation, 14 patents have been placed in evidence, but only 6 of them are referred to in the defendant's brief; and to these latter, therefore, I have confined my attention. Taken separately or together, they do not disclose the invention covered by the patent in suit. As appears from the analysis which has been made of the claims in question, the gist of the invention claimed by the complainant is the combination of the stitch-forming mechanism, by which stitches around the edge of the fabric are made, with a feed mechanism operating to advance the fabric as, and only as, a series of stitches shall have been previously formed, so as to expand the outer ends of the stitches, and shape them into scallops properly spaced, whereby an ornamental border

upon the material operated upon is produced. By the means stated, the complainant attained this object; but in none of the patents set up are the same or equivalent means described, nor could the same, or substantially the same, result be achieved by any means which any or all of them disclose. The patent first mentioned in defendant's brief is that of William O. Hicks, No. 29,268, but upon examination it clearly appears that it does not conflict with that of the complainant. It is for an "improvement in sewing machines," a "mode of sewing or uniting cloth by a succession of differential chain stitches" to prevent ripping. The formation of an ornamental border around the edge of the fabric is not contemplated, and the feed movement occurs, not between groups of stitches, but after the formation of each and every separate stitch. With reference to the remaining five patents insisted upon, the defendants' counsel asked their expert to state what they "show to be old, in so far as the action of feed is concerned." He replied:

"The peculiarity of these feeds is that intermissions occur in their action, so that the sewing mechanism may make several stitches or loops without any motion of the fabric, and therefore locate more than one stitch or loop at the same point in the lengthwise direction of the fabric, and produce ornamental effects by such multiplication or duplication of stitches."

My own investigation does not incline me to accept the opinion embodied in this answer as wholly and precisely correct; but, be this as it may, neither the question nor answer covers the relevant matter. The patents referred to all relate to sewing machines, and not to crocheting mechanism; and the witness was not asked, and did not say, whether the intermissions which he testifies occur in the action of the feeds were, or could be made, available to produce the complainant's ornamental border. I am satisfied that they neither were nor could be, and the fact is that, in each instance, the only result attained or attainable is essentially different from that produced by the organism of his patent.

The answer alleges prior knowledge and use by a number of persons, but the argument upon this defense has dealt only with asserted use by Thomas P. Cope & Bros. and by George D. Munsing. It is not necessary to consider the question of the identity of the Cope-Morley machine or of the Munsing machine with that of the complainant. The point may be fully disposed of upon the question of priority of invention. The complainant contends that he disclosed his invention, and so described its details that it was fully understood by the persons to whom he disclosed it, prior to June 16, 1887. If so, he has established his date of invention as not later than that day, and the question of anticipation must be solved with reference thereto, provided that he was duly diligent in filing his application for a patent, and in constructing his machine. The subject of diligence, however, presents no real difficulty; and I may dispose of it at once by saying that the evidence is amply convincing that, if the date of his invention is as claimed by the complainant, he proceeded, with respect both to his application and the construction of his machine, as speedily as, under the circumstances

of the case, was reasonably practicable. As to the complainant's date, a fact which is indisputable, and quite important in its bearing, is that on June 16, 1887, his mill was destroyed by fire. There can be no doubt that for some time before this fire occurred he had entertained the thought of combining with the then existing plain crocheting machine some device to adapt it for making the scallop finish in imitation of and substitution for that class of border as theretofore produced by hand operation of the ordinary crochet needle. He had then, certainly, also conceived the idea of accomplishing this by advancing the fabric only after a group or series of stitches had been formed to or beyond its edge by the stitch-forming mechanism then in use. In brief, he had distinctly in mind at that time the end which, in his specification, he afterwards declared to be the object of his invention, and also the method which is carried on in its practice. But had he then conceived and perfected the means—the combination of the stitch-forming mechanism with the peculiar feed mechanism—for which he subsequently obtained a patent? I have carefully examined and considered the evidence bearing upon this question, and have arrived at the conclusion that it must be answered in the affirmative. The proofs are too voluminous to be referred to at length, but a few extracts will suffice to indicate their general tenor and effect. The complainant testified:

"As a result of my experiments in the development of the scallop method, I had devised mechanism for producing this result, and when, in the fore part of the year 1887, I concluded to build the scallop machine, (the plain machine having met with encouraging success,) I determined to adapt the scallop mechanism to the plain crochet machines we were then building; that is to say, I decided to utilize the principal parts of the plain crochet machine in building the scallop machine. * * * I discussed this matter with my foreman, William M. Stedman, and made sketches of several styles of feeding mechanism for this purpose. I took the drawings which I had made for my plain crochet machine, and from which I had built this machine, and drew upon them the mechanism which I had decided to adopt. Q. How long before the fire did you make the pencil additions to the old working drawings? A. I cannot at this time definitely fix the date, but it was but a short time,—a matter of a few days." "I thought that there would be considerable money in this machine. I had worked up a considerable trade in our plain machines, and I had got the special tools so far completed to build the plain machines with, and had designed my scallop machine so that the special tools which I had made would also be of use in building the scallop machine. I had taken the drawings which I had made to use in constructing the 1885 machine, and had drawn upon them the necessary changes that I had decided to make, or, in other words, the necessary parts for the scallop machine."

William H. Stedman testified, in part, as follows:

"Q. What, if any, steps were taken by Mr. Merrow during that period, before the fire, looking toward adapting the crochet machine to that kind of work? A. Conversations were frequently had as to the best mechanism to bring about a feed motion which would be adapted to the regular crochet machine, so as to make a scallop finish. Sketches were made of some plans, and freely discussed. Later on, Mr. Merrow, in putting in a new lot of castings, put in an extra number, as he said he wished to make a part of them into scallop machines. The drawings of the regular crochet machine were brought into the shop, and some parts of the scallop machine were penciled into this drawing to see about what changes were needed in the frame of

the machine to adapt it to a scallop machine. * * * The feed mechanism of the regular machine was constructed so as to move the fabric each time the needle was raised out of it, and it was clearly understood by Mr. Merrow and myself that in order to produce a scallop finish the feed should be intermittent,—that is, the fabric be fed along only after several stitches were formed,—and all mechanical motions which would bring about an intermittent feed,—that is, all that occurred to us,—were discussed, as to their relative merits, and their peculiar adaptation to the regular machine. * * * The drawing of the regular crochet machine was brought in, and parts which would be needed in applying an intermittent feed to the regular machine were pencilled in on the drawing, which was in ink, and necessary changes in the frame of the machine were discussed; and Mr. Merrow concluded it would be better to use the regular frame for a few scallop machines, and attach the parts needed. Q. When did you last see the drawings, as well as the sketches referred to, exhibiting the feed mechanism of the scallop machine? A. I last saw the drawings of the crochet machine in the afternoon of June 15, 1887, which was the day before the shop was burned. I do not remember the date when I last saw the sketches of the feeding mechanism which had been made.”

The foregoing testimony is supported by that of other witnesses, and there is nothing to occasion any hesitancy in accepting it, except a single circumstance, which, upon first impression, apparently conflicts with it in one important particular. The complainant and Stedman having said that the drawings which had been exhibited by the former to the latter before the fire, and which it destroyed, had shown the complete mechanism for the scallop machine, a “reproduction” of those drawings, made by the complainant after the fire, upon being put in evidence on his behalf, was found to represent a multiplication of projections upon the cam plate for lifting the feed dog, fitted only to produce, where all the projections are used, the regular or plain stitch. But this seeming discrepancy has been explained and reconciled. The plain machine had been a commercial success, and it was deemed desirable to so construct the feed mechanism for the new machine as to adapt it, as said by the witness Stedman, “to making any kind of crochet work.” The complainant testified:

“These drawings represent the feed mechanism for the scallop machine, as designed before the fire, and reproduced after the fire, for the purpose of carrying out our plan for building scallop machines. * * * In the plain machine there was a circumscribed space for the feed mechanism, and this particular feed mechanism was especially prepared and selected from a number of others, as best adapted to occupy the limited space, and special form of the frame and other parts. * * * One of the principal objects I had in view in designing this feed mechanism was to make as much of it as possible applicable to both the plain and scallop machines which we were about to build, and in pursuing this plan I arranged the parts so that the cam plate, X, which governed the vertical motion of the feed dog, could be changed to raise the feed dog at each reciprocation of the needle, or after a series of reciprocations. In the drawings, Fig. B, the cam plate is shown as provided with five projections or cams, numbered 1 to 5, and represents the arrangement which would be employed for the plain stitch, and by omitting four of the projections, or substituting a cam plate with but one projection, the same mechanism was intended to serve for scallop work, in which case the feed dog would be raised but once while the main driving shaft was making five revolutions, and the stitch-forming mechanism was making five complete stitches.”

Thus, and from other evidence, it appears that the cam plate exhibited upon these drawings, and which was designed with especial

reference to the scallop machine, was intended to be and was so constructed that it might, by retention of all of the projections shown, be employed for making the plain stitch, and, by omitting all but one of them, be used for forming the scallop stitch. This was precisely understood by Stedman. He says, "I think this particular drawing was made in this way to show that it might be adapted to both kinds of work." I conclude that the drawing exhibited to William H. Stedman before the fire, and the reproduction thereof made after that event, did in fact disclose the new scallop machine, as distinguished from the old plain machine; and, upon all the evidence, I am satisfied that the complainant's date of invention, in the sense of the law, should be taken to be as of a few days prior to June 16, 1887. This disposes of the allegation of anticipation by the Cope-Morley machine, for there is nothing in the case which would warrant the finding of a date for it earlier than in July or August of the same year.

With reference to the alleged Munsing anticipation, the defendants rely upon certain conduct of the complainant as concluding him upon the question of priority. The points raised by the defendants under this head are thus stated in their supplemental brief:

"Defendants now assert that this conduct of the complainant amounts to (1) an admission against interest; and (2) that this admission rises from the rank of evidence to the rank of an estoppel in pais."

It is not necessary to extend this opinion by attempting to follow the long and interesting arguments of counsel upon this matter over the whole field of patent-office procedure in interference cases in general, or through all the details of the particular proceeding which they have especially discussed. I will content myself with stating what seem to me to be the only facts which are essential to a proper understanding of the points presented: An interference was declared upon three applications,—one of Munsing, one of the defendants, and one of the complainant. Upon the latter the patent in suit was granted, under the circumstances hereafter to appear. The issue in this interference was thus stated:

"In a machine substantially such as described, for forming a scalloped or shell-like border upon the edges of fabrics, the combination of the following co-operating parts or mechanism: A stitch-forming mechanism having a thread carrier and a looper co-operating to form stitches around the edge of the fabric, a finger located adjacent to the edge of the fabric around which the stitches are formed, and a feeding mechanism operating upon the fabric to advance the latter after a series of stitches have been completed by the stitch-forming mechanism, whereby a series of stitches are formed from a given point around the edge of the fabric while the latter is stationary, and the fabric is then fed a suitable distance to draw or expand the series of stitches, and cause them to assume a shell-like form; being claim 2 of Merrow's application, and including claim 6 of the application of Holton and Malsch, [the defendants,] and also including claim 11 of Munsing's application."

There was an adjudication against the defendants, founded upon the insufficiency of their preliminary statement, and thereafter the case proceeded as between Munsing and the complainant only. The following paper, signed by their respective attorneys, was filed:

"It is hereby stipulated and agreed by and between the parties hereto that the sworn statement of George D. Munsing, executed on the 20th day of September, 1889, and filed for record in this cause September 24, 1889, be received and accepted as evidence in his behalf on the issues of priority of invention now pending between the parties hereto, with the same force and effect as though regularly taken upon notice, and duly filed in this case; that no further or additional evidence shall be taken or received; that the case shall be taken up and decided at the earliest possible moment by the examiner of interferences without argument, and upon the evidence contained in said sworn statement."

The "sworn statement" referred to in the foregoing stipulation is as follows:

"Preliminary Statement. Case B.

"State of Minnesota, county of Hennepin—ss.: George D. Munsing, being duly sworn, deposes and says that he is a party to the interference declared by the commissioner of patents between the application of George D. Munsing, filed October 17, 1888, (serial No. 288,301,) for improvements in crocheting machines, and the application of Joseph M. Merrow and Thomas J. Holton & Frank Malsch; that he conceived the invention set forth in the declaration of interference on or about the 1st day of December, 1882; that on or about the 1st day of June, 1883, he made drawings of the invention; that on about the 1st day of June, 1883, he first explained the invention to others; that on or about the 15th day of July, 1883, he began work on a full-sized machine embodying such invention, which machine was completed about the 10th day of November, 1884; and that on or about the 10th day of November, 1884, he successfully operated said machine, and that he has since built other machines embodying said invention, and has used the same; that he has made no models, except full-sized working machines."

Upon this deposition the examiner of interferences gave judgment in favor of Munsing, and thereupon the complainant struck out of his application the claim involved. The patent in suit was then issued to him, and he accepted a license from Munsing for the only distinctive subject-matter of the canceled claim,—“a finger located adjacent to the edge of the fabric around which the stitches are formed.”

Recurring now to the defendants' statement of their position with reference to these proceedings, the first question is whether the complainant did, by his stipulation that Munsing's preliminary statement should be “received and accepted as evidence in his behalf on the issues of priority of invention;” “that no further or additional evidence should be taken or received;” and that the case should be decided “without argument, and upon the evidence contained in said sworn statement,”—do that which amounted to an admission of the fact of priority of invention, in conflict with the position which he now claims to occupy. He certainly made no express admission; and as it seems to me, in what he did do, he meant to, and did, guard against any possible implication that an admission of any character was involved. Nothing could have been simpler than a direct acknowledgment by the complainant of the priority of Munsing, but he carefully avoided making such acknowledgment. The course pursued could have had no other object. That he abandoned the contest, and this under an agreement that upon adjudication in favor of Munsing—which was, of course, contemplated—the complainant would become Munsing's

licensee, is indisputable. But forbearance of litigation, though coupled with a compact of peace, does not necessarily imply an admission of the facts asserted by the party to whom concession is made, and in this instance, though the complainant "did have some apprehension at the time that Munsing might turn out to be the prior inventor," it nowhere appears that the complainant ever stated that such was the fact, or that he ever conducted himself in such manner as would justify an inference that it was; and the evidence is, to my mind, conclusive that he was induced to relinquish the interference proceedings by business considerations which outweighed, in his estimation, any advantage to be derived from pursuing them, even if their determination should ultimately be in his favor.

The defendants insist that the course pursued by the patent office in connection with this whole matter worked injustice to them; but they do not suggest what was done, if anything, which requires, or would entitle, this court to declare that the patent which was issued to the complainant is invalid. I do not understand that fraud upon the office is imputed to the complainant, and I perceive no ground upon which such an imputation, if made, could rest. The defendants disclaim any intention to assert that the preliminary statement of Munsing in the interference case should be received "as in itself a deposition in this suit," or "that the decision by the patent office has the effect per se of *res adjudicata*." The whole contention, therefore, seems to amount to this: That in the interference case the complainant did something which estops him from setting up a patent which, apart from this supposed operation of the doctrine of estoppel in pais, is at least *prima facie* valid. That he did not, in advance of its issue, acknowledge the invalidity of his grant by admitting lack of priority in invention, has already been shown. What, then, did he do or say, or, in violation of any legal duty, abstain from doing or saying, by which he intentionally caused the defendants or the public to believe that his invention had been anticipated by Munsing; and what action, or abstention from action, on the part of the defendants, or of any other person or persons, was occasioned by such belief, if existent, and caused by the conduct of the complainant? He merely withdrew from contention in a litigated proceeding, and permitted it to be decided upon the sworn statement of the other party to it. This was all he did, and in this there certainly was nothing intended which, when related to the circumstances, was calculated to induce belief that the Munsing invention was anticipatory of his own; and I find nothing in the evidence to indicate that any person was misled by it, or took or refrained from taking any action in consequence of it. The complainant's settlement of the interference proceeding affected no one but himself. It left his patent, subsequently issued, still open to attack on the ground of anticipation; but on that issue the burden rests upon him who assails it, and the defendants, who concede that the Munsing preliminary statement is not competent evidence of the truth of the facts stated in it, have wholly failed to discharge themselves of that burden.

The defense of noninfringement is based upon certain differences between corresponding parts of the feed mechanism of the defendants and of the complainant. The defendants' expert refers to and explains these differences as follows:

"In the complainant's machine there is a reciprocating feed dog, with a toothed or serrated upper surface to engage the cloth, which reciprocates, in the intervals between each stitch, horizontally, but does not engage in the fabric or cloth, but remains below it until it is lifted by a cam attached to a wheel, which rotates but once during several rotations of the main shaft of the machine, and an equal number of reciprocations horizontally of the feed dog. So there are several ineffectual and useless reciprocations of the feed dog horizontally between a single and usefully operative reciprocation thereof in engagement with the fabric. In the exhibit marked 'Complainant's Exhibit Defendants' Infringing Machine,' there is no horizontal reciprocation of the feed dog by a cam on the main shaft of the machine, but all of the functions of the feed dog, both of horizontal reciprocation and vertical motion to engage and disengage it from the fabric, are performed by cams, or a cam and roller, turning upon a wheel propelled by a pinion and spur wheel, with but one rotation during the formation of the cluster of loops which form a single scallop. The action of this cam is continuous, whereas the action of the cam upon the complainant's machine is intermittent, and there are no useless reciprocations of the feed dog in the Exhibit Defendants' Infringing Machine. 58 Q. Are these differences material ones? A. They are, to my mind, material. 59 Q. Why? A. I consider them material because they are less complicated, involve less wear of parts, and fewer parts, avoid the quick action of a cam, whose whole work occurs during a small portion of its revolution, and permit of a convenient and compact form of machine."

With this statement accepted, it would not necessarily follow that the two feeding mechanisms are substantially different, in the sense of the patent law. Nor is the true test of the materiality of differences that which is suggested by this witness in his answer just quoted, for it cannot benefit the defendants that their mode of operating the feed dog is better than the complainant's, as that cannot give them any right to make, use, or vend what is patented to another. The avoidance of useless horizontal reciprocations of the feed dog, which seems to be the principal advantage claimed to be secured by the defendants' arrangement, does not affect its performance of the function assigned it in both machines,—of advancing the fabric only after a group of stitches has been formed. The cams and other driving or lifting parts of the respective machines, separately considered, are not identical; but this is unimportant, because they have the same purpose in the combination,—to intermittently advance the fabric,—and this purpose they accomplish in substantially the same manner. With regard to the combination, which is comprised in both machines, the corresponding parts of the mechanism, though not, individually, exactly the same, are equivalents. *Marsh v. Seymour*, 97 U. S. 359; *National Cash-Register Co. v. American Cash-Register Co.*, 3 U. S. App. 357, 3 C. C. A. 559, 53 Fed. 367. Moreover, the complainant is the person who first succeeded in producing an automatic machine for forming a border of the kind in question upon fabrics, and therefore he is entitled to a liberal construction of the claims of his patent. "He was not a mere improver upon a prior machine capable of accomplishing the same general results,

in which case his claims would properly receive a narrower interpretation." *Sewing-Mach. Co. v. Lancaster*, 129 U. S. 273, 9 Sup. Ct. 299.

Counsel have united in the statement that as to the defendants Wallace H. Jenkins, John Grist, and John Grist, Jr., who compose the Belmont Knitting Mills, Limited, the bill should be dismissed. Therefore, as to those defendants, a decree will be entered accordingly; but against the remaining defendants a decree in favor of the complainant, in the usual form, may be prepared and submitted.

LEWIS v. PENNSYLVANIA STEEL CO.

(Circuit Court of Appeals, Third Circuit. November 21, 1893.)

No. 19.

1. PATENTS—INFRINGEMENT—ROLLING MILLS.

A patent for a turn-over device for use in rolling mills, consisting of a combination, with a set of stationary abutments, of laterally adjustable carriages, having a tilting support arranged transversely to the same, and provided on their under sides with a bulge or projection, adapted to be struck by the abutments when the carriage is shifted, for the purpose of turning over the rail, being a mere improvement in the art, the claim of which is by its terms confined to the particular construction operating in the defined way, is not infringed by a turn-over device, mounted on vertically moving tables, without tilting support, the rail being sustained entirely by the table rolls, the grooves of which act as a stop to prevent lateral movement, and in which the turn-over finger is positively controlled and actuated at all times through an intermediary sway bar. 55 Fed. 877, affirmed.

2. SAME.

The fourth claim of patent No. 247,665, for a turn-over device for continuous rolling mills, construed, and *held* not to be infringed.

Appeal from the Circuit Court of the United States for the Eastern District of Pennsylvania.

In Equity. Suit by Christopher Lewis against the Pennsylvania Steel Company for infringement of a patent. Bill dismissed. 55 Fed. 877. Complainant appeals. Affirmed.

Henry N. Paul, Jr., for appellant.

Philip T. Dodge, for appellee.

Before ACHESON, Circuit Judge, and BUTLER and GREEN, District Judges.

ACHESON, Circuit Judge. This was a suit in equity, brought by Christopher Lewis, here the appellant, against the Pennsylvania Steel Company, for the alleged infringement of letters patent No. 247,665, dated September 27, 1881, granted to the plaintiff for an improvement in mills for rolling rails, girders, plates, etc. The invention described in the specification contemplates the taking of the bloom from the furnace, and entering it between the first pair of rolls, whence it proceeds on through the machine without handling, and comes out a perfect rail. The improvement consists in a series of two-high rolls, arranged alongside of each other,

whose alternate pairs have a reversed motion, a set of movable carriages running laterally on tracks, to convey the billet or unfinished rail from one pass to the next, means for causing it to be fed forward to the rolls, and means for turning over the article being rolled to suit the different positions in which it may be required to be passed through the rolls. According to the conception of the patentee, the combined devices would form an automatic rolling mill. The present controversy, however, involves only the turn-over device, which is the subject-matter of the fourth claim of the patent. The specification describes this device thus:

"For turning the rail or girder over upon its side, as is sometimes necessary in the successive operations of rolling, I have provided a means, as shown in Fig. 5. This consists in a support, K, grooved to fit the rail, and hung upon a bolt, m, held between two crossbars on the carriage, so that the supporting piece, K, will rest crosswise to the carriage. L is a stationary abutment or cam, bolted down fixedly beneath the carriage, in position to be struck by the bulge on the lower side of K as the carriage is shifted, so that when the carriage is shifted laterally the piece K is turned over by contact with L, and the rail or other object is also turned over. These devices, K, may be arranged in sufficient numbers, and at proper distances apart, to co-operate with fixed abutment, L, so as to efficiently accomplish the desired result."

The fourth claim is in the words following:

"(4) The combination, with a set of stationary abutments, L, of the laterally adjustable carriages having tilting support, K, arranged transversely to the same, and provided on their under sides with a bulge or projection adapted to be struck by the said abutments when the carriage is shifted for the purpose of turning over the rail or girder, as set forth."

The case turns upon the question of infringement.

The defendant uses three-high stand rolls and vertically moving tables. The bloom enters a pass between the lower and middle rolls on one side of the stand, and is received on the opposite side on a vertically lifting table, which lifts the piece to the upper side of the middle roll, whence it returns through a pass between the upper and middle rolls to the side from which it started, and is received on a table, and lowered so that it may be caused to enter the third pass, and so on through the several passes. The tables are furnished with a series of rolls to receive and support the piece, and these rolls are provided with grooves in which the piece lies when the turn-over begins to act upon it. The turn-over device consists of a finger pivoted near one end of the table, so as to rise and fall bodily therewith, and connected near its pivot to a link or sway bar extending to and connected with a standard near one side of the table. As the table rises, the finger, moved gradually by the sway bar, acts on the piece of metal so as to turn it over, and then the finger continues its movement, pushing the piece sidewise until it is brought in line with the next pass, when the finger retreats below the surface of the table.

Under the proofs we find ourselves unable to assent to the proposition that the plaintiff was a pioneer in this department of invention. The prior patents show various devices for turning the bloom or billet of metal; the mechanism for that purpose in some instances being operated by hand, and in some instances power-

driven. Nor was the plaintiff the first to contrive a turn-over automatically operated in connection with the rolls of a rolling mill. Such a device is shown and described in the patent to Stephens & Cooper of August 19, 1873. True, there the successive reducing rollers are in front of each other, the bar passing continuously from one to the next; but still the mechanism comprises an automatic turn-over for turning the bar of metal while it is in course of being rolled. The Fritz patent of December 10, 1872, shows and describes three-high rolls with rising and falling tables, and, co-operating therewith, a device for turning over the billet as the tables are lowered. This turn-over device consists of a post having steel points projecting from its upper end for engagement with the piece of metal being rolled, whereby it is turned over as the table upon which it rests descends. The Price & Lewis patent of May 2, 1876, shows and describes three-high rolls provided with rising and falling tables, having, in co-operation therewith, pivoted fingers, automatically actuated by the moving tables, whereby the billet or unfinished rail is pushed over laterally on the table, so as to bring it opposite the required passes. Now, while it must be conceded that none of the earlier patents anticipates the plaintiff's turn-over device, yet, in view of what they disclose, his true relation to this particular branch of the art seems to be nothing more than that of an improver.

Indeed, with respect to the turn-over device, the patent in suit does not purport to disclose an invention of a fundamental or primary character. The device is but one part of the described automatic rolling mill. The claim here in question, it is admitted, does not cover broadly the combination of a pivoted turn-over finger with a movable carriage, which, by its movement, automatically operates the turn-over. Now, when we look into the specification we discover that it simply describes a turn-over device of a specific form, only capable of use in connection with a transfer carriage moving horizontally from one pair of rolls to another pair. The patent says, "Fig. 5 is a detail of the device for turning the rail." This illustrative drawing does not show the device in place, but is a detached figure, exhibiting the features mentioned in the specification. As we have seen, the piece K is described as "a support," as "grooved to fit the rail," and as provided with a "bulge on the lower side," which strikes against the stationary abutment or cam, L, as the carriage is shifted laterally, so that when "the piece K is turned over by contact with L" the rail is also turned over. Fig. 5 shows two notches on the top of piece K. Evidently this notching is what is meant by the phrase "grooved to fit the rail." The combination claimed, it will be observed, includes not only "the laterally adjustable carriages," but all the other specific features above mentioned, except that the "tilting support, K," is not there expressly described as "grooved to fit the rail." The case, then, is this: The patentee has disclosed only one particular construction operating in a defined way, and this construction he has claimed. It is idle to speculate whether or not he might have made a broader claim. The court is powerless to relieve him from the

consequences of self-imposed limitations. *Keystone Bridge Co. v. Phoenix Iron Co.*, 95 U. S. 274, 278; *Fay v. Cordesman*, 109 U. S. 408, 3 Sup. Ct. 236; *Rowell v. Lindsay*, 113 U. S. 97, 5 Sup. Ct. 507; *McClain v. Ortmyer*, 141 U. S. 419, 12 Sup. Ct. 76.

Upon any fair interpretation of the terms of the fourth claim, can it be truly said that the defendant employs the plaintiff's invention thereby secured to him? We are constrained to give a negative response. Not only is the defendant's turn-over mounted on vertically moving tables instead of "laterally adjustable" ones, but it altogether lacks the "tilting support" of the patent. The billet or unfinished rail is sustained, not by the defendant's pivoted finger, but entirely by the table rolls, the grooves of which act as a stop to prevent any lateral movement of the piece of metal under treatment. In mode of operation, also, the two devices are substantially different. In the defendant's apparatus there is no "bulge or projection" to turn the rail by contact with a stationary abutment, but the defendant's turn-over finger is positively controlled and actuated at all times through the intermediary sway bar. Moreover, the defendant's finger not only turns the billet or rail, but by a continuous movement pushes the piece of metal sideways on the table until it registers with the next pass. In our judgment, the two structures cannot be deemed mechanical equivalents.

Our conclusion is that no infringement is shown, and the decree of the circuit court dismissing the bill is therefore affirmed.

STEINER FIRE EXTINGUISHER CO. v. CITY OF ADRIAN.

(Circuit Court of Appeals, Sixth Circuit. November 13, 1893.)

No. 101.

1. PATENTS—ANTICIPATION—CHEMICAL FIRE EXTINGUISHER.

A claim for the connection of a hollow journaled reel with the generator of a chemical fire engine, so that the contents of the generator may be discharged through a hose wholly or partially wound on the reel, is anticipated by well-known prior devices for forcing water and other liquids through a hose, while wound upon a reel, by the use of a hollow journal. 52 Fed. 731, affirmed.

2. SAME—NOVELTY.

As a hollow journaled reel is not wholly impracticable in machines for throwing water, where pressure is applied in the usual way, its mere application to the generator of a chemical fire engine does not involve invention, for the result attained in either case is merely one of degree. 52 Fed. 731, affirmed.

3. SAME—VALIDITY.

Patent No. 147,442, for a chemical fire extinguisher, is void for anticipation and want of invention. 52 Fed. 731, affirmed.

Appeal from the Circuit Court of the United States for the Eastern District of Michigan.

In Equity. Bill by the Steiner Fire Extinguisher Company against the city of Adrian for infringement of a patent. Bill dismissed. 52 Fed. 731. Complainant appeals. Affirmed.

Parker & Burton and Geo. Lothrop, for appellant.

John G. Elliott, for appellee.

Before BROWN, Circuit Justice, TAFT, Circuit Judge, and SEVERENS, District Judge.

TAFT, Circuit Judge. This is an appeal from a decree of the circuit court for the eastern district of Michigan dismissing the bill of the Steiner Fire Extinguisher Company, which seeks to enjoin the city of Adrian from using a chemical fire engine averred to be an infringement of the letters patent No. 147,442, granted to John H. Steiner February 10, 1874, on his application of January 5, 1874, and assigned by Steiner to the complainant below.

The defense is anticipation and want of novelty. The patent is for an improvement in chemical fire extinguishers. The only improvement in the Steiner machine which is material here is the use of a hollow journaled reel, upon which the hose is wound. The hollow journal is, at one end, permanently connected by a standpipe with the hose, while at the other end it is connected with the generator so that the contents of the generator may be discharged through the hose while the same is wholly or partially wound on the reel. The patentee says in his specifications:

"As the hose used with this class of engine is of such stiffness that it does not flatten or collapse, it may be filled while wound on the reel, or while being unwound therefrom. In bringing the engine into use, it is only necessary to draw off so much of the hose as is required. No connections require to be made, and no time is spent in making adjustments. The charge always passes through the entire length of the hose, whether it be partially wound on the reel or not. * * * I am aware that the hollow journaled reel, such as used by me in this engine, is not new; and therefore I lay no claim thereto, except in connection with the generator and the connecting pipe, as shown."

The fourth claim of the patent, which is the only one herein involved, is as follows:

"A chemical fire engine, consisting of a wheeled frame provided with a generator or extinguisher, and with a hollow journaled reel, N, the latter having its journal connected permanently to the generator by a pipe, M, and provided with a hose, O, coupled to it, as shown and described."

The generator of Steiner is filled with bicarbonate of soda, sulphuric acid, and water. The soda and sulphuric acid unite to form carbonic acid gas, the expansive force of which creates such a pressure as to expel the water mingled with the gas from the generator through the hose. This use of carbonic acid gas and water to extinguish fires was the invention of W. A. Graham, to whom was issued, under a special act of congress, a patent of July 9, 1878. All chemical fire engines since invented have used Graham's process. There have been small hand extinguishers adapted to be carried upon the back, and larger ones to be carried upon a wheeled frame drawn by horses from the engine house to the fire. The frame has generally been supplied with a reel, upon which the hose to be used is wound, or with a basket, in which it is coiled. The advantage of the Steiner patent is in the rapidity with which it can be brought into action, due—first, to the fact that the connection between the hose and the generator

is permanent, rendering unnecessary any delay in coupling; and, second, to the fact that the water and carbonic acid gas can be discharged through the hose without unwinding it. The claim relied on is admitted to be a combination of old parts, but the result, and the means of obtaining it, are said to be new.

The permanent connection of the hose to the generator on chemical fire engines was not new. That was shown in the patent of Latta, which was earlier by six months than the patent in suit. In this patent there was but one generator, cylindrical in form, which was journaled in a suitable supporting frame or carriage in such a way as to make it available as a drum or spool upon which the hose might be reeled or wound. The hose was permanently attached to the generator, and then was wound around it. By pulling the unreeling end of the hose, the entire generator was revolved, and its chemical contents were so agitated as to promote the generation of the necessary carbonic acid gas. No after coupling of the hose to the generator was necessary, for its connection with the generator was permanent. The generator had flanges upon it to keep the hose in position when wound. The discharge of the gas and water while the hose was unwound does not certainly appear to have ever occurred in chemical engines before the complainant's device. There is no reason why it might not have taken place in the Latta machine. Latta's specifications, in describing the operation of his machine, say that the leading hose is reeled off in the usual manner, and "then the gate, j, is opened so as to discharge the confined gas through the pipe, J, the leading hose, I, and the nozzle, Y." This leaves in some doubt whether, in the mind of the inventor, it was necessary, in his machine, to reel the entire hose off.

However this may be, it is very clear that several devices were well known before complainant's patent for forcing water and other liquids through a hose while wound upon a reel by the use of a hollow journal.

On an application filed May 10, 1873, there was issued to Orin R. Mason a patent for a device for thawing ice in water or gas pipes. This device consisted of a flexible pipe of lead, or other suitable material, wound about a revolving reel or drum, one end of the pipe being connected with the hollow portion of the axial shaft of the reel. The axial shaft was connected to a force pump, and the operation was as follows: The force pump, having been placed in a pail or other vessel containing hot water, forced a stream of the hot liquid through the coiled pipe, the open end of which was thrust into the frozen water or gas pipe. As the thawing out progressed, the stream of hot water was made to follow up the yielding obstruction closely by unwinding the pipe from the drum, so that the heat could be applied just where the work was done. In his specifications the patentee stated that it was evident that a reservoir of steam might be connected with the coil, and carried into the water or gas pipe, in the same manner.

Another device antedating complainant's invention, in which the same use of the hollow journal for the purpose of forcing liquid through reeled pipe is shown, is an English patent, of 1865, issued

to one Russ, for spreading liquid manure on land. The hose is wound on a reel supported on a wheeled frame. One end of the hose is connected to the fixed reservoir from which the manure is drawn, and the other is connected with the hollow journal, at the end of which is a receptacle with holes in it, like a water sprinkler, from which the manure is spread upon the ground. The reel is moved forward, from and back to the reservoir on the land to be treated, while the hose is reeled off and on with the movement of the reel. In this device the liquid enters at what is usually the nozzle end of the hose, and is discharged from the hollow journal, taking an opposition direction from that which it takes in complainant's device; but this does not, of course, change the principle of its working. The same thing is true of another English patent, of 1868, issued to one Headley, for a water sprinkler, which consisted of a wheeled frame carrying a windlass or drum, the axis of which was made hollow, and upon which a hose was wound. One end of the hose was connected to the hollow axis, while the free end was fitted with suitable connections for attaching it to hydrants or standards supplying water under pressure. At the end of the hollow axis were affixed suitable distributing media. The inventor stated the device could be used for extinguishing fires by attaching the free end of the hose to a fire engine.

It will thus be seen that in the use of a hose and reel in fire engines, and other machines for throwing water and other liquid, it was old, by means of a hollow journal, to secure one end of the hose permanently to the source of supply, and to force the water or other liquid through the hose while the hose was wound upon the reel.

To escape the manifest conclusion that application of such a device to a chemical fire engine did not involve any invention, the contention of counsel is that the use of such a device was poorly adapted to ordinary fire engines, where the propulsion of the water through the hose and out of the nozzle is caused by a pressure exerted at one end of the column of water, because the resistance caused by the curved sides of the hose, when wound, would so reduce the propulsive force at the nozzle as to make it impossible to throw the water a practicable distance; but that in the chemical fire engines this difficulty of resistance is entirely absent, because the force by which the mingled water and carbonic acid gas are thrown from the nozzle of the pipe is not applied only in the generator, but is generated in the hose as well. It is said that the mixture of carbonic acid and water is self-propelling, and, in addition, that the union of all of the bicarbonate of soda and sulphuric acid is not completed in the generator, but that particles of each, un-united, are carried along the escape pipe, to settle together at every turn and elbow in the pipe, there to unite, and to generate additional carbonic acid gas, and new pressure. On the ground that an ordinary knowledge of mechanics would lead one not to use the hollow journal reel as an improvement of the ordinary fire engine, it is claimed that the use of this device in a chemical fire engine did involve invention, for its use could only be suggested by the discovery,

that the device when used in chemical engines did not encounter the difficulty which made it impracticable in ordinary fire engines.

If it were true that the hollow journal reel was wholly impracticable in machines for throwing water through a wound hose where the pressure is applied in the usual way, and that this fact was well known and plainly manifest to every one, we might be compelled to acknowledge the force of the argument, but this is not true. This is shown by the fact that devices have been made, and patents have been granted, for hollow journaled reels to be used for fire engines and kindred purposes, in which water is expelled by force applied in the ordinary manner. There is the Dillon reel, patented at an earlier date than complainant's. It was for extinguishing fires in a house. It consists of a reel journaled in a bracket to be hung against the wall. The axis of the reel is hollow, and is permanently connected at one end with some source of supplying water under pressure, and at the other with the hose. The hose is wire lined, so as to enable the water to pass through it freely, even when wound on the reel. It is said that Steiner conceived his invention before the date of the Dillon application, and the court below seems to have conceded this. Whether Dillon's conception of his device antedated that of Steiner, is not material here. We only refer to Dillon's patent to show, what also appears from Headley's, that the impracticable character of the hollow journal reel in fire extinguishing machines, where water is thrown by force applied in the usual way, is not known or recognized by the ordinary mechanic, and does not seem to be well understood in the patent offices of England and America. In other words, the hollow reel is not so plainly inapplicable to ordinary fire engines that a patent for such a device like the Headley patent would not naturally suggest its use in a chemical engine. The new use is not an analogous use. It is the same use. It seems clear to us, therefore, that it did not involve invention to take the hollow reel from the ordinary fire engine or water sprinkler, and put it on a chemical engine. The introduction of the hollow journaled reel in the chemical fire engine was nothing but the application of an old device to a similar subject, with little or no change in the manner of application, and with no result substantially distinct in its nature. The hollow journaled reel may have been better adapted to the use in the chemical engine than in the ordinary steam pressure pump engine; but this, it seems to us, is a mere difference in degree of the result, and did not involve, in bringing it about, anything but what would naturally occur to one skilled in the art. Similar cases may be found in *Roller-Mill Co. v. Walker*, 138 U. S. 124, 11 Sup. Ct. 292; *Electric Co. v. La Rue*, 139 U. S. 606, 11 Sup. Ct. 670; *Blake v. City and County of San Francisco*, 113 U. S. 679, 5 Sup. Ct. 692; *Pennsylvania R. Co. v. Locomotive Engine Safety Truck Co.*, 110 U. S. 490, 4 Sup. Ct. 220; *Preston v. Manard*, 116 U. S. 661, 6 Sup. Ct. 695.

For the reasons given, the decree of the court below is affirmed, with costs.

NORTON et al. v. EAGLE AUTOMATIC CAN CO.

(Circuit Court, N. D. California. November 27, 1893.)

1. PATENTS—INJUNCTION—VIOLATION—CONTEMPT.

Violation of an injunction is not excused by the fact that the infringing machine is made according to a junior patent, for, on a question of infringement, such patent cannot be introduced, even as prima facie evidence of a substantial difference. *Blanchard v. Putnam*, 8 Wall. 420, applied. *Truax v. Detweiler*, 46 Fed. 118, and *Harrow Co. v. Hanby*, 54 Fed. 493, disapproved.

2. SAME—INFRINGEMENT.

The Norton patent for a can-heading machine (No. 267,014) is infringed by a machine made according to the Merriam patent of June 3, 1884.

In Equity. Proceeding to punish defendant for contempt in violating an injunction issued in the suit of Edward Norton and Oliver W. Norton against the Eagle Automatic Can Company for infringement of letters patent No. 267,014, issued November 7, 1882, to Edwin Norton, for a can-heading machine. Defendant adjudged guilty.

For report of decision on motion for preliminary injunction, see 57 Fed. 929.

Munday, Evarts & Adcock and Estee & Miller, for complainants.

John L. Doone, Pillsbury & Hayne, and S. C. Denson, for respondent.

McKENNA, Circuit Judge, (orally.) The plaintiffs' patent is for applying, automatically and exteriorly, can heads to can bodies. It was construed in *Norton v. Jensen*, 1 C. C. A. 452, 49 Fed. 859, very broadly, and held of a primary character; "standing," to quote the court, "at the head of the art, as the first machine ever invented for applying tight exterior fitting can heads to can bodies automatically, and appellees are entitled to a broad and liberal construction of the claims of their patent."

The order of injunction was for the defendant, its agents and servants, to "absolutely desist and refrain from making, using, or selling any machine for putting on the ends of fruit or other cans which is an infringement of the claims of letters patent of the United States No. 267,014, granted to Edwin Norton on November 7, A. D. 1882; also, from making or selling any machine for applying to can bodies heads fitting outside of the same, containing the combination of a device for sizing the exterior diameter of a can body to conform to the exterior diameter of the can head, and holding the same so sized while the head is applied; said sizing and holding device having its end enlarged to fit the exterior diameter of the can head so as to leave an annular space between it and the can body for the reception of the flange of the can head, with a device for forcing the can head into the said annular space, and thereby applying the head outside of the can body,—or any colorable imitation or evasion or equivalent thereof." There was also a prohibition against using the above device in combination with other devices

for delivering the can bodies to the heading machine. Of the latter kind was the machine especially enjoined.

Counsel for the defendant contend that the patent to Norton only covers the latter combination, the automatism consisting in not only applying the can heads to the bodies, but in delivering them,—in other words, an organized machine consisting of a feeding device and a heading device. But the order of the court precludes this contention. It enjoins the use, as I have already quoted, of “the combination of a device for sizing the can body with a device for applying the can head exteriorly,” and the order of the court seems to be justified by the first claim of the patent.

It is this part of the order with which we are now concerned, and the use of a machine containing the combination described in the order, or, to quote the order, “any colorable imitation or evasion or equivalent thereof,” is within its prohibition. The defendant uses a machine made under a patent to C. R. Merriam, issued June 3, A. D. 1884. It is not necessary to explain the details of it. Considering the broad construction given to the Norton patent by the court of appeals in *Norton v. Jensen*, supra, I think it is infringed by the Merriam machine. But defendant contends, if this be made to appear after judicial inquiry and consideration, it is not obviously so, and that defendant is excused, by the fact of the patent to Merriam, and the advice of counsel, from a willful violation of the order of the court. Abstractly, it would seem that, if the plaintiffs' patent was *prima facie* evidence of novelty, (difference from all things before it,) a subsequent patent to the defendant, or for a device used by defendant, would be *prima facie* evidence of novelty, (difference from all things before it, and hence from the plaintiffs' device,) and hence would be admissible in evidence on the issue of infringement, and its use would be innocent; and it was so held in *Corning v. Burden*, 15 How. 271. But this case was overruled in *Blanchard v. Putnam*, 8 Wall. 420. The court said:

“What the jury have to determine is, does the machine of the defendant infringe the machine of the plaintiff? And, if it does not, then the defendant is entitled to a verdict. But, if it does infringe the plaintiff's machine, then the plaintiff is entitled to his remedy; and it is no answer to the cause of action to plead or prove that the defendant is the licensee of the owner of another patent, and that his machine is constructed in accordance with that patent.”

In both cases the patent under which defendants, respectively, claimed was issued subsequently to those under which plaintiffs, respectively, claimed.

In *Truax v. Detweiler*, 46 Fed. 118, it was held, on the authority of *Onderdonk v. Fanning*, 2 Fed. 568, that the issuing of a later patent is *prima facie* evidence that there are substantial differences between the devices described in the two patents; and, in the case cited from 2 Fed. it was decided that the new patent shows that the action of defendant was not so plainly colorable as to entitle plaintiff to an attachment against the defendant for contempt. It was also held as late as March 2d of this year, in *Harrow Co. v. Hanby*, 54 Fed. 493, that, in a suit for infringement, the fact that the defendant's machine is patented is *prima facie* proof that it does not

infringe. To sustain this doctrine the court quotes *Brown v. Selby*, 2 Biss. 457, (a circuit court case,) and quotes *Burden v. Corning*, 2 Fish. Pat. Cas. 477, 497, which case, as we have seen, was overruled in *Blanchard v. Putnam*, supra. But the cases at circuit may be reconciled with *Blanchard v. Putnam*, applying them no further than affecting intention.

At any rate, I cannot say, in view of them and the advice of counsel, that defendant acted in willful contempt of the order of the court. In view, however, of the construction of the Norton patent by the circuit court of appeals, and the decisions on it of the circuit court, I do not consider defendant blameless. It would have been more considerate to have taken the judgment of the court on the Merriam machine before using it, and risking disobedience of the order of the court and injury to plaintiff. Therefore, I think it should be punished by at least a nominal fine, and the cost of the proceedings.

The defendant is therefore adjudged guilty of contempt, and is fined the sum of five dollars, and ordered to pay plaintiffs the costs of this proceeding, including reasonable counsel fees.

UNITED STATES CREDIT SYSTEM CO. v. AMERICAN CREDIT IN-
DEMNITY CO.

(Circuit Court of Appeals, Second Circuit. December 5, 1893.)

1. PATENTS—INVENTION.

The use of sheets or tables with spaces and headings suitable for recording business transactions as part of a scheme for insuring merchants and traders against excessive losses by bad debts, possesses no patentable novelty. 53 Fed. 818, affirmed.

2. SAME — "MEANS FOR SECURING AGAINST EXCESSIVE LOSSES BY BAD DEBTS." Patent No. 465,485, issued December 22, 1891, to L. Maybaum, for "means for securing against excessive losses by bad debts," is void for want of patentable novelty.

Appeal from the Circuit Court of the United States for the Southern District of New York.

In Equity. Bill by the United States Credit System Company against the American Credit Indemnity Company for infringement of patent. A demurrer to the bill was sustained. 53 Fed. 818. Complainant appeals. Affirmed.

This is an appeal from a decree of the circuit court for the southern district of New York dismissing the bill of complaint. The suit was brought on letters patent to Levy Maybaum, dated December 22, 1891, No. 465,485, for "means for securing against excessive losses by bad debts." Defendant demurred to the bill, which was in the usual form, the objections presented being not to the form of pleading, but to the sufficiency of the patent itself.

Rowland Cox, for appellant.

Edgar M. Johnson, (Hoadly, Lauterbach & Johnson, on the brief,) for appellee.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

LACOMBE, Circuit Judge. What the patentee conceived and sought to patent is correctly enough entitled a "means for securing against excessive losses by bad debts." He contemplated the insuring of merchants or traders against such losses by means of contracts of insurance; the insurer, whether individual or corporation, guarantying to make good to the insured whatever losses in excess of a definite percentage he might incur from bad debts. In his specification he states that a careful observation of statistics discloses the facts that the average loss due to bad debts varies in different lines of business, and that the average percentage of profits varies in like manner, so that, "on the average, persons transacting any given line or class of business can afford to make losses to the amount of the average percentage of their class without danger of too great a reduction of the profits of their business." Having determined from tables compiled, either by himself or others, what is the average percentage of loss in the kind of business the person asking insurance is engaged in, the person practising the patented scheme then "enters into a guaranty with the party applying to be guarantied, based on the payment by him of a premium determined by the risk of his class, securing him against any loss from bad debts in excess of the average loss of his class." To secure the insurer against undue risk the patentee states that it should be further provided that the persons, losses from whom are to be guarantied against, should be of a given rating as to credit or capital, or both, in some established mercantile agency to be agreed upon between insurer and insured; and for additional security to the insurer the agreement of guaranty is to be so restricted as not to cover losses incurred from dealing with any party in excess of a given percentage of the capital of such party as reported by such mercantile agency.

It is manifest that the alleged "new and useful improvement" is a mode of conducting the business of insurance, to be made effective in securing against losses from bad debts by means of contracts of guaranty entered into by the person "practicing the improvement," and conducting the business of such insurance, with persons desiring to protect themselves by obtaining the security of such contracts. Whether a new method of conducting a business such as insurance is or is not patentable, and whether "forms of contract" by which improved methods in conducting such business are made effective are or are not patentable, are questions which were discussed at length upon the argument, but which need not be decided upon this appeal. They do not arise under this patent.

The patentee begins his specification with the statement that he has invented a "new and useful improvement in means for securing merchants and others from excessive losses by bad debts," and then sets forth what he declares to be "a full, clear, and exact description of the means and mode of making such guaranty, and of practicing said invention." The specification which follows begins

with a statement of the fixed relation between average percentage of loss and of profits. It proceeds as follows:

"My invention or art or method of guarantying credits is based upon the ascertainment of these facts, and for the purpose of practicing my invention I have prepared or compiled tables, [nowhere given in the patent,] in which all kinds of business are classified, and the average rate of percentage of loss in each ascertained, from which can be readily determined what amount of loss in any given class of business would be a loss in excess of the average usually sustained from bad debts in that class, and what, therefore, would be an amount of loss which a person in that business cannot afford to make without impairing the average profits normally due in that class; and I have invented a sheet, page, or form for entering the details of such transaction, forms of which are shown in Figs. 1 and 2, respectively."

Fig. 1 is as follows:

Fig. 1.

Guarantees.		Percentage on Sales.	Percentage on Ratings.	Ratings Covered.		Con-sidera't'n.	Con-ditions.
Name of Assurer.	Name of Assured.	beyond which assur'ce is given.	which individ-ual indeb't's must not ex'cd.	Capital Rating.	Credit Rating.		

Fig. 2 is the same, only with the headings arranged perpendicularly instead of horizontally. If the columns headed respectively "Percentage on Sales beyond which assurance is given," and "Percentage on Rating which individual indebtedness must not exceed," be assumed to set forth some of the results of each transaction, it is only as a record of something otherwise determined.

The specification, after stating that guaranties for individual doubtful debts are common, sets forth the patentee's "plan, method, or process,"—his "system of guarantying payment by all persons of a given class on the payment of a fixed premium." The substance of such system has been already described. It consists in the ascertainment of the average percentage of loss, and the making of a contract of insurance, prepared to cover only the excess of loss beyond such average percentage, and restricted both as to the rating of the parties whose losses are insured against, and as to the amount of risk to be taken in the case of each debtor. The specification then proceeds as follows:

"It will be readily understood from the above description of my art, method, or process that it is practiced by the use of peculiar books and tables, and by the use of forms of contract or guaranty substantially of the kind and containing the provisions above indicated. The peculiar construction of book used in the practice of my art, method, or process is as follows: I set apart a certain portion of the same to be used in connection with each guaranty that is made. I prefer to apply a page for such purpose, and I will proceed to describe a single page of a book of which all pages are alike. Said page or book is more fully described in my divisional application for letters patent, Serial No. 404,582, filed September 5, 1891. At the

top of the page I provide a form to be filled out with the distinguishing features of the particular guaranty to which the page is devoted. The drawing annexed hereto represents a page from said book, and I there indicate the form which I have found useful for this purpose. The remainder of the page I rule as shown in said drawing, indicating by appropriate words or signs, the method of filling up the blanks. Columns are particularly provided for the details, which will disclose whether or not any loss, or what part thereof, is covered by the guaranty, and from which it may be readily ascertained whether any or how much loss against which the person has been guarantied has been sustained. When notice of any loss to a person guarantied is received, the details of the same are entered on the page or portion of said book devoted to this particular guaranty. Illustrations of the peculiar sheet, form, or page which embodies my invention are shown in Figs. 1 and 2, respectively. I provide separate spaces for entering the several details of the transaction hereinbefore described. For instance, there is a space for entering the name of the assurer, another for entering the name of the assured, another for entering the percentage or amount beyond which losses are guarantied against, another for entering the percentage of the capital rating or the amount which the indebtedness of the party guarantied against to the party guarantied must not exceed, and another for entering the rating, capital, or otherwise according to some established mercantile agency, which the party guarantied against must have. The space for entering the name of the assurer or other of said details may be previously filled in, as shown in Fig. 2, and there also may be spaces for entering other conditions and the consideration of the transaction."

At the close of the specification appears this statement:

"What is described herein and not claimed I do not abandon, but I make a divisional application for letters patent for the same in the above-mentioned divisional application."

The claims are as follows:

"(1) The means for securing merchants and others from excessive losses by bad debts, which consist of a sheet provided with separate spaces and suitable headings, substantially as described, for the name of the assurer, the name of the assured, the percentage or amount beyond which assurance is given, the class or classes of persons, as to rating, capital, or otherwise, in respect to whom said losses are guarantied against, and the percentage of said capital or the amount which said losses must not exceed.

"(2) The means for securing merchants and others from excessive losses by bad debts, which consist of a sheet bearing the name of the assurer, and provided with separate spaces and suitable headings, substantially as described, for the name of the assured, the percentage or amount beyond which assurance is given, the class or classes of persons, as to rating, capital, or otherwise, in respect to whom said losses are guarantied against.

"(3) The means for securing merchants and others from excessive losses by bad debts, which consist of a sheet provided with separate spaces and suitable headings, substantially as described, for the name of the assured, the percentage or amount beyond which assurance is given, the class or classes of persons, as to rating, capital, or otherwise, in respect to whom said losses are guarantied against, in conjunction with a register for details of the transaction adapted to disclose the amount of loss sustained, substantially as described."

It is manifest from these excerpts that what is claimed is not what is stated in the title and declaration of invention, viz. "Means for securing against excessive losses by bad debts." The sheets described in the claims may be printed by the ream, and may even be filled in interminably with details appropriate to each heading, "the several details of the transaction hereinbefore described," as the patentee expresses it, and yet not a single dollar of loss by bad

debts will be secured against. Nor are the "sheets," the "forms of contract," or "guaranty" referred to in the specifications. The three claims of the patent are concerned solely with the providing of sheets with appropriate headings, adapted to be used in preparing historical records of certain business transactions. There is nothing peculiar or novel in preparing a sheet of paper with headings generally appropriate to classes of facts to be recorded, and whatever peculiarity there may be about the headings in this case is a peculiarity resulting from the transactions themselves. No one could prepare a full record of the business of insurance, when conducted in the way in which the patentee proposes to conduct it, without entering upon such record the very same details of the transactions which the patentee says that his pages or sheets are to contain. Given a series of transactions, there is no patentable novelty in recording them, where, as in this case, such record consists simply in setting down some of their details in an order or sequence common to each record. In the specification the manner of conducting the business of insurance suggested by the patentee, and the kind of contract of indemnity to be entered into, are both described. The conducting of such business and the making of such contracts constitute the transactions to be recorded. But neither the "method of business" nor the "form of contract" is claimed in this patent. Whether such methods and forms of contract are not novel, or not patentable, or are patentable, but abandoned to the public because described and not claimed, or are patentable and covered by some other patent, is immaterial. In testing the validity of this patent for the "sheets," the methods and forms of contract described and not claimed in it are to be considered as outstanding. *Underwood v. Gerber*, 149 U. S. 224, 13 Sup. Ct. 854. The holder of this patent has not, by it, secured any monopoly of the "transactions" to be recorded; and, such transactions having their origin and completion independent of this patent, there is not patentable novelty in the use of sheets for the purpose of recording them.

The decree of the circuit court is affirmed, with costs.

LALANCE & GROSJEAN MANUF'G CO. v. HABERMAN MANUF'G CO.

(Circuit Court of Appeals, Second Circuit. December 5, 1893.)

1. PATENTS—INFRINGEMENT—METAL-SPINNING MACHINERY.

A patent for the combination, in a machine for spinning sheet-metal vessels, with an improved form of headstock for holding the blank, of a mold chuck mounted eccentrically inside the blank, so that an outside roller presses the metal of the rotating blank inwardly along the circumference of the mold chuck, and thus forms a vessel with a contracted mouth, is not infringed by a machine having substantially the same headstock, but using a mold chuck mounted separately outside the vessel, and a spinning roller within, movable by hand screws, pressing the metal outward to and along the rotating mold chuck to form a vessel with bulged sides. 54 Fed. 517, affirmed.

2. SAME.

The first and second claims of the Chaumont patent, No. 286,115, for improvements in machinery for sheet-metal spinning, construed, and held not to be infringed.

Appeal from the Circuit Court of the United States for the Southern District of New York.

In Equity. Suit by the Lalance & Grosjean Manufacturing Company against the Haberman Manufacturing Company for infringement of a patent. Bill dismissed. 54 Fed. 517. Complainant appeals. Affirmed.

Arthur van Briesen, for appellant.

Wm. H. Kenyon and Robert N. Kenyon, for appellee.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

SHIPMAN, Circuit Judge. This is an appeal from a decree of the circuit court for the southern district of New York, which dismissed the appellant's bill in equity for relief against the alleged infringement by the defendant and appellee of the first and second claims of letters patent, No. 286,115, dated October 2, 1883, to Jules Chaumont, for improvements in machinery for sheet-metal spinning.

The art of "spinning" or shaping blanks of sheet metal into hollow vessels by pressure applied by a roller to the circumference while they are rotated in a lathe was old at the date of the patented invention. The state of the art at that time, so far as the features of the first and second claims of the patent in suit are concerned, is shown in the English letters patent to Gomme & Beaugrand, dated September 14, 1855, and to Watts & Fleetwood, dated December 22, 1870. The patent of 1855 describes a spinning machine in which the blank, which is held by the neck, is revolved around an eccentrically supported mold chuck, and is formed "by a roller mounted on the outside of the blank for compressing the upper part of the vessel into the desired form." In the machine described in the patent of 1870, the bottom of the vessel is clamped against a revolving cup-shaped chuck or headstock, and is spun against a concentrically mounted internal roller by means of four external rollers, which bear against the outside of the vessel.

Chaumont's improvement was particularly applicable to the production of sheet-metal vessels which were to have a greater diameter at the base than at the mouth. It is stated as a fact by the complainant's expert that, speaking generally, the articles, as they come from the press, are somewhat larger at the mouth than at the bottom. The patentee wanted to spin so as to make the vessel smaller at the mouth than at the base. It was therefore very desirable, if not indispensable, that the mold chuck should be inside the vessel; and it was necessary to mount the chuck eccentrically, "so as to enable a mold chuck to be used which was of less diameter than the least diameter of the vessel to be formed," and therefore capable of being withdrawn when the vessel is finished. It was also desirable to clamp very firmly, so that the heavy pressure of the roller against the eccentrically mounted revolving chuck should not dis-

place the vessel. He clamped his blank by a plate against a flanged chuck or headstock having a flat surface, and thus improved upon the clamping mechanism of the English patent of 1855, by means of his improved headstock, which, taken by itself, had no element of patentable novelty, because there can be nothing patentable in making the face of a chuck flat, with a projecting rim, instead of cup shaped, when a hollow vessel with a flat bottom is to be formed.

The following description of the general outline of his machine, so far as the first two claims are concerned, without reference to the particular details which make it a working machine, and which are claimed in the third and fourth claims, is abbreviated from the description in the specification: A chuck or headstock, constructed in the form of a socket, and having a rim or flange, is rigidly secured to one end of a spindle and revolves therewith. The cylindrical blank, which has been previously formed, is placed with its flat portion against the corresponding plane surface of the headstock within the rim, and is held firmly in place. A mold chuck is so mounted as to be capable of freely revolving inside the blank upon a rod which also holds the blank securely against the headstock. The circumference of this mold chuck is in the form which will characterize the corresponding portion of the completed vessel. The headstock and blank are rotated so that the side of the blank is continuously in near proximity to the mold chuck. A roller is firmly pressed from the outside against the revolving sides of the blank, and by its gradual lateral movement the revolving sides of the blank are contracted and forced against the periphery of the mold chuck, and made to correspond with its outline.

The patentee, in his specification, announces the limitation which he places upon his invention, and the combination which he claims as new, as follows:

"I am aware that it is not new to spin sheet-metal vessels by revolving the blanks from which they are formed around an eccentrically supported mold chuck; but the combination of a rotary mold chuck, so supported, with my improved form of headstock, I believe to be new, as well as the other specific combination of parts, as hereinafter claimed."

The two claims which are said to have been infringed are as follows:

"(1) In a machine for spinning sheet-metal vessels, the combination, substantially as hereinbefore set forth, with a headstock or chuck mounted directly upon the spindle of the machine, and having a flat surface for supporting the base of the vessel, and a rim or guard laterally projecting from its periphery, of means for holding the vessel within or against said headstock, and a rotating mold chuck mounted eccentrically with respect to the axis of the headstock. (2) In a machine for spinning sheet-metal vessels, the combination, substantially as hereinbefore set forth, with a headstock or chuck mounted directly upon the spindle of the machine, and having a flat surface for supporting the base of the vessel, and a rim or guard laterally projecting from its periphery, of means for holding the vessel within or against said headstock, a rotating mold chuck mounted eccentrically with respect to the axis of the headstock, and a roller mounted in proximity to said mold chuck and blank, whereby the contour of the blank is forced to conform to that of said mold chuck."

The defendant's machine is thus described in the opinion of Judge Wheeler, before whom the case was tried in the circuit court, (54 Fed. 517:)

"The defendant uses a concentric rod for holding the vessel against the headstock, a rotating mold chuck mounted separately outside the vessels, and a spinning roller within, movable by hand screws, to press the metal of the rotating blank outwardly to and along the rotating mold chuck in forming vessels with bulged sides. * * * Instead of the eccentrically supported mold chuck within the vessel of these claims, a separately supported mold chuck without is used. The spinning roller is within the vessel, instead of without, and works in a different direction. The patented combination, which can only work inwardly, could not do the work of the defendant's machine, which can be done only by spinning outwardly."

The headstock of each machine is substantially the same.

The question of infringement depends upon the proper construction of the patent, which, in turn, depends upon the actual invention of the patentee, as shown by the state of the art and the specification, for the general language of the first and second claims is broad enough to include a rotating mold chuck without the vessel, but eccentrically mounted with respect to the axis of the headstock. It appears, both from the specification and "the file wrapper and contents," that the patentee had invented a seamless sheet-metal vessel, having a greater diameter at its base than at its mouth, and that the invention of the patent in suit related particularly to apparatus for producing vessels of that form. The very broad claims in his original application were rejected upon reference to the English patents which have been described, and the applicant was told that he had merely substituted Watts & Fleetwood's chuck for the chuck shown in the other patent. The disclaimer was then inserted by amendment. A modification of the claims was rejected because too nearly approaching the patent of 1855, until the existing claims were accepted, which pointed out the peculiarities of the chuck, and apparently, in the opinion of the patent office, sufficiently differentiated the alleged invention from the holding mechanism of either pre-existing patent. The invention of the first and second claims was simply an acknowledged improvement upon the earlier of the two English patents, which had an eccentrically mounted mold chuck inside the cylindrical blank; the Chaumont mold chuck being placed in the same relative position, so that the outside roller might press the metal inwardly along the circumference of the mold chuck, and thus form a vessel with a contracted mouth. The line that the patentee drew in his patent between the old and the new mechanism marks the extent of that portion of his invention now under consideration. It consisted merely in the improved form of headstock in combination with an eccentrically supported mold chuck inside the blank. The machine of the defendant, which places its mold chuck outside of the blank, and by an inside roller spins the metal outward to form a vessel with bulged sides, is not within the scope of the patent.

The decree of the circuit court is affirmed, with costs.

AMERICAN ROLL-PAPER CO. et al. v. WESTON.

(Circuit Court of Appeals, Sixth Circuit. November 20, 1893.)

No. 76.

1. PATENTS—ANTICIPATION—PRIOR USE.

Daily use of a roll-paper cutting machine for more than two years in a store employing a considerable number of persons is sufficient public use to constitute anticipation. 51 Fed. 237, affirmed.

2. SAME—PRIOR USE—EVIDENCE.

Anticipation may be established by testimony entirely from recollection of the existence and use of a prior machine, when the witnesses are numerous, disinterested, and unimpeached. Washburn & Moen Manuf'g Co. v. Beat 'Em All Barbed-Wire Co., 12 Sup. Ct. 443, 143 U. S. 275, distinguished.

3. SAME—INVENTION—ROLL-PAPER CUTTERS.

There is no invention in giving additional weight to the knife bar of a roll-paper cutter, so as to obviate the necessity of pressing it down by hand when cutting the paper.

4. SAME—PARTICULAR PATENT.

The Hopking patent, No. 301,596, for a roll-paper holder and cutter is void for anticipation.

Appeal from the Circuit Court of the United States for the Western Division of the Southern District of Ohio.

In Equity. Suit by the American Roll-Paper Company and Richard W. Hopking against Edward B. Weston for infringement of a patent. The patent was at first sustained by the court below, (45 Fed. 686,) but on rehearing was declared void for anticipation, and the bill dismissed. 51 Fed. 237. Complainants appeal. Affirmed.

Statement by SEVERENS, District Judge:

This case was brought here from the circuit court for the southern district of Ohio, western division, upon an appeal by complainants in that court from the decree there rendered upon the pleadings and proofs, dismissing their bill. The bill was filed for the purpose of restraining the infringement by the defendant of rights alleged to be secured by letters patent No. 301,596, bearing date February 8, 1884, issued to Hopking, under whom the other complainant claims by assignment, for the invention of an improved paper holder and cutter, and for profits and damages.

The defendant, answering, denied that Hopking was the first inventor of the alleged improvement, and averred that it had been previously known and used in this country, and had been so publicly used for more than two years prior to the application for this patent; and the answer particularly set forth certain patents therein enumerated, and other devices not patented, but alleged to have been in prior public use, which it was claimed anticipated the supposed invention of Hopking. The answer was several times amended by leave of the court, and by those amendments it was particularly specified that the Hopking invention had been known to and publicly used by various other parties, among them one Martin N. Nixon, at Richmond, Ind., and O. J. Livermore, at Holyoke, Mass.

Prior to the amendments specifying the public use of the supposed invention by Nixon and Livermore, the case was brought to hearing on the pleadings and proofs as they then stood, which included many of the patents relied on by the defendants, and the court below decreed for the complainants, sustaining their patent. Subsequently, upon petition showing grounds deemed sufficient, that decree was vacated, the pleadings amended, and evidence regarding the previous use by Nixon, Livermore, and others received. Upon consideration of the evidence produced in support of the suggestion of previous use of the complainants' devices by Nixon and Livermore, the court held that

it was sufficiently proved in each case, and accordingly held, contrary to its original conclusion, that the patent in question was void, and dismissed the bill.

Geo. H. Knight, (Geo. W. Lathrop and John W. Noble, of counsel,) for appellants.

Stem & Allen, for appellee.

Before TAFT and LURTON, Circuit Judges, and SEVERENS, District Judge.

SEVERENS, District Judge, (after stating the facts.) This case has been argued here as if it were to be assumed that the original decree was right upon the case as it then appeared, and counsel for both parties have confined their briefs and arguments to the sole question whether the court below was right in holding the complainants' invention to have been anticipated by the public use of the Nixon and Livermore machines. We conceive that in this case we may properly limit ourselves to the same scope of inquiry. We therefore do not decide what the result should have been upon the case as it stood before the new matter was added, but confine our attention to the particular subjects which have been argued.

The paper holder and cutter for which the patent in question was granted was designed for the purpose of conveniently supporting and paying off paper put up in rolls, and cutting off strips of required length as it should be unrolled. The structure consisted of the following elements: A hanger or bracket, from which is suspended a yoke, composed of a straight bar a little longer than the roll of paper, having arms turned at right angles to it, the arms having flanges projecting from their outer ends at right angles to them, the flanges entering the opening in the center of the roll of paper at each end; and a knife, having a length about the width of the roll, or a little more, which is kept pressed against the anterior side of the roll by a knife yoke, which is attached by its extending arms to the knife, and along its upper bar to the bracket parallel therewith, but to the latter not rigidly, being so adjusted as to roll slightly thereon, and being also provided with springs attached thereto at one end and around it, and so applied at the other to the bracket as to produce a continual pressure by the yoke and knife upon the side of the roll towards the operator. The paper having been suspended upon the first-mentioned yoke, the knife, which is held flat against the side, operates as a brake, preventing the paper from unrolling except as it is drawn out by the operator. The free end of the paper is drawn out under the knife, and the paper unrolled until a sufficient length is obtained, when the strip is drawn up and a little sidewise against the edge of the knife, and cut off.

Four of the claims thereon were for combinations of these parts, or some of them. The other two were for the knife and the knife yoke, respectively. The claims upon which the complainants rely are the second and fifth. They are as follows:

"(2) The combination in a roll-paper holder of a hanger or bracket and a spring knife, substantially as set forth."

"(5) In a roll-paper holder, a knife carrier or yoke, substantially as described, provided with means for keeping the knife to its work."

The paper holder and cutter of the defendant, which is alleged to be an infringement, instead of supporting the roll of paper on a yoke, suspends it upon a shaft running through its center, and projecting beyond the roll somewhat at each end, so as to form a journal which rests in the lower end of a slot cut down into the sides of perpendicular uprights planted on and secured to a table, and held in place by a cap across the top. Arms projecting from the sides of the uprights are fastened to the outer ends of a weighted knife running parallel with the roll and resting upon the anterior side of it, and which knife, with its added weight, serves both as a brake and a cutter. The paper is drawn under the knife and cut off as desired. The complainants insist that the pressure of the weight added to the knife is an equivalent to that of their spring; and this, we think, must be admitted.

Coming now to the question we are to decide, our attention will be given, in the first place, to the use claimed to have been publicly made of the subject patented to Hopking in the Livermore machine. A paper holder and cutter was, according to the testimony of several witnesses, constructed as early as 1878 by O. J. Livermore, who was at that time an employe of Clark, Sawyer & Co., at Worcester, Mass., a firm engaged in general merchandise there. That machine, according to the description, was in all respects like that of defendant, except that the combined brake and knife, instead of being set off by arms so as to press upon the side of the paper roll, was let down upon the top of the roll through the same slots in the standards in which the journals of the shaft supporting the paper were contained, and except, probably, that the weight of the brake and knife was less in the Livermore machine. The manner of its use was by drawing the loose end of the paper under the brake and knife until a sufficient quantity was obtained, whereupon the paper was drawn upwards and sidewise against the knife, cutting it off. This machine, after having been thus used for several years, became dilapidated, and went out of use.

Livermore testifies that, conceiving some such a thing would be convenient, he devised and constructed this machine there used, and set it up in the store of his employers, where it was in constant use in their business for the purpose of holding and cutting off the paper employed in doing up parcels. He states that this use of the machine was continued for more than two years prior to his leaving employment in that store, which was in 1880. Mr. Sawyer, who was a member of that firm, testifies that he remembers the machine well; that he used it himself; and that, according to his remembrance, it was substantially as above described, and was in use in the store seven or eight years. Mr. Richardson, another member of the firm, testifies that he recollects the machine, and corroborates the description of it, and its continuous use in their store for several years; and he describes the manner in which the paper was rolled out and stripped off against the cutting bar. Mr. Marsh states that he was an employe of the firm, remembers the machine, and also corrob-

orates the description given by the other witnesses; states that it was in constant and daily use in the store during the time he was there, from July 24, 1882, to March 8, 1884, and that the paper was taken out and torn off in the manner already described. Mr. Sander-son, another employe from 1875 to 1881, testifies that such a machine was in constant use there for at least two years before the last-mentioned year. Another witness, Mr. Fletcher, who was also an employe of the firm from 1876 to 1880, testifies that such a machine was used there daily for holding and tearing off the paper in the manner described; that he returned there some four years afterwards, and found the machine still in use.

Judging from the number of persons employed about the business of this firm, and other indications from the testimony, it would appear that the use of the machine was sufficiently public to bring the case within the consequences of the statutory provision in that regard. The machine to which this testimony relates is not produced, and is said to be no longer in existence.

We are fully sensible of the just criticisms which were made upon this class of testimony by the supreme court in the case of Washburn & Moen Manuf'g Co. v. Beat 'Em All Barbed-Wire Co., 143 U. S. 275, 12 Sup. Ct. 443, and many times repeated by that and other courts in dealing with such cases; but it is impossible to resist this mass of testimony, coming as it does from witnesses who are unimpeached, and, possibly with one exception, wholly disinterested. Besides all this, the existence and long-continued public use of the Livermore machine is proven by the testimony of two witnesses produced by the complainant, Stevenson and Ball, the former an employe and the latter a member of the firm of Clark, Sawyer & Co. It is true their testimony tends to show that the knife bar was too light to be efficient, and Ball, in particular, states that it was necessary to hold it down upon the roll while the paper was being cut off; and this latter statement receives some, though slight, corroboration from the defendant's witnesses, though the preponderance of the evidence is that the knife bar was sufficient without additional weight, when used by those familiar with the machine.

However this may have been, the addition of weight to the cross-bar, for the purpose of making it more efficient, was so obvious as not to require the faculty of invention. Anybody who saw the need would immediately see the means of supplying it, and would adopt it if it was deemed worth the while. By that addition, and the use of more skillful mechanism, the undoubtedly useful machines of these parties have been produced. But the principle in both is the same as in the Livermore machine, and the defendant's is substantially identical with it, the only difference being in the increased weight given to the cutting bar.

For these reasons we think the court below was right in holding that the second and fifth claims of the Hopking patent were anticipated by the prior public use of the Livermore machine. The evidence in regard to the alleged prior public use of the Nixon machine is less satisfactory, but we do not find it necessary to determine whether that is established, in view of our conclusions upon the evidence of

the prior public use of the machine made by Livermore; that being sufficient to support the decree appealed from. *Fruit-Jar Co. v. Wright*, 94 U. S. 92; *Egbert v. Lippmann*, 104 U. S. 333, 336; *Andrews v. Hovey*, 124 U. S. 694, 701, 8 Sup. Ct. 676; *Jones v. Barker*, 11 Fed. 597.

The decree in the court below must be affirmed, with costs.

BENJAMIN et al. v. CHAMBERS & McKEE GLASS CO.

(Circuit Court of Appeals, Third Circuit. December 7, 1893.)

No. 22.

1. PATENTS—NOVELTY—GLASS-MELTING TANKS.

A tank for continuous melting of glass, having gas and air ports, and differing from previous tanks only in being over 18 inches deep, presents no patentable novelty, either in the formation of a semifluid layer below the upper fluid portion of the metal, as that result was shown in the patents of C. W. Siemens of 1868, 1876, and 1877, and of Leuffgen of 1870, or in the vertical fining produced, also shown in the Siemens' patents to have been well understood. 51 Fed. 902, affirmed.

2. SAME—ANTICIPATION.

Such a tank was anticipated by the Belgian patent of 1877 to C. W. Siemens, and by Granger's patent of 1868, which cover tanks exceeding 18 inches in depth. 51 Fed. 902, affirmed.

3. SAME—VALIDITY.

Siemens' patent, No. 261,054, for glass-melting tanks, is void for want of novelty and for anticipation. 51 Fed. 902, affirmed.

Appeal from the Circuit Court of the United States for the Western District of Pennsylvania.

In Equity. Suit by George H. Benjamin, Alexander Siemens, Joseph Gordon Gordon, and John Wreford Budd, executors, etc., of Sir William Siemens, deceased, Frederick Siemens, and Alexander Siemens, trustees, and Frederick Siemens, against the Chambers & McKee Glass Company, for infringement of patent. Bill dismissed. 51 Fed. 902. Complainants appeal. Affirmed.

Thomas B. Kerr and George H. Christy, for appellants.

James I. Kay and Francis T. Chambers, for appellee.

Before DALLAS, Circuit Judge, and BUTLER and GREEN, District Judges.

BUTLER, District Judge. The bill charges infringement of patent No. 261,054, issued to Frederick Siemens, July 11, 1882, for "improvements in the construction and method of working glass-melting furnaces." A patent for the same invention was granted to C. W. Siemens in France, November 22, 1879.

The specifications are lengthy, discursive, and indefinite—containing many repetitions and leaving the mind in some doubt respecting the invention intended to be secured. They commence with a statement of the class of glass-melting furnaces to which the invention relates, and then proceed to say that:

"Glass-melting tanks have heretofore been constructed under the belief that the 'fining' operation of the material takes place mostly at the surface, and consequently such tanks have been made of considerable superficial area, but of very moderate depth—such as a foot or 18 inches. * * * It has been discovered however that in the glass-melting process the metal as it fines sinks below the surface, and consequently, in order to work out the metal to the best advantages, the depth of the tank should be very considerably increased so that below the fluid molten metal there may be a layer of metal in a semifluid or partially solid condition lining the bottom of the tank."

Of his tank he says:

"The tank, D, is made over eighteen inches in depth for the following reasons: In continuous melting tanks shown in former patents, the surface of the metal subjected to the action of the flame was made considerable, in order to permit of the reactions taking place in the upper portion of the current traveling toward the working holes. These dispositions appeared indispensable, for the lower portion of the metal in the tank is chilled by contact with the bottom, which is kept actively cooled by circulation of air to prevent leakage of the glass through the joints. By increasing the depths of the tanks to a sufficient degree while maintaining an active circulation of air beneath, the metal under treatment is maintained quite fluid to a depth of about eighteen inches, and it has been found not only possible but advantageous to reduce the surface metal subjected to the action of the flame, for the reason that the reactions among the particles occur in this case during their descent from the higher to the lower zones of fluid metal. * * *

"The advantage to be obtained from increasing the depth of these tanks will be the formation of a layer of chilled glass on the surface of the bottom, at which point the movement of the particles ceases, whereby the bottom blocks will be protected from wear, the presence of stones in the glass avoided, and a larger proportion of first-quality glass will be produced."

The claim is as follows:

"A tank for the continuous melting of glass, having gas and air ports, and of the depth herein described, for the purpose of forming below the upper fluid portion of the metal a layer of metal in a semifluid or partially solid condition, as and for the purposes described."

A process claim was rejected; and the one allowed was obtained with considerable difficulty. A brief reference to the method employed in the manufacture of glass will facilitate an understanding of the case. We will adopt what the circuit court has said on the subject:

"The materials were formerly melted in pots about thirty-nine inches deep. They were expensive to construct, and subject to frequent breakages, caused by the variations in temperature between the melting and working processes. They were charged with batches of materials for making glass, placed in furnaces and subjected to great heat, the batches renewed as the melting went on, until they were filled with molten glass, when they were allowed to cool, and the glass grew stiff enough to work. This intermittent process resulted in great loss of time, fuel and material. There are four processes in glass making: First, melting; second, clarifying or fining; third, planing; and, fourth, working out.

"The tendency of inventive minds for the last thirty years, to overcome these difficulties, has been towards tank furnaces. By means of them pots have been dispensed with and a continuous method of working reached, the batch being constantly fed at one end and worked out at the other. In large measure they have revolutionized the glass business. These tanks hold great beds of glass; some of them are one hundred and twenty feet long by twenty feet wide, and of varying depths from two to six feet. Large bricks or blocks placed underneath at some distance apart, between which the molten glass can run, form their bottoms. They are placed on pillars or arches, thus forming a cave through which a cool

circulation of air passes, and the molten glass immediately over them is thus chilled and prevented from escaping through the crevices between the blocks—the molten glass being drawn off a short distance above. * * * In this progress the Siemens brothers bear a distinguished part. They first applied the regenerative gas furnace for glass melting; and the cave principle was their work; these important features, and many others, the result of their inventive genius, were all patented."

Before passing to an examination of the claim it may be well to see what Mr. Benjamin, one of the plaintiffs, who appeared as an expert witness, says of the invention and patent:

"The particular invention set out in the letters patent, I understand to relate to the construction of glass furnaces of the general type set forth in the patents 127,806 and 230,667. That is to say, a tank for the continuous melting of glass, having gas and air ports, but differing from the construction set forth in the patents just named, by having such a depth of tank that there shall be formed below the upper fluid portion of the metal in the tank, a layer of metal in a semifluid or partially solid condition. By the term 'metal' I mean the combined or combining glass-making materials which are employed to make glass. The depth of the tank, I understand from the patent in suit, should be such as to permit the necessary refining (melting and combining of the glass-making materials) of the glass in the tank, without permitting the particles of glass in the process of 'fining' to be brought into contact with the bottom blocks of the tank. In other words, that the depth of the tank should be such as to allow the fining operations therein in transforming the glass-making materials from batch to planed metal, to take place in a vertical direction above the body of metal in a semifluid or partially solid condition lining the bottom of the tank.

"From the patent I learn that the depth of the tank must be over eighteen inches to permit the fining operation to take place in a vertical direction, as the patent says that 'the metal under treatment is maintained quite fluid to a depth of about eighteen inches.' I understand from the patent that, while the metal is kept quite fluid for a depth of about eighteen inches, there is formed under this fluid layer a layer of metal in a semifluid or partially solid condition, or what is spoken of in the patent as 'a layer of chilled glass on the surface of the bottom of the tank, at which point the movement of the particles in a vertical direction in fining ceases, and whereby the bottom blocks will be protected from wear, the presence of stones in the glass avoided, and the proportion of first-quality glass produced increased.'

"The differentiation between the furnace described in this patent No. 261,054 and that set forth in the former patents of Siemens consists in the fact that the furnaces described in the earlier patents of Siemens were constructed under the belief that glass would fine in a horizontal direction. In other words, that the decomposition of the glass-making materials and their recombination into planed glass took place upon the surface and in its zone of highest temperature, and the formed metal, by its greater specific gravity, was precipitated and gradually worked its way horizontally towards the gathering end of the furnace. For this reason tanks were made of a depth of a foot or eighteen inches, so that the whole mass of metal in the body of a tank might be continuously exposed to a temperature approximately equal to that upon the surface and so produce more rapid fining of the glass.

"The tank described in patent No. 261,054 is constructed to carry out the theory that glass fines in a vertical direction; that decomposition of the glass-making materials takes place mainly upon the surface and recombination to form planed metal during the descent of the metal, and is completed at or near the bottom of the zone of fluid glass; that the particles in falling in a shallow tank of the construction shown in Siemens' former patents are brought into contact with the material of which the bottom of the tank is composed, thereby acting both chemically and mechanically to eat into and to decompose the bottom of the tank, and filling the tank with melted glass mingled with particles of decomposed bottom block, thereby giving rise to what is known as 'stones, seeds and cords' in the glass.

"To overcome this the tank described in complainants' patent is made of such a depth that the fining operation takes place vertically, and the particles in their descent come in contact at their lowest zone of motion with a body of semifluid or partially solid glass which lines the bottom of the tank, and can, under no condition of proper employment of the furnace, come in contact with the bottom blocks of the furnace. By reason of this construction, furnaces of this class and construction have been given the name by the Messrs. Siemens of 'deep-tank' furnaces."

We have thus copied largely from Mr. Benjamin's testimony (selecting the particular parts relied on by his counsel) for the purpose of presenting the full strength of their case.

We have seen what the claim of the patent is in terms. What does it embrace? Simply a tank for the continuous melting of glass, "over eighteen inches deep," having gas and air ports. The additional terms are a statement of its use. As the gas and air ports are old, nothing is left but the prescribed depth. This of course will not sustain the claim, unless the tank, by reason of the increased depth, discharges some new and useful function. The plaintiffs say it does—not one only, but two: the creation of a "semifluid layer," as described in the claim, and "vertical fining," as described by Mr. Benjamin—but not alluded to in the claim. There is no doubt that the "semifluid layer," and "vertical fining" result from the use of this tank. But is either new?

As respects the first the proofs show that it is not. Mr. Benjamin himself substantially admits it. He says:

"One of the most radical improvements made in the tank furnace was the substitution by C. W. Siemens of a cooling cave for the air channels under the bottom of the tank whereby the ventilation was greatly improved. By the use of this improvement and by the effective cooling of the tank sides, they succeeded in forming a lining of glass upon the sides and bottom, which protected the tank against the injurious action of the heat and glass-making materials."

Nothing more than this is claimed or suggested by the claim, or specifications. The several patents of C. W. Siemens, of 1868, 1876, 1877, and that of Leuffgen of 1870, show the "semifluid layer." In the plaintiffs' brief, (page 60,) it is said:

"In regard to the foregoing statements in the opinion of the lower court, we desire to submit that while it is true that prior to the invention in suit, tank furnaces were provided with cooling appliances to protect the sides and bottom by forming a layer of chilled glass on the inner surface thereof, it is not true that such layer was always hard enough to stand against the side, and was not also recognized as immobile or quiescent fluid."

To us this seems to be a full admission that the "semifluid layer," contemplated by the patent is old. The reservation contained in the last two lines appear to be unimportant. It is not relevant to anything in the case, as we understand it. The terms of the specifications, in this respect are "so that below the fluid molten metal there may be formed a layer of metal in a semifluid or partially solid condition, lining the tank;" and the claim is in similar terms. The admission seems therefore as broad as the claim. The language is an accurate description of what was done by the use of every tank constructed for the continuous melting of glass. It would be a waste of time to enlarge on this subject.

Is the other function new? The term "vertical fining," is not contained in the patent; nor is the subject of "fining" generally alluded to in the claim. To ascertain what "vertical fining" is, we must first ascertain what constitutes "fining," generally. The latter is not easily done; the proofs leave us in doubt. Is it that part of the process of melting in which particles of the mass, freed from gas, and impurities, sink and find their level? Or is it the act of purifying and combining, in the formation of glass? Whether it be the one or the other, however, it results from the influence of heat, alone, and has occurred under all known methods employed in the manufacture of glass. Time out of mind glass has been made by melting mixtures of sand and alkali in crucibles. For many years the crucibles have consisted of large tanks; and the contents been subjected to continuous heat on the surface. As the ingredients melt they gradually form a mixture of glass more or less perfect, sand, etc. By maintaining the requisite temperature the effect called "fining" is produced. The proportion of glass increases, and being heavier than the unpurified balance of the mass, sinks, while the latter rises. Thus there is a constant motion of the particles upward, and downward, and to some extent laterally—the purer glass forming the lower strata, with the less pure and refuse above. If therefore the term "fining" signifies that part of the process of melting, in which the purified particles sink and find their level, then "vertical fining" was well understood long before 1879. In the Italian patent of C. W. Siemens of 1877, it is said:

"The composition melts gradually under the influence of heat developed at the surface: then in proportion as the glass melts and refines, it gains the bottom of the tank. As the heating takes place by the reverberation of heat upon the surface, while the bottom is energetically cooled, when a molecule of glass is refined at the surface, and has consequently acquired a greater density, it gains the bottom and is replaced at the surface by a molecule of greater density."

Prof. Silliman, in a lecture before the American Institute of Mining Engineers, (as appears by the record,) says:

"The fundamental idea upon which all the Siemens' glass patents are based, is founded in the cardinal fact, before overlooked, or not availed of, that in the melting or 'fining' of glass there is an important difference of density in the product, in the successive stages of the process, the glass being denser, and falling by gravity to the bottom, while the less refined floats on the surface of the denser glass, bearing with it the 'scum' or 'stone,' so-called, imperfectly melted material, and impurities. The Siemens brothers, with characteristic sagacity, seized on this fact, and developed out of it a new system of glass furnace, and glass manufacture."

An examination of the several Siemens' patents for glass-melting furnaces, issued before 1879, shows the accuracy of the foregoing statement. That such "fining" occurs throughout the molten mass, as well as at the surface, was equally understood, though it may have been believed to occur principally at the latter point. This understanding is expressly stated in the patent before us.

But suppose the term "fining" is to be understood as signifying the act of purification and combination of particles, and that the patentee discovered that such purification and combination principally occurs in their descent, is the plaintiffs' situation improved?

Of course the discovery is unimportant if the patent does not secure it. The claim for a method of glass manufacture, as we have seen, was disallowed. If the advantages of the discovery are not therefore embodied in a new function of the tank, the discovery is not secured. Does the tank perform a new function in this respect? We have seen that "fining" occurs, and has always occurred to a greater or less extent, throughout the entire mass; and it occurs doubtless not only in a downward direction, but in every other in which the particles may be driven by the forces set in motion. Even what Mr. Benjamin calls "vertical fining" is therefore old. It is a necessary consequence of melting glass-making materials, in all tanks that have ever been employed for the purpose. Mr. Benjamin says the "fining" which occurs as the particles descend is different from that which takes place at the surface. He does not explain how it is different, nor what causes the difference; nor does any one else. The patent does not suggest any such difference. It is unnecessary, however, to dwell on this scientific problem, or even to determine what "vertical fining" is; for conceding Mr. Benjamin's conclusions to be right the same description of "fining" was old. It was not only practiced in all crucibles, but was well understood by C. W. Siemens in 1872, and is described in his French patent of that date. In speaking of the descent of the heavier particles under the influence of heat, he says:

"There results from these vertical movements, combined with the general advancement of the glass, from the charging doors to the gathering ports, a pugging, so to speak, of the glass mass, which imparts to it homogeneity, and augments its fineness, and improves its quality."

It seems difficult to distinguish this from Mr. Benjamin's definition of "vertical fining." But suppose "vertical fining" was not previously understood, though practiced, what is the result? The patentee discovered that a greater degree of "fining" occurs below the surface than was formerly supposed. Of what avail has his discovery been? What did he do in consequence? Nothing whatever but increase, immaterially, the depth of the old tank. No new function is secured thereby. In every old tank, as we have seen, "fining" of precisely the same character, was performed, and in the same manner. Even if he effected a degree of improvement in the result it would not sustain his patent. But the increased depth is too immaterial to influence the result. The old tanks were 18 inches deep. His specifications say so—"a foot to eighteen inches." He makes his, (according to the patent,) "over eighteen inches." He thus covers everything above the depth of the old tank. One or two inches, or half an inch, distinguishes his tank from the old. It is true Mr. Benjamin says they manufacture the tank very much deeper; but this is unimportant. If the patent can be sustained at all it must be for one "over" 18 inches, no matter how little over. It is plain that this difference between the old tank and that of the patent is immaterial, in all respects. Thus it appears that his tank neither performs a new function nor improves an old one. Mr. Benjamin sums up, in a single sentence, his understanding of what the patentee did:

"He succeeded in getting a tank which was practically lined with glass, and in which the fluid glass could fine vertically (its natural movement produced by the combined effects of the melting temperature and gravity) being permitted to take place without limitation or restriction."

And he claims to have accomplished this by adding an inch, more or less, to the depth of the old tank! As we have seen, his description of the functions of this tank apply with equal truth to those of the old ones of 18 inches.

While it seems unimportant to go further, we do not hesitate to say that we think the patentee was anticipated even as respects the specified depth. He does not appear to have been first to manufacture similar tanks of "over eighteen inches" deep. C. W. Siemens' Belgian patent of 1877, and Granger's patent of 1868, seem to cover deeper tanks, and appear to be in no material respect distinguishable from his. The criticism on the measurement of the first, and the effort to distinguish the latter by the fact that it calls for pots instead of a tank, and shows some other apparently immaterial differences, present no serious difficulty. The measurement in the one case leaves no reasonable doubt respecting the depth, and it is not we think, in conflict with the authorities cited; and in the other the pots are used in place of tanks.

It is unnecessary to examine the question of infringement. For the reasons stated the decree dismissing the bill is affirmed.

FULLER & JOHNSON MANUF'G CO. et al. v. STEVENS et al.

(Circuit Court, N. D. New York. December 22, 1893.)

1. PATENTS—EXTENT OF CLAIM—PRIOR ART—TRANSPLANTERS.

The fifth claim of the Bemis patent, No. 423,723, for improvements in transplanters, must be narrowly construed, in view of the prior art, as shown in the Bowman & Selby patent, No. 115,688, and the Vivion patent, No. 194,745, both for improvements in planters.

2. SAME.

The third, fourth, and sixth claims of the Bemis patent, No. 423,724, and the fifth claim of the Starks & Felland patent, No. 486,200, both for transplanters, if valid at all, must be strictly limited, and are not infringed by defendants.

3. SAME.

Claims 1, 2, 3, 4, 5, 6, 7, and 8 of the Starks & Felland patent were not anticipated, and are valid as to the precise combinations shown.

In Equity. Suit by the Fuller & Johnson Manufacturing Company and Frank A. Bemis against Abram W. Stevens and Leroy W. Stevens for infringement of patents. Decree for complainants.

C. H. Duell, for complainants.

J. H. Whitaker, for defendants.

COXE, District Judge. This is an equity action for the infringement of three letters patent, Nos. 423,723 and 423,724, granted March 18, 1890, to Frank A. Bemis, and No. 486,200, granted November 15, 1892, to Starks & Felland, for improvements in transplanters. The claims involved are the fifth claim of No. 423,723, the third,

fourth, and sixth claims of 423,724, and the first eight claims of 486,200. The patents relate to improvements in machines for transplanting tobacco and other plants, by means of which the operators, seated on the machines, place the plants in the furrows made by the plow; the roots are then watered, the furrows filled up and the earth pressed about the roots. The only manual labor required is placing the plants in the furrow. The rest is automatic. The machines are useful and popular. About 2,000 machines embodying the Starks & Felland improvements have been sold. The validity of the first four claims of the Starks & Felland patent is not disputed, and their infringement is admitted. As to the other claims the defenses are that they are void for lack of patentability and are not infringed.

The contention regarding the fifth claim of 423,723 is that broadly construed it is anticipated, and narrowly construed it is not infringed. The claim is for the following combination in a transplanting machine: A frame. Rearwardly extending pivoted parallel supporting bars. A plow secured between said bars. Angle irons and a compressor plate secured to said angle irons and extending horizontally from the plow. The advantages which the patentee points out for this combination are mainly due to the compressor plate. This is secured to the land side of the plow, and leaves a smooth perpendicular wall of earth, which stands firmly while the plants are being placed in position. Two patents are cited against this claim. They are No. 115,688, granted to Bowman & Selby, and No. 194,745, granted to Vivion, for improvements in planters. The principal criticism urged against these patents is that they are for planters and not for transplanters. It is thought that this difference is not material. The law does not permit a party to obtain a patent for an old corn planter because he uses it for transplanting tobacco plants. And yet this could be done if complainants' contention is carried to its logical conclusion. The patents referred to do not anticipate the claim in question, but they require a narrow construction. In view, therefore, of the prior art, and of the limitations found in the description and in the claim itself, it is thought that it is not infringed. I am unable to find that this question is discussed by the experts, but from such light as can be obtained from the record, and the obscure drawings of the patent, I fail to find in the infringing machine the precise elements of the claim. The defendants' plow is not secured between two parallel support bars, and it is not provided with a mold board and compressor plate operating in the manner and performing the functions attributed to these parts in the Bemis patent. In other words, if the defendants' machine were found in the prior art, it would not anticipate this claim. As many reasons could be urged against it as an anticipation as are urged against the Bowman structure.

The defendants urge substantially the same arguments against claims 3, 4 and 6 of No. 423,724, and present the same references. Concededly these claims relate to minor matters of construction. Although, to my mind, it is doubtful whether they disclose invention, they may be sustained if confined strictly to the mechanism described and shown, but so construed they are not infringed. I am

not at all sure that the lifting mechanism shown in the fifth claim of No. 486,200, by means of which the beam and furrow opener are raised and lowered, discloses patentable novelty. But confining the claim strictly to the parts described, I am inclined to think that it can be upheld. The apparatus is most conveniently located with reference to the seats of the operators, and is admirably designed for prompt manipulation by them. As to the remaining claims, they are not anticipated, and the combinations covered thereby perform some functions which are not shown by any of the references introduced by the defendants. It is not necessary to broaden these claims as the defendants concededly use the precise combinations shown. When limited to these elements the claims are valid and are infringed.

The complainants are entitled to a decree for an injunction and an accounting upon the first eight claims of the Starks & Felland patent, but without costs.

DALBEATTIE STEAMSHIP CO., Limited, v. CARD.

(District Court, E. D. South Carolina. December 27, 1893.)

DAMAGES—BREACH OF CHARTER PARTY—OTHER EMPLOYMENT OF VESSEL.

In awarding damages against a charterer for refusing a vessel, the net freight earned by obtaining another—less valuable—cargo is to be deducted from the sum which would have been earned under the charter. *Watts v. Camors*, 6 Sup. Ct. 91, 115 U. S. 353, followed.

In Admiralty. Libel by the Dalbeattie Steamship Company, Limited, against H. St. Julian Card, doing business as Henry Card, for breach of charter party. Decree for libellant. Hearing on master's report as to damages. Report recommitted.

Bryan & Bryan, for libellant.

J. N. Nathans, for respondent.

SIMONTON, District Judge. In this case, after full hearing, it was held that the charterer was responsible for a breach of the charter party. A master, having been instructed to inquire as to the damages incurred by the vessel, has made his report, awarding the net sum which the vessel would have earned if the contract of the charter party had been carried out.

There can be no doubt that the general rule is that a shipowner who is prevented from performing the voyage by a wrongful act of the charterer is prima facie entitled to the freight that he would have earned, less what it would have cost him to earn it. *The Gazelle and Cargo*, 128 U. S. 487, 9 Sup. Ct. 139. In that case a charter party had been entered into for the carriage of a cargo to a port in Norway. After the cargo was aboard, the master and the charterer differed as to the particular port to which the vessel should go. After much negotiation and discussion, an agreement became impossible, the cargo was discharged at the port of loading, and the voyage was broken up. The time spent in the discussion and negotiation was about the same as the voyage would have con-

sumed, and the expenses of the vessel in the port of loading were about the same as they would have been on the voyage. The circuit court held the charterer in fault, and, nothing being shown to take the case out of the general rule, it was enforced. We must inquire, therefore, whether any circumstances exist in this case which overcome this *prima facies*, and take it out of the general rule.

When a party is entitled to the benefit of a contract, and can save himself from a loss arising from a breach of it at a trifling expense, or with reasonable exertions, it is his duty to do it; and he can charge the delinquent with such damage only as, with reasonable endeavors and expense, he could not prevent. *Warren v. Stoddart*, 105 U. S. 229. The rule of damages prevailing in this court is the actual loss sustained in the particular case, regard being had to all the circumstances attending it. The question we are discussing came before Judge Pardee in *Watts v. Camors*, 10 Fed. 148. In that case the action was for breach of charter party, one of whose covenants bound the parties to the performance thereof in the penal sum of the estimated amount of freight. After the breach of the charter party the vessel procured another cargo. The owners of the vessel demanded the stipulated sum fixed, or capable of being fixed, by the charter party. The charterers claimed the benefit of the profit received upon the cargo subsequently obtained by the ship, and the learned judge so held for respondents. The case went into the supreme court. *Watts v. Camors*, 115 U. S. 362, 6 Sup. Ct. 91. That court entered at large into the question. They assert the practice of the courts of the United States sitting in admiralty to award the damages actually suffered, whether they exceed or fall short of the amount of the penalty; and, applying their reasoning to the circumstances of that case, they decide that the circuit judge rightly held that the charterers were liable only for the amount of damages which their breach of the contract had actually caused to the owners of the ship. This conclusion is further emphasized. The charterers contended that as the ship was tendered on 11th September, and was refused the next day, it was the duty of the master at once to seek another cargo, and thus prevent any damage that might follow. Instead of this, she remained idle during the lay days. The supreme court, however, excused this delay because various negotiations were pending between the parties after the first refusal, during the whole period of the negotiations, and held the charterer liable. This decision controls this case. The charterer refused the vessel on 15th February. In a day or two afterwards she got another charter, but less valuable. She sailed from this port, earning the freight.

Let the report be recommitted to the special master, who will ascertain what was the net result of the freight earned by the *Balbeattie* on the cargo carried. Let this be deducted from the sum of £773. 2s. 4d., which would have been the net result of the charter party, had it been carried out, and let judgment be entered in favor of libellant for this difference and costs.

THE ROANOKE.

BOTSFORD et al. v. UNION MARINE INS. CO. et al.

(Circuit Court of Appeals, Seventh Circuit. December 1, 1893.)

No. 97.

1. SHIPPING—GENERAL AVERAGE—DAMAGE IN EXTINGUISHING FIRE.

Damage by water poured on cargo to extinguish fire, by request or direction of the officers of the vessel, is a proper subject of general average. 46 Fed. 297, affirmed.

2. SAME—STATUTORY EXEMPTION.

Rev. St. § 4282, which exempts the owner of a vessel from liability for damage to cargo by fire happening without his design or neglect, does not release him from liability to contribute towards general average. 46 Fed. 297, affirmed.

3. SAME—EXCEPTIONS IN BILL OF LADING.

Clauses in a bill of lading, exempting the carrier from liability for any loss or damage arising from fire and wet, and giving him the benefit of the insurance, do not exempt the vessel from a general average claim by the underwriters for damage caused in extinguishing fire, since the bill of lading only affects rights and liabilities incident to the contract of carriage. 53 Fed. 270, affirmed.

Appeal from the District Court of the United States for the Eastern District of Wisconsin.

In Admiralty. Libel by the Union Marine Insurance Company of Liverpool, England, the Insurance Company of North America, and the Atlantic Mutual Insurance Company of New York against the steamer Roanoke, W. F. Botsford, C. D. Thompson, and James W. Martin, claimants for contribution in general average. Exceptions to the libel were overruled, (46 Fed. 297,) and a decree rendered for libelants, (53 Fed. 270.) Claimants appeal. Affirmed.

Statement by SEAMAN, District Judge:

Libel was filed against the steamer Roanoke, by the appellees, as underwriters upon her cargo, claiming general average contribution for sacrifice of cargo under the following circumstances: On the evening of May 17, 1890, while the steamer Roanoke was lying at her dock at Buffalo, and taking on a cargo of merchandise, including a quantity of jute, bound for Toledo, fire was discovered in the midship hold, in some bales of jute. The officers of the vessel gave alarm, which brought the fire department and fire tug to their assistance. The lines were cut, and the vessel removed from her dock, and water poured upon her and into the hold. The fire was apparently quenched about 10:30 P. M., the damage to the steamer being confined to the upper works and main deck; but water was necessarily poured into the hold throughout the night, because of smoldering fire in the jute. On the morning of May 19th, fire again appeared in the jute, and was extinguished by throwing in water for an hour. The steamer departed for Toledo at 3 P. M., the 19th. At intervals on the voyage, and after arrival, during the unloading, up to completion, May 22d, fire was breaking out in the jute, and only kept down, and finally extinguished, by streams of water thrown in, through the steamer's hose, at each outbreak. The damage to the cargo by the water thus employed is undisputed. There was a general average statement, and the libelants paid thereupon, to the cargo owners, respectively, the amounts so adjusted for damages by water, in addition to fire damage. Decree was for libelants thereupon, for the damage by water, \$2,505.62, and the owners of the steamer appeal.

The bills of lading for the shipments in question contain provisions as follows: That any carrier or vessel receiving the goods shall not be liable
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"for any loss or damage sustained by any person, or any loss or damage to all or any of said property, arising from, caused by, or connected with * * * any peril, danger, or accident of, or incident to, navigation or transportation, * * * any fire, * * * explosion, * * * wet, combustion, heating, * * * nor shall there be any liability * * * for any loss or damage herein mentioned, unless the same affirmatively, and without presumption, be proved to have been caused by the negligence of the person, party, or vessel sought to be made liable;" and, further: "Whenever any liability for loss of or damage to all or any of said property shall arise, that person, or party, or vessel then engaged in the actual carriage, or having custody, of the property, shall be deemed the carrier, and be solely liable for such loss or damage, and the person or party liable, or who might sustain loss in consequence of owning * * * such vessel, shall have any insurance, however effected, on, as to, or covering the property lost or damaged, and all benefit and advantage to be derived therefrom."

George D. Van Dyke and P. H. Phillips, for appellants.

John C. Richberg, for appellees.

Before WOODS, Circuit Judge, and BAKER and SEAMAN, District Judges.

SEAMAN, District Judge, (after stating the facts.) Against the allowance of general average in this case, and especially against recovery by the insurers, the appellant raises four points of objection, which were clearly presented and ably argued. They are of importance to the various shipping interests, in some respects, at least, not settled by precedents, and will be considered under the following inquiries: (1) Independent of statute or contract, do the facts make a case for general average? (2) Does the statute—section 4282, Rev. St. U. S.—apply to general average contribution? (3) Do the exemptions from liability contained in these bills of lading save the carrier from such contributions? (4) Is general average liability included in the clause giving the carrier the benefit of shipper's insurance?

1. The question which must be determined primarily is whether the destruction of property on shipboard, by water pumped or poured onto it, through the hatches or otherwise, to rescue ship and cargo from peril by fire, constitutes such sacrifice of a part for the whole adventure as will meet the requirements for general contribution. The conceded facts here show a common peril; and the saving flood of water, although furnished by the fire department of Buffalo at the first outbreak of the fire, was invoked by the officers of the vessel, and, at the subsequent appearances, was entirely under their charge. Vessel and remaining cargo were saved, but at the expense of destruction by water of the portion of the cargo for which contribution is claimed. The district court held that it was a case of general average, and the opinion there filed—reported in 46 Fed. 297—well states the grounds for so holding, and the authorities in support, and is adopted here for answer to the first question.

2. The next inquiry—whether section 4282, Rev. St., exempts the vessel from contribution in such case—does not appear to have been raised heretofore in the courts of this country. This statute was first enacted in 1851, and now appears in the Revised Statutes

under the general title of "Commerce and Navigation," and the subtitle of "Transportation of Passengers and Merchandise." It provides as follows:

"No owner of a vessel shall be liable for, or make good to any person any loss or damage which may happen to any merchandise whatsoever, which shall be shipped, taken in, or put on board of any such vessel, by reason or by means of any fire happening to or on board the vessel unless such fire is caused by the design or neglect of such owner."

It is evident, from the provisions in *pari materia* with this, that the legislative intent was to relieve the carrier from a liability which had theretofore entered into the contract for carriage of goods. This object is recognized in *Moore v. Transportation Co.*, 24 How. 1, and the opinion states: "The decision in the case of *The Lexington*, which was burned upon Long Island sound, led to this act of 1851,"—referring to *New Jersey Steam Nav. Co. v. Merchants' Bank*, 6 How. 344, where the carrier was subjected to liability for a loss of goods by fire in transit, under the rule at common law. By that rule the carrier became absolutely responsible for the safety of the goods intrusted to him for transportation, excepting only for acts of God or the king's enemies. The liability as an insurer, which was thus imposed by the common law, had proved onerous and discouraging when applied to cases of loss by accidental fire, and relief had been extended in England by statute; this similar enactment followed here. Both the circumstances and the context show that this provision was intended only to affect the contract for carriage, so that this insurance against loss by fire should no longer be implied as a part of that contract.

The rule for contribution in general average is older than, and entirely aside from, the common law; is a rule both of equity and policy, which has come down through the centuries from an old Rhodian law, adopted in the Roman jurisprudence, and thence entered into the general maritime law. It appears to have been preserved in England without enforcement by statute. It applies only to shipping, and prescribes that in all cases of imminent peril to the whole adventure, where release is obtained by intentional sacrifice of any part for the benefit of the residue, contribution shall be made by the saved portions for that which was so sacrificed. The common peril takes from the master of the vessel his paramount obligation to his vessel owners, and charges him with a joint agency for the owners of cargo and vessel, to act impartially, decide when a sacrifice is necessary, and select for sacrifice that which will best serve the interest of all to avoid the peril. This general average contribution is not dependent upon contract, but is "built upon the plainest principles of justice," (3 Kent Comm. 233,) and is aside from contract, (*The Eagle*, 8 Wall. 23:) "It is the safety of the property, and not of the voyage, which constitutes the true foundation of general average." *Insurance Co. v. Ashby*, 13 Pet. 331. The vessel is made to contribute, as well as the cargo saved, not because of its undertaking to carry, or out of any duty as carrier, but because it had encountered peril, and had been saved to the owners by a sacrifice of other property.

It therefore appears that the adoption of this statute, which is now invoked to relieve the vessel from contribution, found in force these well-known rules, in no respect dependent upon each other, and of separate origin,—the one from the common law, and the other from the maritime law. That from the common law was harsh, imposing upon the contract of carriage an absolute insurance against loss by fire, and clearly within the legislative view for relief; the other, for general average, was an ancient rule of the highest equity, not touching that contract, but applicable only to an emergency of great peril to the whole adventure,—a rule of mutual benefit and value, protecting vessel and cargo when peril arose. The statute makes no mention of general average. The legislative intent was clear to relieve the carrier from the onerous contract liability, for the encouragement of vessel interests; and that intent furnishes the key to the meaning of the statute, unless its language is so broad and unmistakable that it cannot be limited to that purpose. The appellants' contention is that the terms here employed—that the owner "shall not be liable to answer for or make good" any loss or damage which may happen to merchandise "by reason or by means of any fire," in the absence of negligence—must be held to include this damage by wetting of the goods; that, although general average is not allowed for damage by fire, it is here given for the wetting, which was "by reason" of the fire, and its direct consequence; that the uniform rule of construction which has been applied to policies of insurance against fire, to cover such damage by water as well, must govern here. The basis for general average allowance constitutes the distinction. It is not predicated upon any accidental damage or loss; it is not an indemnity for particular goods from any peril or loss by fire, and cannot arise if the peril is only of this portion, and not common, but accrues only in the case of a voluntary sacrifice of a portion to release the whole adventure from peril of storm, fire, or other stress,—and the sacrifice may be made by jettison, stranding, scuttling, or, as here held, by pouring in water; and contribution is charged upon the beneficiaries as such, whether cargo or vessel, or both. The peril is often such that the vessel must be the subject of sacrifice, either in whole or partial, or must incur extraordinary expense to save the cargo or residue, and then its owner receives the general average contribution. Surely, it cannot have been intended that the vessel should retain this benefit without sharing its burdens. We are of opinion that the general words of this statute do not warrant a construction which would disturb these just and valuable rules, which would tend to discourage impartial conduct by the master in cases of peril, and that this statute does not affect general average.

The courts in England have so construed the parent statute in recent decisions. *Schmidt v. Steamship Co.*, 45 Law J. Q. B. 646; *Crooks v. Allan*, 5 Q. B. Div. 38, 4 Asp. 216. Counsel for appellants urge that these decisions should not be taken as precedents here, because the English courts have administered this statute "with tight and grudging hand," while the courts of this country have uniformly pronounced for its liberal construction. The cases cited

in support of that contention do show that courts there have taken this different view of the statute; but it does not appear to have affected the opinions above cited, and their reasoning is clear and satisfactory to the conclusion here reached.

3. The bill of lading in question contains a clause that the carriers shall not be liable for any loss or damage "arising from, caused by, or connected with" certain specified causes, among which are mentioned fire, wet, combustion, and heating. This special clause is urged in behalf of the appellants to exempt the vessel from the general average claim in question, while it is conceded that the ordinary terms found in the contract, viz. "to be transported in like good order and condition, dangers of navigation, fire, and collision only excepted," does not so operate. *Vide* *Nimick v. Holmes*, 25 Pa. St. 366; *Schmidt v. Steamship Co.*, *supra*. The enlarged details of this bill of lading are directed to the contract of carriage, as in the simpler form. All of the causes enumerated are risks incident to the carriage by water or rail intended by this instrument. General average has an entirely different basis, and is aside from the contract relation for carriage, as shown under the preceding point; and the terms here employed do not warrant a holding that it was in the minds of the parties to this contract of affreightment as touched thereby. The definition adopted in the English cases, under similar special clause,—*Crooks v. Allan and Schmidt v. Steamship Co.*, *supra*,—is appropriate here, viz.:

"The office of the bill of lading is to provide for the rights and liabilities of the parties in reference to the contract to carry, and is not concerned with liabilities to contribute in general average."

4. The stipulation in the bill of lading which gives to the carrier the benefit of insurance must have similar construction, and be held to cover only liability and damage contemplated by the contract to carry the goods. The issue here being upon the allowance of general average, the discussion in *Phoenix Ins. Co. v. Erie & W. Transp. Co.*, 10 Biss. 18, and *Id.*, 117 U. S. 312, 6 Sup. Ct. 750, 1176, has no application, as the only contest and ruling there was against recovery of damages for which the carrier would have been liable as such, but for similar stipulation in that bill of lading. That case has, however, in its facts, some significance in support of the view here adopted, for it is conceded in behalf of appellant that the insurer there had judgment against the vessel owners for general average contribution by the insured cargo, although it may not be accepted as a clear precedent upon that point, in the absence of a showing of dispute of this liability by the distinguished counsel there engaged.

The decree of the district court is affirmed.

BAXTER et al. v. CARD.

(District Court, E. D. South Carolina. December 28, 1893.)

1. ACCOUNT STATED—"E. & O. E."—ACCEPTANCE OF NOTE FOR BALANCE.

Under a charter party requiring payment in cash of the amount due the vessel, the charterer presented to the master, as he was about to sail, an

account with the ship, having on it "E. & O. E.," and gave him a note for the balance appearing thereon. *Held*, that acceptance of the note by the master did not preclude correction of the account for mistake.

2. SHIPPING—CHARTER PARTY—CHARTERER'S COMMISSIONS.

A charterer, who is agent for the ship at the port of loading, and obtains for her a full cargo, is entitled to commissions for loading stipulated in the charter party, although he was unable to make all the advances to the master agreed upon.

3. SAME—EXPENSES OF LOADING.

A provision of a charter party that the vessel shall pay "for loading, compressing cotton, and insurance at presses," includes compressing elsewhere than at the port of loading, of which the ship receives the whole benefit, and for which the charterer has made allowance in the freights paid by shippers at rates less than that fixed by the charter party.

In Admiralty. Libel by Harrison Baxter and George Gallilee, managing owners of the steamship Kendal, against H. St. Card, trading as Henry Card & Son, for breach of charter party. Decree for libelants.

Bryan & Bryan, for libelants.

J. N. Nathans, for respondent.

SIMONTON, District Judge. This is a libel for breach of charter party. The respondent entered into a charter party with the owners of the British steamship Kendal. By the terms of the charter party, the vessel was to be furnished a full and complete cargo of cotton from Charleston to Liverpool or Bremen, for five-sixteenths of a penny sterling per pound; sufficient cash for ordinary disbursements at port of loading to be advanced to the master by the charterer's agents, at current rates of exchange, steamer to pay $2\frac{1}{2}$ per cent. commission thereon. Any difference between the amount of freight by the bills of lading, which the captain was authorized to sign at any rate of freight, and the freight fixed by charter party, was to be settled at the port of loading before sailing, and, if this were in favor of the vessel, was to be paid in cash, at current rate of exchange, less insurance. Eighteen working days were allowed for loading and demurrage, at the rate of six pence per net register ton, to be settled with the captain before the steamer left the port of loading; no claim to be valid if made after that time; steamer to pay for loading cargo, compressing cotton, and insurance at presses, \$1.21 per bale, at loading port. The charter party was dated 20th July, 1892. The master reported himself to the charterer on 31st October, 1892, and the loading began on 1st November, ended on 28th November, and the ship cleared on 30th of that month.

The breaches charged are unnecessary delay in loading, causing demurrage for ——— days, in all \$919.92; failure to furnish advances for necessary disbursements of the ship; failure to settle in cash the difference between the freight as per bills of lading and the rate of freight fixed by charter party, in all \$6,457.25.

It appears from the evidence that the respondent, being charterer and agent of the ship, entered her in the customhouse, assigned her a berth, and proceeded to get a cargo for her. He began to make

advances, and did so to the amount of \$527.53; but, having become embarrassed, he ceased his advances, and thenceforward paid none of the bills of the ship. This failure caused the master much embarrassment, and finally he was compelled to settle the claims against his ship by his own drafts, and after libels issued against her. On 30th November he cleared the ship himself. On that day, just as the ship was about to sail, the respondent presented him an account with the ship. In this account he credited the ship with freight, as per charter party, £4,301. 17s. 7d., and charged her with freight, as per bills of lading, £2,953. 16s. 2d.; leaving a balance due the ship of £1,348. 1s. 5d., (\$6,457.25.) Against this balance he credited himself as follows:

By compressing and insurance, 3,050 B/C, at 76 cts.....	\$2,318 00
Advances for disbursements.....	527 52
Commissions and insurance on advances.....	254 80
Brokerage, 3½%, as per charter.....	721 21
Balance due ship.....	2,635 72
	<hr/>
	\$6,457 25

The account has on it the usual letters, "E. & O. E."

Upon presentation of this account and examination thereof, the respondent gave to the master his note, at 60 days, to the order of the owners of the ship, for £645. 17s. 7d., (\$2,635.72,) the balance appearing on this account. On the next day the proctors of the ship, by letter, advised the respondent that this note had been left with them by the master; that it could not be in settlement, because the charter party required such settlement to be in cash, and the master could not vary it. They also notified him that the settlement was made with the master at a time and under circumstances which gave him no opportunity of verifying it, and that the question of the amount of indebtedness was still open. The note has been tendered to respondent.

The first question we must meet is, was this settlement final? Whether we call this an "account stated," or an "account settled," it is open to correction for mistake, the burden being on the ship. *Wiggins v. Burkham*, 10 Wall. 132; *Perkins v. Hart*, 11 Wheat. 256; *Chappedelaine v. Dechenaux*, 4 Cranch, 306. There can be no doubt that the master, in receiving the note for the balance, instead of cash, varied the terms of the charter party, and for this he was without authority. *Macl. Shipp.* 138. We may treat the acceptance of the note as an admission of the correctness of the balance, subject to correction for mistake.

Of the items of the account, that for advances—\$527.52—is admitted to be correct.

The item, "Commissions and insurance on advances," being estimated on disbursements not made or advanced by the respondent, is clearly an error, and must be eliminated from the account.

There are two items remaining, one for brokerage and commissions, 3½ per cent., as per charter party. The charter party provides that the steamer shall be consigned to the charterer's agent at port of loading, and be entered and cleared by them at the customhouse, paying the usual loading commissions, of 3½ per cent.

The respondent became agent for the ship, as well as charterer. There is no evidence showing that in this respect he did not do his duty by the ship. She obtained a full cargo, and until his means failed the respondent advanced for her. This item should be allowed,—\$721.21.

The remaining item is: "Compressing and insurance, 3,050 B/C, at 76 cts.,—\$2,318." The cargo of this ship came from the interior, compressed at the point of shipment in the interior. The respondent paid out no money for the compressing or insurance. He says that the compressing was allowed for in the rate of freights he gave the shipper, and thus, in a sense, he paid for compressing. He did not explain this, nor did he state the deduction or allowance in the rate. The custom is this: Cotton is engaged for a ship in uncompressed bales. It is for the interest of the ship that it be compressed. To this end the ship has the cotton sent to press, or authorizes or confirms this sending to the press, and pays for the compressing. As it thus constructively takes possession of the cotton which is in the press, and at its risk, it insures the bales while in press. The charter party makes a fixed allowance for this,—70 cents for compressing, and 6 cents insurance, per bale. These are charges for actual work and actual risk. The language of the charter party is: "Steamer to pay for loading, compressing cotton, and insurance at presses, one dollar and twenty-one cents per bale, at loading port." This is a stipulated sum now fixed by usage, and is made up, 45 cents loading, 70 cents compressing, 6 cents insurance. It forms a part of the consideration in fixing the rate of the charter. Libelants contend that the ship agrees to pay only for cotton compressed and insurance effected at the port of loading. But the compressing of the cotton was for the benefit of the ship. Her carriage capacity was largely increased thereby. And, as the charterer was obliged to accept freight rates below that provided in the charter party, the greater the number of bales, the greater his loss. Under these circumstances, when the charterer furnished cotton compressed, instead of cotton uncompressed, the ship received the whole benefit of it. Charter parties must be construed liberally, in furtherance of the real intention of parties and the usage of trade. *Raymond v. Tyson*, 17 How. 53. It would be a narrow construction of the charter party to say that the ship would be relieved from the burden, simply because the compressing was done elsewhere than at the port of loading. Counsel for libelants say that the ship cannot be made to pay for this compressing, because, having been done in the interior, there is no lien on her for it. *The Paola*, 32 Fed. 174. There would be no lien had the compressing been done in the port of loading. *The Joseph Cunard*, *Olcott*, 120. This libel is in personam, by the owners of the ship against the charterer. The charterer, having fixed the rate of freight, making allowance for compressing, is entitled to the provision of the charter party.

There is no evidence on the matter of demurrage. Respondent admits two days and one-half,—£95. 12s. 6d. Let this sum, reduced

to dollars and cents, be added to the decree; and, when the necessary subtractions and additions are made, let judgment be entered for libelants for the result, with costs.

THE S. S. WILHELM.

VANCE et al. v. THE S. S. WILHELM.

(Circuit Court of Appeals, Sixth Circuit. November 6, 1893.)

No. 52.

1. ADMIRALTY—APPEAL—WEIGHT OF EVIDENCE—FINDINGS BELOW.

Where a decree of the district court in admiralty on conflicting evidence is sustained by the circuit court on appeal, the circuit court of appeals will not reverse the findings below, though it might originally have reached a different conclusion.

2. TOWAGE—LOSS OF TOW.

A tug with two vessels in tow, all lumber laden, bound down Lake Huron to Tawas, after passing Thunder bay, was struck by a violent northeast gale, with heavy snow. The master made allowance for leeway by sailing one point to windward of the usual course, but finding, from the shoaling of the water, that his distance from shore had decreased from 5 miles to 3 in running less than 6 miles, he stood out for about a mile, and then resumed his former course, the water shoaling from 9 fathoms down, for about 10 miles. When near Au Sable point, he again rounded to, in executing which maneuver the towline parted, and the tow went ashore. *Held*, that the loss was caused by the negligence of the master in bringing his tow so near the shore, and the tug was liable therefor. 52 Fed. 602, reversed.

Appeal from the Circuit Court of the United States for the Eastern District of Michigan.

In Admiralty. Libel by Emery J. Vance and others against the propeller S. S. Wilhelm for loss of a tow. The district court dismissed the libel, (47 Fed. 89,) and, on appeal by libelants, its decree was affirmed by the circuit court. 52 Fed. 602. Libelants again appeal. Reversed.

Harvey D. Goulder and Simonson, Gillett & Courtright, for appellants.

F. H. Canfield, for appellees.

Before BROWN, Circuit Justice, and TAFT and LURTON, Circuit Judges.

TAFT, Circuit Judge. The libelants and appellants, Emery J. Vance and others, owned the barge or schooner Mears, and filed their libel to recover damages for the total loss of the barge while being towed by the steam barge Wilhelm from Cheyboygan, Mich., to Tawas, Mich. The towline between the propeller and the Mears parted in a storm on Lake Huron, a little to the north of Au Sable or Fish point, on the western shore of the lake. The Mears went ashore and was broken up, and her cargo of lumber was completely destroyed. The libel charged that the loss occurred through the negligence of the Wilhelm, and pointed out five faults in which negligence was shown:

(1) That the propeller was not properly officered and manned.

(2) That the propeller attempted to tow the Mears and the Midnight, another lumber-laden barge, across Lake Huron, during a violent and increasing storm, instead of taking them to the only accessible and safe shelter, in Thunder bay, as she could have done without difficulty, and as ordinary and prudent seamanship required her to do.

(3) That after going about and holding her tow, head into the wind, about four miles off shore, and attaining this position of comparative safety, she negligently resumed her course on a lee shore in a furious gale.

(4) In negligently pursuing a course down the west shore of Lake Huron in a thick, driving snowstorm, and with a heavy wind and sea from the northeast, without making sufficient allowance for the leeway caused by such storm and wind.

(5) In negligently turning at full speed into the lake, so sharply as to part her towline, whereby the Mears was necessarily rendered helpless in such close proximity to the lee shore, and her destruction was thereafter inevitable.

All these faults were denied, and after a full hearing of the evidence the district judge held against the libelants, and dismissed the libel. On appeal the circuit judge refused to disturb the findings of the district judge, and affirmed the decree.

It is well settled that every presumption is in favor of the correctness of a decree in admiralty that comes into the court of last resort sustained by the district judge in the original hearing and the circuit judge on appeal, and that the appellate court will not disturb such a decree unless a manifest mistake is made clearly to appear. The appellate court will not reweigh conflicting evidence, though it might originally, upon such evidence, have reached a different conclusion from that announced in the courts below. *The S. B. Wheeler*, 20 Wall. 385; *The Richmond*, 103 U. S. 540; *The Quickstep*, 9 Wall. 669; *Newell v. Norton*, 3 Wall. 267. With this presumption in favor of the appellees, we proceed to the consideration of the issues of the case.

The obligation of the towboat to the tow is well defined. The highest possible skill is not required of the towing vessel. She is bound to bring to the performance of the duties she assumes reasonable skill and care, and to exercise them in everything relating to the work until it is accomplished. The want of either in such a case is a gross fault, and the offender is liable for the full damages resulting therefrom. *The Margaret*, 94 U. S. 494-497.

With reference to the first fault charged, namely, that the steamer *Wilhelm* was not properly manned, there was no evidence whatever to sustain it, and the issue was properly found against the libellant.

With reference to the second charge, namely, that the master of the propeller was negligent in not taking refuge in Thunder bay, instead of proceeding on his course to Tawas, a point 60 miles below Thunder bay light, the evidence was very conflicting as to what the condition of the wind and weather was at the time when it would have been possible to go into Thunder bay, and as to whether

there were any indications, upon which a prudent master should have acted, of the approach of the furious storm and gale which subsequently prevailed. Whatever might be our original view of this evidence, we think that there was no such preponderating weight in favor of the libelants' contention that we ought now to reverse the finding of the district and circuit judges upon this point.

We come now to the third fault charged, namely, that the master of the Wilhelm, after rounding to and heading into the wind, did not remain in that position, but resumed his course down the lake. It is conceded by all the witnesses in the case, and found by the district judge, that about 7 o'clock, or shortly thereafter, the tow was struck by heavy squalls from the northeast or east-northeast, accompanied by snow, and that from that time until the loss of the barges, about 2 o'clock in the afternoon, the wind blew a gale from the northeast, accompanied by heavy snow; that about 9 o'clock, when off Sturgeon point, a distance of about 25 miles from Thunder bay light, the Wilhelm, which was heavily loaded with lumber on deck and in her hold, lost her starboard deck load, and that this gave her a heavy list to port, and made her steer badly; that at this time the lead showed her in 7 fathoms of water or about 3 miles from shore; that thereupon she rounded to and headed into the wind while her cargo was being trimmed; that she remained in this position for $1\frac{1}{2}$ hours, working slowly to the windward to a point where the lead showed 9 fathoms, when she turned and resumed her course, S. $\frac{1}{2}$ E., down the shore of the lake; that as she went on this course for $1\frac{1}{2}$ hours or 2 hours the lead showed that she was shoaling; that she rounded to again, and during this maneuver, or shortly thereafter parted the towline; that within 15 or 20 minutes the tows, which had failed to secure themselves by anchor or by sail, were aground, and were beaten to pieces. An examination of the evidence inclines us to think that it would have been much better judgment on the part of the master of the Wilhelm to have remained head up to the wind when he first rounded to, until the fury of the storm had abated, than to go down the lee shore in search of the harbor of Tawas, which, confessedly, could not have been found in a snowstorm, with the wind blowing from 40 to 60 miles an hour. We think that the chances of saving his tow were very much better to maintain the position where he then was, in which he was able to make headway against the wind, than to move in the direction of a port which he certainly could not make until the storm had abated; but in view of the conclusion reached by the district and circuit judges with the witnesses before them, expert and otherwise, we should not feel disposed to reverse this case on such a ground, and are willing to concede that it was an error in judgment, not amounting to negligence or fault, for the master to resume his course. We therefore do not sustain the appeal from the finding with respect to the third issue.

Coming now to the fourth fault charged, that of negligently taking a wrong course too near the lee shore, we think the appeal must be sustained, and the decree reversed.

The usual course of vessels from Thunder bay to Tawas, in

fair weather, is S. $\frac{1}{2}$ W. The course sailed by the Wilhelm was S. $\frac{1}{2}$ E.; that is, the master made allowance for leeway by sailing one point to the windward of the usual course. The master of the Wilhelm states that he passed Thunder bay light from 7 to 10 miles out, and that after running 35 or 40 miles, measuring by his log, he found himself 3 miles from shore, in 7 fathoms of water; that, in the 5 $\frac{1}{2}$ miles just preceding his rounding to, the lead had shown a shoaling of from 13 fathoms to 7 fathoms, which, the master himself admits, proved that his distance from shore had decreased from 5 miles to 3 miles in going less than 6 miles. It is in evidence, and admitted on all sides, that along this shore the bottom of the lake gradually shelves so that the lead enables the mariner to judge quite accurately his distance from the shore, and that 7 fathoms is about 3 miles from shore, and 13 fathoms about 5 miles. The storm, which had begun at 7:30, continued until 2 o'clock. This is admitted. It was thus apparent, and was admitted by the master to have been known to him at the time, that under the influence of this northeast wind and gale his leeway had been 2 miles in a progress of less than 6 on a course S. $\frac{1}{2}$ E. He pulled out into the lake, he thinks, about 1 mile. This estimate was confirmed by the cast of the lead, which showed 9 fathoms when he resumed his course. He still maintained his course S. $\frac{1}{2}$ E. He was then 4 miles from shore. He ran that course, shoaling from 9 fathoms down, for 2 hours, or about 10 miles. If his leeway continued to be the same, his distance from the shore must have been reduced to less than a mile, and he would have brought up in the breakers near Au Sable point. There is nothing to show why the leeway did not continue the same in the undiminished violence of the gale. These facts, which do not seem to have been considered by the learned judges below, are taken from the testimony of the master himself, and make it mathematically demonstrable that when he rounded to a second time, after running 10 miles, he was in or near the breakers, and that his evidence, and that of his mate, that they were then in 7 fathoms of water, and never less, and were never less than 3 miles from the shore, are untrue.

We find that the master, in the log which he prepared a week after the loss with a view to the litigation, says that the lead showed 6 or 7 fathoms. Hill, the master of the Midnight, the other tow which went ashore, now in the employ of the claimants, says that the captain told him that he got 5 fathoms or less. Two witnesses testified in the circuit court after the appeal. One of them, Robert Hovenden, was the notary who took the master's protest and delivered it to the master as soon as it was executed. Singularly enough, the captain did not produce it, or explain its absence. Hovenden testified that in the protest the captain stated that he was surprised at the storm, which prevented him from seeing the shore, and when he did see the shore he was so close to it that, inevitably, he would have gone on it, if he had not turned away, and in doing so the rope broke; that he did the best he could to save the tow, but he was not able to save it, because all of them would go if he had not turned out.

Another witness, Bristol, a marine reporter, and a correspondent of the Chicago, Detroit, Cleveland, and other papers, who visited the scene of the wreck the day after, with the master of the Wilhelm, to find the barges, testified that the master said that he had expected to weather the storm and reach Tawas safely; that at times it would lighten up somewhat, and during one of these times he saw that he was quite close to the land, and that in putting his helm over hard, to sheer out and keep away from the land, in that way he parted his towline. These were wholly disinterested witnesses, so far as the record shows, and their evidence, which was clearly admissible, (see *The Potomac*, 8 Wall. 590; *Packet Co. v. Clough*, 20 Wall. 540,) fully confirms the necessary conclusion from the facts admitted by the master. This conclusion also finds strong confirmation in the short time which it took for the barges to ground after the parting of the towline. We think, therefore, that the presumption arising in appellee's favor from the decrees below is overcome, and we must find that it was the negligence of the master which brought the vessels into a position of great peril, a short distance off of Au Sable point.

The master ought to have known that his course, if continued, would bring him into a position of such imminent peril that escape was only possible by suddenly executing the maneuver of rounding to with his tow in this furious gale. That was the natural result of his negligent navigation. Such a maneuver, executed in extremis, could not but strain the towline, and would probably cause it to part, either in the maneuver or soon after. The parting of the towline near or in the breakers made the loss of the barges, cast adrift with no time to anchor or set sails, a matter of minutes. We are therefore of the opinion that as the negligence of the master, in bringing his tow so near to the shore, might have been expected to result in the loss, (*The Elfinmere*, 39 Fed. 909,) it was the proximate cause of the loss. It is no answer to say that, had he kept out in the offing, the fury of the storm might there have parted the towline, and cast adrift the tows to destruction. Whether the towline would there have parted, or whether the tows, if cast adrift in the offing, might not have anchored or set sail, and have ridden the storm safely, we cannot tell; but that the loss, as it did occur, was due to the negligent navigation of the master of the Wilhelm, is certain. To relieve the Wilhelm of responsibility for such negligence, the burden is on her to show that the loss would have followed, even if the master had not been negligent, and that burden she cannot sustain.

It is said that whether the rounding to was sudden or not was an issue of fact before the district and circuit judges, and that they found that it was careful and deliberate. We do not so understand their finding. They found that the rounding to was not done in a negligent manner, under the circumstances, and we do not disagree with them. The language of the district judge is as follows:

"Lastly we come to the parting of the towline. It is said this was caused by too abruptly turning about in making the maneuver of hauling head to the

wind off Fish point. It seems to the court quite idle to seek for any other cause for the parting of this towline than the resistless force of the storm itself, described in the proof, which swept Lake Huron. Why should we go below the decks of this propeller, laboring in a mighty storm, from which her cargo was being swept by the angry waters, to examine in her flooded engine room, her diminished steam and somewhat shackled engine, listen for the sound of her signal above the howling of the furious winds, watch the hasty and trembling movements of her death-threatened officers and crew, to inquire whether this turning to the wind, almost in extremis, for safety from the driving storm, was more or less abrupt in its relation to a towline chafing in the chock, although sufficiently parceled, they say, or whether everything was done precisely as it ought to have been done in the face of such an extraordinary storm, when we find in its violence a tremendous and unusual force, abundantly capable of causing this disaster? The court finds the parting of the line to have been caused by the fury of the storm, and that it was an act of God, against which the owners of the Wilhelm did not insure the vessel of the libelants."

It is obvious from the foregoing that the question whether the maneuver was a sudden one or not, and whether the towline parted during its execution or not, was immaterial, in the view of the district judge. He thought, and so do we, that the maneuver was under circumstances where careful and deliberate action was impossible, and that it was in extremis, and that, therefore, negligence was not chargeable. We fully agree with this, but it seems clear to us that the extremity in which the master found himself was one to which, by proper navigation, he would not have been exposed.

We do not know that it is material whether the towline parted in the maneuver, or shortly thereafter, because it was something which the master was obliged to contemplate as possible or probable, and to provide against loss from, by keeping far enough off the shore to enable the tows to shift for themselves, if cast adrift. However this may be, our conclusion as to the circumstances of imminent peril under which the tow was rounded to, taken in connection with the other evidence, makes it clear to us that the line parted before the maneuver was completed, and that it was caused by the consequent extra strain. In this conclusion we do not overrule a finding of the court which originally heard the case, because, as already shown, the issue was not regarded as material, and the evidence was not weighed with a view to a definite conclusion thereon.

The decree of the court below is reversed, with instructions to assess the damages of the libelants, and enter a decree in their behalf for the amount assessed.

THE PORT ADELAIDE.¹

PERRY v. THE PORT ADELAIDE.

(District Court, E. D. New York, December 12, 1893.)

CHARTER PARTY—WHOLE VESSEL CHARTERED—UNAUTHORIZED DEVIATION—EXTRA FREIGHT PROPERTY OF CHARTERER—LIEN.

Libellant chartered the whole of a ship, and loaded her for a voyage from New York to Aden, Amoy, Shanghai, and Yokohama. The ship-

¹Reported by E. G. Benedict, Esq., of the New York bar.

owner officered and manned the vessel. At Shanghai the ship loaded cotton on her own account for Kioto, whence she thereafter proceeded to Yokohama, and delivered in good order the balance of her original cargo. The charter party contained no provision as to shipment of cargo on ship's account, and no authority to proceed to Kioto. Libelant sued to recover the freight collected for cargo transported from Shanghai to Kioto, and also to recover damages for breach of charter. *Held*, that the ship was answerable to libelant either for the freight from Shanghai to Kioto, or for damages for breach of charter, but not for both, and that a maritime lien against the ship existed in favor of libelant for either amount.

In Admiralty. Libel for freight collected and for breach of charter. Decree for libelant.

Foster & Thomson, for libelant.

Convers & Kirlin, for claimants.

BENEDICT, District Judge. The steamship Port Adelaide was chartered by the libelant for a voyage from New York to Aden, Amoy, Shanghai, and Yokohama. By the terms of the charter party, "the whole of said vessel, with the exception of the necessary room for the crew, and storage of provisions, coals, sails, and cables," was chartered to the libelant. The charter party also contained the following clause: "Charterers to have the full reach of vessel's holds, spare bunkers, cabins, &c., the same as if the steamer was loading for owners' benefit." The shipowners officered and manned the vessel, and were to receive "for the use of said vessel during the voyage aforesaid the sum of £4,500." Bills of lading were to be signed by the master, and any difference between the charter money and the freight named in the bills of lading was to be settled before the vessel's departure from New York.

Under this contract the charterer furnished the steamer a full cargo from New York, and, the freight named in the bills of lading being less than the £4,500 named in the charter party by the sum of £453.47., the difference was paid by the libelant to the ship's agent before the ship's departure from New York. None of this cargo was shipped the libelant, but by other shippers found by him. It was to be delivered at the ports of Aden, Amoy, Shanghai, and Yokohama, respectively, as per the bills of lading signed by the master; the greater proportion of the cargo being deliverable at Aden, Amoy, and Shanghai. The steamer proceeded to those ports, and there duly delivered the cargo consigned to those ports. From Shanghai the steamer was bound, by the terms of the charter, to proceed direct to Yokohama, and there deliver the remainder of her cargo. Instead of so doing, the master of the steamship, without authority from the charterer, took on board at Shanghai a quantity of cotton to be transported in the steamship upon freight from Shanghai to the port of Kioto,—a port not within the terms of the charter. The freight on this cotton was collected by the ship's agent, and turned over to the shipowners. From Kioto the ship proceeded to Yokohama, and there safely delivered the remainder of the cargo that had been shipped in New York for that port. This deviation from the voyage described in the charter

caused a delay in reaching Yokohama of some two or three days. So far as appears, however, none of the consignees of the cargo delivered in Yokohama made any complaint of the deviation to Kioto, or any demand upon the charterer by reason thereof. And now the charterer files his libel against the steamship, seeking to recover the amount of the freight received by the shipowners for the transportation of the cotton from Shanghai to Kioto, and also damages for the deviation.

In regard to the claim for the freight earned by the ship in transporting cotton from Shanghai to Kioto, the contention of the claimants is that the charter party should be interpreted to mean that the charterer was to have the right to ship in New York a full cargo for delivery at the ports of Aden, Amoy, Shanghai, and Yokohama, but, when once the full space of the vessel had been occupied by him, the right to furnish further cargo was exhausted; that the shipowners, by virtue of their possession and control of the ship, had the right to the space in the ship left empty by the delivery of the cargo at Aden, Amoy, and Shanghai, and consequently were entitled to transport on the ship's account the cotton transported from Shanghai to Kioto.

To this view of the effect of the charter party, I cannot assent. As I read the charter party, it gave the charterer the right to have the ship perform the voyage from New York to Aden, then to the port of Amoy, then to Shanghai, and then to Yokohama, or to any of them, either full or with sufficient cargo for ballast, shipped by the libellant or his shippers, and not otherwise; and it gave the shipowners no right to take in cargo on the ship's account at any port during the voyage. The loading of the ship on ship's account at Shanghai increased the weight of the ship during the rest of the voyage, and by so much retarded her progress. It might also well be that a shipment of cargo on the ship's account from Shanghai to Kioto would have an important effect upon the ventures of those merchants who, by agreement with the libellant, shipped goods in New York for Yokohama under a charter which gave the whole ship to the charterer. Authority for a shipment of cargo on ship's account should therefore be found plainly set forth in the charter party. No such authority is stated in the charter party, and in my opinion such authority cannot be implied from the fact that the possession and control of the ship remained in the shipowners. The possession and control of the ship by the owners during the voyage was for the sole purpose of the ship's navigation during the voyage. Certainly, no authority to proceed to Kioto, a port not included in the voyage described in the charter, is to be found in the charter party.

In my judgment, therefore, the shipment of cotton in Shanghai for Kioto on ship's account was a breach of the charter party. But as it appears that the ship proceeded from Kioto to Yokohama, and there delivered in good order the cargo shipped in New York under the charter party for the port of Yokohama, and in view of the terms of the charter party, it seems to me that the charterer is entitled to adopt the act of the shipowners in taking in cargo at

Shanghai for Kioto, and to recover the freight earned by the ship for the transportation of that cargo, or, at his option, to treat the transaction as a breach of the charter party, and hold the ship for the damages caused thereby. I do not see how the charterer can be entitled to the freight earned by the breach of the charter party, and also to damages for such breach.

It is said that if the freight collected at Kioto, and paid over to the shipowners, belongs to the charterer, the libelant's claim is against the shipowners for money had and received, and is not within the jurisdiction of the admiralty. But the service performed in earning the freight was a maritime service, and the duties of the respective parties arise out of, and are fixed by, the terms of a charter party of the ship, and the ship was the instrument used in performing the service. Under such circumstances, it is my opinion that a maritime lien in favor of the charterer attached to the ship for the amount of the freight earned by the steamship by transporting the cotton from Shanghai to Kioto, and withheld from the charterer by the shipowners.

The drift of the libelant's argument leads me to suppose that, if compelled to elect, the libelant will elect to recover the freight earned by the ship; and a decree for the libelant for that amount will therefore be entered, unless the libelant gives notice of electing to receive the damages instead, in which case a reference will be had to ascertain the amount of such damages.

The parties will doubtless agree as to the amount of the freight collected.

McMULLIN et al. v. BLACKBURN.

(District Court, N. D. California. December 11, 1893.)

No. 10,467.

1. ADMIRALTY JURISDICTION—SALVAGE—COSALVORS.

Admiralty has jurisdiction of a suit by a salvor against his cosalvor to recover a share in the salvage money, the whole having been received by the latter under a decree enforcing a salvage contract, and the libelant having failed to intervene in that suit, so that the value of his services and the compensation therefor remain undetermined.

2. SALVAGE SUITS—DELAY IN PRESENTING CLAIMS.

Promptness should be required in presenting salvage claims, and a delay of nearly a year in suing a cosalvor for a share in the salvage money received by him will be considered in determining the amount of the award.

In Admiralty. Libel by Robert McMullin, Jacob Koop, and Frank Wackrow against D. O. Blackburn to recover shares in salvage money received by the latter. Decree for libelants.

W. H. Hutton, for libelants.

Geo. W. Towle, Jr., for respondent.

MORROW, District Judge. In the month of April, 1891, the master of the steamer Montserrat found the steamer Wellington in a disabled condition on the Pacific ocean, about 72 miles south-

west from the mouth of the Columbia river. After some negotiations, a contract was entered into between the master of the steamer Wellington and the master of the steamer Montserrat for the towage of the former vessel to San Francisco, a distance of about 500 miles, for the sum of \$15,000. The service was undertaken and completed, the ships arriving in the harbor of San Francisco at the expiration of about four days. Upon the failure of the owner of the steamer Wellington to pay the sum agreed upon for the towage service, D. O. Blackburn, the master of the steamer Montserrat, filed a libel in this court to recover the said sum of \$15,000. On the hearing of the case the owner of the Wellington resisted the action on the ground that the amount claimed was in excess of what the service was reasonably worth. The court determined that while the sum of \$15,000, agreed upon between the masters, was too large for the service rendered, it was not so exorbitant as to justify setting aside the contract, and a decree was accordingly entered for the amount claimed by the libellant in full for the service rendered.

In November, 1892, Robert McMullin, Jacob Koop, and Frank Wackrow, members of the crew of the steamer Montserrat, commenced this action to recover their shares of the \$15,000 recovered by D. O. Blackburn, alleging that they were employed as seamen on the steamer Montserrat at the time the towage service was rendered the steamer Wellington; that they assisted in bringing the latter vessel to the port of San Francisco, and in doing so performed services for which they had not been hired on board the Montserrat. The services rendered the steamer Wellington were salvage services. The Wellington, 48 Fed. 475; The Emulous, 1 Sumn. 207; The A. D. Patchin, 1 Blatchf. 420; The Saragossa, 1 Ben. 551; The Emily B. Souder, 7 Ben. 555. The libellants were entitled to participate in the award made in the Wellington Case, but, having failed to intervene for their interests, the question arises, can they now maintain an action in this court against D. O. Blackburn, a cosalvor, to recover from him their proportionate shares of the salvage award? In *Waterbury v. Myrick*, Blatchf. & H. 34, the court assumed, for the purpose of that case, "that an action in personam will lie by one salvor against a cosalvor to recover a proportionate share of the salvage compensation, when the whole is received by the latter, and he withholds the share of the former." The question of jurisdiction was, however, not raised, and what the court assumed was therefore in the nature of dictum.

The first reported case in this country, where the question was directly involved, is that of *The Centurion*, Ware, 477, decided by Judge Ware in 1839. The court, in this case, distinctly affirms the right of the salvor to sue a cosalvor in a court of admiralty for a proportionate share of salvage award, where the latter has received the whole award. The court regards such an action as, to all intents and purposes, a salvage suit. In this case the libellant was a sailor who assisted in performing a salvage service. Arbitrators fixed upon the amount of compensation, and the whole award was paid over to the master. The sailor sued the master

for his share, which he recovered. The court, in holding that the jurisdiction of admiralty attached to libels of this character, drew a distinction between the case where "the libelant does not demand a specific sum which the master is alleged to have received to his use," and where he has been decreed a specific sum, which has been paid to another, and by the latter converted to his own use. The court says:

"He claims generally an unliquidated sum as a reward for his services as a salvor, the amount to be ascertained by a decree of the court. The libel is founded, therefore, strictly upon the maritime service, a consideration over which the court has an undisputed jurisdiction. The question at issue is whether he performed such services as entitle him to a reward as a salvor or not."

In *Studley v. Baker*, 2 Low. 205, decided by Judge Lowell in 1873, the question is very fully considered and the authorities reviewed. The court stated the conclusion reached:

"That a court of admiralty has such jurisdiction, I cannot entertain the slightest doubt. The liability of the defendants does not rest on a promise, express or implied, so much as the duty of the owners to pay the men their wages, and whatever else is due them by virtue of their employment in the vessel and of the incidents of the voyage. The amount is not liquidated, and can be conveniently ascertained only by a court of admiralty, which distributes salvage according to its own views of propriety and justice. The money, in this case, was taken by the defendants upon a trust which may sometimes be enforceable at law or in equity, and always in admiralty. Indeed, a suit for distribution of salvage is really a salvage suit, and is always so denominated by good pleaders."

Roff v. Wass, 2 Sawy. 389, decided by Judge Deady in 1873, and affirmed by Judge Sawyer on appeal, (Id. 538,) is an open recognition in this circuit of the right to maintain such an action. Judge Deady relied upon the authority of *The Centurion*. Here, the master and owners received, in settlement of salvage services, from the parties for whose benefit the service had been rendered, the sum of \$5,000 therefor. The libelants sued the master and owners to recover the proportionate share of the \$5,000, alleging that they had received no portion of said money paid for such salvage service, and that the master and owners had wrongfully converted the same to their own use. Exceptions were filed to the libel, and, among others, the objection was made that the court did not have jurisdiction. But the court overruled this exception, treating it as immaterial. It was maintained by the respondents that the libelants should have proceeded against the barkentine and her owners for their share of the salvage. The learned judge disposed of this argument as follows:

"Admitting the libelants might maintain a suit against the barkentine and her owners for their shares of the salvage earned in rescuing her from destruction, notwithstanding the payment of the \$5,000 to respondents, it does not follow that they are bound, or ought, under the circumstances, so to do. If, as is alleged, the matter has been adjusted with the respondents, and they have received a compensation for the whole service, the libelants may affirm such settlement and payment, so far as they are concerned, and recover their share of it as money had and received to their use; and this suit is such an affirmance."

And further on he says:

"It is clear, both upon reason and authority, that the master of a salvage vessel, in adjusting and receiving compensation for salvage service, is acting as agent for the owners and crew, and is responsible to them for their respective shares thereof; and where, as in this case, it happens that the compensation is received by the owners of the salving ship in the first instance, the result is the same,—they are liable to the crew for their respective portions of the amount received."

McConnachie v. Kerr, 9 Fed. 50, decided by Judge Brown in 1881, is the next case. The libelants sued to recover their share of a sum of money alleged to have been paid to the master and owner of the salving vessel by those for whose benefit the service had been rendered. The court recognized the right of the libelants to maintain the suit in a court of admiralty in the following language:

"If the money in question was paid to and received by Kerr as salvage compensation, and for the entire service, as substantially alleged in the libel, I have no doubt of the jurisdiction of this court to compel contribution to the libelants in this action. The receipt of the whole compensation as salvage would necessarily import its receipt for the benefit of all other cosalvors interested in the same service; and the determination and apportionment of the several interests of cosalvors in the gross sum received by one of them would present questions peculiarly within the cognizance of a court of admiralty. Its jurisdiction has been frequently exercised in such cases in this country during the last half century. *The Centurion*, Ware, 477; *Roff v. Wass*, 2 Sawy. 538; *Waterbury v. Myrick, Blatchf. & H.* 34. Numerous other instances of this kind are cited by Judge Lowell in the careful opinion given by him in the case of *Studley v. Baker*, 2 Low. 205, which renders further references here unnecessary."

But the court declined to grant such relief in this particular case on the ground that the amount awarded by an arbitration was intended and understood by the parties to the award as compensation for a towage service, not as remuneration for any salvage service. The libelants had an ample remedy against the *Colon* for their salvage services, as they were not concerned or considered in the award made by the arbitrators; but the court observed that, if the arbitrators had intended that the award should be for the benefit of all concerned, (master, owners, and crew,) there would be no question as to the right of any cosalvor, whose share was withheld from him, to proceed in a court of admiralty to recover his pro rata of the award. The case was appealed to the circuit court. 15 Fed. 545, Wallace, J., reversed the decision of Judge Brown, but in doing so he in no wise impaired the position taken by Judge Brown as to the right of a cosalvor to sue. On the contrary, he distinctly affirms the correctness of that proposition. He says:

"If the payment was received as salvage compensation for the entire service rendered by the *Pomona*, the libelants are entitled to recover. As it is tersely stated by the learned district judge in his opinion, 'the receipt of the whole compensation as salvage would necessarily import its receipt for the benefit of all the other cosalvors interested in the same service.'"

But he reversed the decision of the district judge as to the effect of the award made by the arbitrators,—that is, whether it was intended merely as the payment to the owners and master alone for a towage service, or whether it was designed and considered as a settlement in full for the whole salvage service. Judge Wallace held

that Judge Brown erred in regarding the award by the arbitrators as a payment for a towage service. He held that the award was intended and regarded as a payment for the entire salvage service. Judge Nelson, in *The Olive Mount*, 50 Fed. 563, assents to the above doctrine.

It has been established that actions involving considerations of salvage services are peculiarly within the province of the admiralty courts, and such a jurisdiction necessarily includes proceedings for the distribution of the salvage award. In the present case the libelants ask, in effect, that an award heretofore made to the respondent, in full for a salvage service in which they were engaged as cosalvors, shall be distributed in accordance with the rules of the admiralty law. It is true that the amount recovered by the respondent is not in the registry of the court, but that fact does not change the character of the service rendered by the libelants. Whether the services rendered by the libelants were salvage services is a question involving principles of admiralty and maritime jurisdiction. Moreover, if the services rendered were salvage services, then comes another important question as to their value. The court must determine—First, whether the libelant is a salvor, or, what is the same thing, whether a salvage service has been rendered; second, the remuneration to which such salvor is entitled. These questions are obviously characteristic of a salvage suit; and, where a court is called upon to determine such questions, it is manifestly exercising a power conferred by the admiralty and maritime law. In the present case the respondent sets up in his answer that the service rendered the steamer *Wellington* was a towage, and not a salvage service; and the court, in the exercise of its admiralty and maritime jurisdiction, determines that it was a salvage service. Next comes the question of remuneration for the service, wherein considerations again arise involving principles of maritime law. Thus, for instance, the libelant may show that he rendered services of such merit or magnitude that his remuneration should be far superior to that of his cosalvors; or respondent, on the other hand, may show that the salvor has impaired or forfeited his right to salvage by disobedience or misconduct during the salvage service, or by waiver of his claim.

There might be some doubt of the jurisdiction of this court if, in the former suit, the court had fixed the amounts to be awarded to the libelants, and the respondent had then received the whole award and converted it to his own use. But such is not this case. The value of the services rendered and the amount to be awarded to each of the libelants are questions yet to be determined, and, from the principles stated, I am of the opinion that they are questions properly within the jurisdiction of this court.

The salvage service rendered in this case consisted, as before stated, in the towage of the steamer *Wellington* to San Francisco, in which the power and appliances of the steamer *Montserratt* were the chief factors. The labor of the crew of the latter vessel was but little in excess of what it would have been had the towage serv-

ice not been performed. The services of the libelants were, therefore, not of a high order of merit. Furthermore, it was nearly a year after a decree was rendered in favor of the respondent in the other suit before the libelants brought this action. Such a delay cannot be encouraged. In presenting claims for a salvage service, all the parties in interest should come forward promptly, that the court may consider and determine at one time the merit of the claim of each salvor, and the value of the whole service.

In view of all the circumstances, a decree will be entered in favor of the libelants for \$100 each.

THE W. B. COLE.
O'CONNELL v. PATE.

(Circuit Court of Appeals, Sixth Circuit. November 6, 1893.)

No. 66.

1. MORTGAGE ON VESSEL—RECORD—FAILURE TO INDEX.

A mortgage recorded under Rev. St. §§ 4192-4194, relating to the record of mortgages on vessels, is constructive notice, although not indexed. The W. B. Cole, 49 Fed. 537, affirmed.

2. SAME—NOTICE TO PURCHASER.

A purchaser of a vessel is charged with notice of a recorded mortgage thereon, executed by a previous owner while holding the record title, even though the mortgage may not have been recorded before the bill of sale was recorded, by which the previous owner parted with his title.

3. SAME—BONA FIDE PURCHASER.

Such notice puts the purchaser on inquiry as to whether the vendee of the previous owner and the subsequent vendees acquiring title before the mortgage was recorded did so, either without paying value or without actual notice of the mortgage. If none of such vendees paid value without notice, the purchaser takes subject to the mortgage lien. If any one of such vendees had no notice of the mortgage and paid value, he took title freed from the mortgage.

4. SAME.

Such vendee could convey a title freed from the mortgage to all the world except to the wrongdoer who, after taking title with notice of the mortgage, fraudulently sold for value to one without notice of the mortgage, and deprived the mortgagee of his lien. Against the wrongdoer, when the title revests in him, the lien of the mortgage is revived.

5. SAME.

One who purchases the second title of the wrongdoer is put upon inquiry by the record of the mortgage and the recorded fact that his vendor once acquired the title under a bill of sale executed after the mortgage but recorded before it, as to whether his vendor had not actual notice of the mortgage when he first took title and fraudulently parted with it to an innocent purchaser. It follows that the purchaser can take no better title than that held by the wrongdoer, and that the intervention of bona fide purchasers for value without notice in the chain of title between the first title and the second title of the wrongdoer cannot aid or better the title of the wrongdoer's vendee. Severens, District Judge, dissenting.

6. SAME.

An assignee of a mortgage on a vessel is chargeable with constructive notice of a prior recorded mortgage, notwithstanding that the assigned mortgage was given to secure a negotiable note.

Appeal from the Circuit Court of the United States for the Western Division of the Southern District of Ohio.

In Admiralty. Libel by Leo Baumgartner against the steamer W. B. Cole for supplies. F. J. O'Connell and C. M. Pate intervened as claimants under mortgages held by each, as to which the district court adjudged the lien of Pate's mortgage superior to that of O'Connell, and this decree, on appeal by O'Connell, was affirmed by the circuit court. 49 Fed. 587. O'Connell again appeals. Affirmed.

Statement by TAFT, Circuit Judge:

This case was begun by a libel filed by Leo Baumgartner against the steamer W. B. Cole in admiralty in the district court for the southern district of Ohio. Baumgartner was the owner of a supply claim against the steamer, and libeled her for its satisfaction. The steamer was ordered sold by the decree of the district court, and the fund brought into court for distribution between Baumgartner and other intervening claimants. The question presented in this appeal was one of priority between two mortgage claimants,—Pate, the appellee, and O'Connell, the appellant. The fund remaining in the court after the payment of prior claims was not sufficient to satisfy both mortgages. The facts were as follows: C. M. Pate and P. B. Bradley were, in the year 1889, joint and equal owners of the steamer W. B. Cole, engaged in navigation on the Ohio river. In May of that year, Pate sold his half interest in the boat to John Eshman, Jr., for \$1,500, of which \$500 was paid in cash, and the remainder in two notes of Eshman for \$500 each, secured by a mortgage on the one-half interest in the boat sold. Bradley, the other owner of the boat, witnessed the mortgage, and went with Pate to the office of the collector of the port at Cincinnati, where Pate left the mortgage for record on the day of its execution. The clerk of the collector, who received the mortgage, did not indorse upon it the date of its receipt, and the mortgage was mislaid, and not recorded during the term of the then collector. The succeeding collector found the mortgage some time after September, 1889, but for reasons not appearing in the record, it was not recorded until March 6, 1890. In January, 1890, Pate made inquiry at the office of the collector, and was told that it had not been recorded. The mortgage was not indexed in accordance with the statute before March 30, 1890. Eshman sold his half of the boat to Bradley, and Bradley paid Pate \$200 on the \$1,000 due under the Eshman mortgage. January 17, 1890, Bradley sold the entire interest in the boat to the Moscow & Cincinnati Towboat Company for \$3,000, the sale being evidenced by a bill of sale properly executed and recorded upon the same day. The towboat company, by the bill of sale dated March 7, and recorded March 8, 1890, sold the boat to W. H. Wright for \$3,000. At the same time, Wright executed and delivered to Bradley a note for 30 days for \$1,300, secured by mortgage on the boat. This mortgage was left for record March 8, 1890, and was duly recorded in the collector's office. On March 28, 1890, Bradley sold and assigned the note and mortgage for value to F. J. O'Connell, the appellant. O'Connell made no inquiry at the collector's office to find out whether there was any prior recorded mortgage upon the boat.

T. N. Ross and Miner & Carroll, for appellant.

Philip Roettinger, for appellee.

Before TAFT, Circuit Judge, and BARR and SEVERENS, District Judges.

TAFT, Circuit Judge, (after stating the facts.) The question whether a mortgage on a ship delivered to the collector of a port to be recorded, as provided by sections 4192-4194, Rev. St. U. S., is constructive notice to subsequent purchasers if, through the negligence of the collector, it is not actually recorded, was much dis-

cussed in the briefs and arguments of counsel. It is by no means free from difficulty, and, as the decree of the court below can be satisfactorily affirmed on another ground, we express no opinion thereon.

The subject-matter of this controversy is the one-half interest in the steamboat *W. B. Cole*, which Pate held in May, 1889. He held this, as he had a right to do, independent of Bradley, and could mortgage it and grant it without Bradley's consent. We may therefore dismiss the other half of the boat from our consideration, and regard the case as if Pate had owned the entire boat.

Pate sold the boat to Eshman, May 8, 1889. Eshman mortgaged to Pate on the same day. Eshman sold to Bradley some time thereafter. Bradley sold to the Moscow & Cincinnati Towboat Company, January 17, 1890. Pate's mortgage from Eshman was recorded March 6, 1890. The towboat company sold to Wright, March 7, 1890, and the bill of sale was recorded March 8, 1890. Upon the same day, Wright gave his note at 30 days and mortgage to Bradley, and the mortgage was duly recorded. Bradley sold this note and mortgage to O'Connell, March 28, 1890, before the note had fallen due. Bradley had notice of the Pate mortgage when he bought from Eshman. It does not appear that the Moscow & Cincinnati Towboat Company had any notice of that mortgage when they bought from Bradley, and at that time the mortgage was not recorded. It is clear that the Moscow & Cincinnati Towboat Company was a bona fide purchaser of the boat from Bradley, and, as its title was recorded before the Pate mortgage was recorded, it did not take subject to the Pate mortgage. It had neither actual nor constructive notice of the existence of that lien. Whether Wright had notice of the lien or not, he took all the right in the boat which the Moscow & Cincinnati Towboat Company could convey, and therefore he also held his title to the boat free from the Pate mortgage.

When Wright conveyed to Bradley, the title to the boat as a mortgagee revested in him who had been guilty of the original fraud in selling a boat, which he knew to be mortgaged, free from that mortgage. As against him, Pate's equity was revived, and Bradley held the mortgage on the boat subject and junior to the Pate mortgage. Story, *Eq. Jur.* § 410; Bisp. *Eq. par.* 265; Perry, *Trusts*, 222; Daniel, *Neg. Inst.* (3d Ed.) § 805; *Church v. Ruland*, 64 Pa. St. 432; *Ashton's Appeal*, 73 Pa. St. 153; *Sawyer v. Wiswell*, 9 Allen, 39; *Kost v. Bender*, 25 Mich. 516; *Kennedy v. Daly*, 1 Schoales & L. 355, 379.

The question now is whether O'Connell, who purchased from Bradley for value, got any better right than Bradley had in the mortgage which Wright had executed to him. O'Connell had constructive notice of the Pate mortgage, because when O'Connell bought, March 8, 1890, the Pate mortgage had been recorded. It had not been indexed, but it is generally held in all the authorities that the failure to index a mortgage, if the mortgage is recorded, does not destroy the priority acquired under the law by recording the mortgage. The indexing is for the benefit of the subsequent

purchasers, and a failure to properly index is a violation of the duty of the recording officer, owing, not to the person tendering the instrument for record, but to the subsequent purchasers, who are interested in discovering what the instrument contains. *Green v. Garrington*, 16 Ohio St. 548; *Jones, Mortg.* § 553.

If O'Connell had constructive notice of the mortgage from Eshman to Pate, he was bound to know that, if Bradley had actual notice of the Pate mortgage when he bought from Eshman, the statute would not protect Bradley from the Pate mortgage. He was further bound to know that if Bradley, with actual notice of the Pate mortgage, had sold the boat to the towboat company free from the mortgage, the subsequent revesting of the title in Bradley would revive the equity which Pate held against Bradley when he first purchased the boat from Eshman, and would give Pate's mortgage priority over Bradley's. It therefore follows that O'Connell's position in receiving a mortgage from Bradley is exactly the same as if neither the towboat company nor Wright had intervened in the chain of title, for he was bound to know that he could get from Bradley nothing more than a title affected by the same equity in favor of the Pate mortgage with which Bradley's original title was affected.

It is said, however, that O'Connell was not charged with constructive notice of the Pate mortgage, because the mortgage was out of the chain of title. The chain of title disclosed by the record showed a conveyance from Pate to Eshman, from Eshman to Bradley, from Bradley to the towboat company, from the towboat company to Wright, and from Wright to Bradley. Eshman was in the chain of title. The mortgage, which was recorded, bore date at the time when Eshman was shown to be the owner of the boat, though recorded at a later date, and after Eshman had parted with his title. The authorities are uniform in holding that a subsequent purchaser is charged with notice of whatever appears in the chain of title. The mortgage of Eshman to Pate was in the chain of title, because it was executed by one who owned the boat, while he owned it. The fact that it was recorded at a time after he had parted with the possession of the boat does not take it out of the chain of title.

In *Flynt v. Arnold*, 2 Metc. (Mass.) 619, 622, Chief Justice Shaw says, in discussing the effect of the recording acts:

"Suppose, for instance, A. conveys to B., who does not immediately record his deed. A. then conveys to C., who has notice of the prior unregistered deed to B. C.'s deed, though first recorded, will be postponed to the prior deed to B. Then suppose B. puts his deed on record, and afterwards C. conveys to D. If the above views are correct, D. could not hold against B.—not in right of C., because, in consequence of actual knowledge of the prior deed, C. had but a voidable title; and not in his own right, because, before he took his deed, B.'s deed was on record, and was constructive notice to him of the prior conveyance to B. from A., under whom his title is derived."

Again, the learned chief justice said:

"The practical consequences resulting from this view of the registry acts would seem to be these: If a prior conveyance is recorded at any time, however late, before a subsequent conveyance is made by the same grantor to

a second grantee, the registration of the deed is conclusive legal notice to the second grantee of such prior conveyance."

The same doctrine is held in *Mahoney v. Middleton*, 41 Cal. 41; *English v. Waples*, 13 Iowa, 57; *Van Rensselaer v. Clark*, 17 Wend. 25; *Van Aken v. Gleason*, 34 Mich. 477; *Jackson v. Post*, 15 Wend. 588; *Fallas v. Pierce*, 30 Wis. 473.

In the last case Chief Justice Dixon delivered a very interesting opinion, in which he explained the reason for the rule. He says, on page 473:

"Now, the reason why the purchaser from C., in the case first above supposed, who buys after the recording of the prior deed to B. from A., also the grantor of C., is bound to take notice of B.'s deed, or of the fact that the true title is or may be in B., is that such purchaser, in looking upon the statute, sees that B.'s prior and paramount title at common law is not to be divested, or his deed avoided, except upon the happening of three distinct events or contingencies, the absence of either of which will save the title of B., or prove fatal to that claimed by C., or which may be acquired by a purchaser from him. Those events or contingencies are—First, good faith in C., i. e. the purchase by him, without notice of the previous conveyance to B.; second, the payment of a valuable consideration by C.; and third, the first recording of C.'s deed. The purchaser from C., looking upon the record, sees—First, the prior conveyance from A. to B.; and, second, the first recording of C.'s deed. Of these two facts the record informs him, but, of the other two facts requisite under the statute to constitute valid title in C. as against the prior purchaser, B., the record gives him no information. For knowledge of the other two facts, namely, the good faith of C. and valuable consideration paid by him, the purchaser from, or any one claiming title under, C., as against B. or his grantees, must inquire elsewhere than by the record, and is bound at the peril of his title, or of any right which can be granted by or claimed under C., to ascertain the existence of those facts. * * * The operation of the statute, so far as it goes, in favor of the first purchaser, is not limited, and does not stop or cease with the first, second, or third, or any specified number of first recorded subsequent conveyances to subsequent purchasers, or from one such purchaser to another, and consequently the right of the first purchaser to save himself by the recording of his deed continues, or may continue, after any number of subsequent conveyances have been recorded; for if the facts exist that such subsequent purchasers, one and all, bought, either not in good faith, or not for a valuable consideration, then his prior deed will hold, and the title conveyed by it be preferred."

It is obvious from the foregoing authorities that the proper construction of the recording acts charges every person taking title with all conveyances or mortgages made by any one in the chain of title while he holds title, whether the recording of such conveyances occurs then or not. If, upon the record, a prior conveyance seems to be defeated by a subsequent one through delay in recording, then the person taking title must inquire as to the facts which might defeat the statutory effect of such prior record.

But it is said that because O'Connell, in an examination of the record and an investigation dehors the record, would have discovered the fact that the towboat company had acquired a good title as a bona fide purchaser from Bradley, he cannot be charged with notice as to the condition of the title on the record previous to that conveyance. This view, in our opinion, cannot be sustained. A purchaser is charged with notice of his chain of title, whether the grantees therein are bona fide purchasers or not. Whether such constructive

notice will defeat his title is quite another question. O'Connell could not, by an examination of the record, know that the towboat company was a bona fide purchaser, without knowing that it acquired title from Bradley, and therefore that Bradley was in the chain of title. O'Connell also knew that Bradley was his immediate assignor, and that equities against Bradley, existing when he first acquired the title, would revive against him as a mortgagee. Therefore, he was put upon inquiry in regard to Bradley's bona fides in reference to conveyances and mortgages appearing upon the record, recorded subsequently to Bradley's first title, but executed prior thereto.

In other words, O'Connell's position is not affected by the question whether the towboat company and Wright had an indefeasible title, by the reason of a want on their part of actual or constructive notice, because the revesting of the title in Bradley eliminates their indefeasible title from further consideration, and makes the situation exactly as it was when Bradley first held the title. O'Connell had notice that Bradley had taken the title from Eshman. He knew that he was buying his mortgage from Bradley. He ran the risk, therefore, of Bradley's having actual notice of the Pate mortgage when he acquired title. Bradley, it is admitted, did have actual notice of the Pate mortgage. Therefore, the constructive notice which O'Connell received of the Pate mortgage put him on inquiry as to how Bradley's title was affected by it. As that title was subject to the Pate mortgage, O'Connell can take nothing more.

But it is argued that O'Connell is protected in this case by the negotiable character of the note which he received from Bradley, to which he acquired title before maturity. It is said that, as the mortgage was given to secure the note, it was an incident to the note, and went into the hands of O'Connell as free from original equities as the note. There is no doubt that under the commercial law, as administered in the federal courts, a mortgage given to secure a negotiable instrument passes to a bona fide purchaser as free from original equities as the instrument whose payment it secures. *Carpenter v. Longan*, 16 Wall. 271.

But how does this principle affect the case at bar? The original equities, which are barred by the transfer of the securing mortgage, are equities of which the assignee has neither actual nor constructive notice. O'Connell had constructive notice from the record of Pate's possible equity against Bradley, and, when he bought from Bradley, he therefore took at his peril. Wright had a good title, and could convey one. When Bradley took title, however, it became tainted, by his previous relation to the title. O'Connell, by reason of the negotiable character of the note, took Bradley's title free from any equitable defense by Wright against the mortgage not disclosed by the record; but whatever infirmity there was in Bradley's title, apparent, or suggested by the record of the collector's office, O'Connell was bound to know at his peril. It seems manifest that the doctrine of negotiability does not do away with the effect of the recording acts. *Daniel*, Neg. Inst. (2d Ed.) § 834b; *Linville v.*

Savage, 58 Mo. 248; Logan v. Smith, 62 Mo. 455; Sims v. Hammond, 33 Iowa, 368; English v. Waples, 13 Iowa, 57.

Finally, it is argued that in order to give Wright, the purchaser from the towboat company, the full benefit of the title of the towboat company, it is necessary that he should be able to dispose of that good title to any one, and that as O'Connell held the mortgage, as from Wright, by Bradley's assignment, he took the title which Wright was able to convey. Wright was able to convey a good title to everyone in the world but Bradley, Bisp. Eq. par. 265. As against Bradley, Pate's equities revived. O'Connell could not get any better title to the boat by the mortgage than Bradley had, if he knew that Bradley's title was defective. We have shown that he was charged with notice of a defect in Bradley's title, and notice is equivalent to knowledge.

The decree of the circuit court affirming the decree of the district court holding Pate's mortgage prior in right to that of O'Connell upon the one-half of the boat covered by the Pate mortgage is affirmed, at the costs of the appellant.

SEVERENS, District Judge, (dissenting.) I regret my inability to concur in the proposed disposition of this case. In my opinion, the result is wrong, and the reasoning upon which the result is reached is not founded upon sound principle or warranted by authority.

Upon a careful examination of all the cases cited, the text-books referred to, and the cases cited by them, and some other authorities not referred to, I cannot see that they sustain the positions assumed in regard to this case. In the case of Flynt v. Arnold, quoted from 2 Metc. (Mass.) 619, 622, the illustration entirely fails to support the proposition for which it is cited, if there be inserted in the case there supposed what was the fact here, namely, that C. conveys to D. before B. puts his deed on record. That changes entirely the whole line of consequences. The same observation is true of the discussion in Fallas v. Pierce, 30 Wis. 443. The application of the remarks in that case to the facts in this as ground for the conclusion sought to be deduced ignores the controlling fact that the towboat company, by its purchase, became the absolute owner of the boat, and the lien was lost. Having ascertained this from an inspection of the registry, and on inquiry into the fact of the payment of valuable consideration in good faith by the towboat company, the purchaser could take and stand on that title, and he was not bound to look further, for he would not be affected by the defective status of a prior party, even if he knew of it.

The recording of a conveyance after the grantee has lost all title by reason of the prior record of the deed of a bona fide purchaser is not constructive notice to a subsequent purchaser from that bona fide purchaser of anything except that, whatever his pretensions, they have been cut off. Surely, such subsequent purchaser is not thereby bound to pursue an inquiry which would end in an immaterial discovery.

Then, secondly, assuming that Wright stood in the place of absolute owner of the property, he had the privileges which belong to

that character, one of which was to convey it to anybody in security for his obligation, and thus give his note commercial value. His right to do this was not restricted to the privilege of mortgaging it to such persons as might not be affected with equities with which he had nothing to do, any more than any bona fide holder is prevented from communicating his rights to another, even though the latter may be the only one, or is one of a few, who has or have notice of equities which are obsolete as to the bona fide holder.

Thirdly. But it is said that Bradley, on becoming mortgagee, was charged with an equity in favor of Pate in his (Bradley's) relation to the boat, because Bradley sold the boat to the towboat company without disclosing Pate's lien, and thus cut the latter out. It is held by the majority of the court that it was fraudulent in Bradley not to inform the purchaser of the unrecorded mortgage.

Taking this to be so, for the purpose of the discussion, it raised an equity which was collateral to the title. The lien had become dissociated from the title, and the equity survived only by reason of Bradley's demerit. He was not charged with it simply, or at all, because he had notice of the equity of Pate when he took the mortgage from Wright, or because of anything in the recording laws. It was a general equity attaching to him personally. The lien had been detached, but Bradley had come into such a situation that equity acted upon his conscience. That is the theory of the equitable doctrine of the revival of the trust.

Lastly. The mortgage is a mere incident of the note given by Wright. It is not to be treated as an independent thing. It is urged that O'Connell knew he was buying the mortgage from Bradley. This seems to me to indicate a misapprehension. What he knew was that he was buying the note of which the mortgage was the security, given by Wright to communicate value to the note, and thus enable Wright to get money on his note. It is also said that "the original equities which are barred by the transfer of the securing mortgage in such a case are the equities between the mortgagor and mortgagee," as if equities of that kind were the only equities which are barred. This ignores the relation of the mortgage to the note. It is impossible to hold that the rule above stated is the one (as thus limited) which applies to the transfer of negotiable paper before due. In such case the transfer cuts off all equities of third persons. To illustrate, if Bradley had taken the note as a mere agent or trustee for another, his negotiation of the note to a bona fide holder would give a perfect title to the latter, discharged of such equities as attached to him, and the mortgage would go with it, even though he did not transfer it at all. What Wright did was not merely to promise to pay Bradley the note, but it was also a direct promise to pay it to the indorsee, and the mortgage secured this promise. The indorsee did not take an assignment from Bradley of Wright's promise to pay the note to Bradley. He passed by Bradley, and is independent of his merits. The security passed and inured in the same way.

Says Jones on Chattel Mortgages, (3d Ed. § 503:)

"If the debt be in the form of a negotiable promissory note, the assignee by indorsement takes the mortgage as he takes the note, free from any equities which existed in favor of third persons while it was held by the mortgagee."

And this, in effect, is what was supposed to have been decided in *Carpenter v. Longan*, 16 Wall. 271. See *Kenicott v. Supervisors, Id.*, at top of page 469; and *Sawyer v. Prickett*, 19 Wall., near bottom of page 166; *Sweet v. Stark*, 31 Fed. 858.

If O'Connell were to have foreclosed his mortgage, the purchaser at the sale would acquire the title which Wright had when he gave the mortgage; otherwise, every indorsee of negotiable paper secured by mortgage is at the peril of any intervening equities which may have attached to parties while it was in their hands,—a result utterly destructive of the object of the rule which ties the security to the note, and attributes to the former the color and character of the latter.

PENNSYLVANIA R. CO. v. CENTRAL R. CO. OF NEW JERSEY.

(District Court, S. D. New York. June 24, 1892.)

1. NAVIGABLE WATERS—OBSTRUCTION BY RAILROAD DRAWBRIDGE—SIGNALS.

Proprietors of drawbridges over navigable streams are bound to use reasonable means to avoid accidents, and not to obstruct navigation, including the use of available signals to avoid misunderstanding and collision, though not expressly required by statute.

2. SAME—PREFERENCE TO RAILROAD TRAINS.

A tug with a tow on a hawser in going up the channel of Newark Bay, on approaching the defendant's drawbridge, and when at a reasonable distance therefrom, gave the usual signal of three whistles, showing her wish to go through the draw. No answer was received, and the whistles were repeated several times. When within 1,500 or 2,000 feet, or nearer, a railroad freight train was seen approaching the draw, some two miles distant, and the draw was not opened. No answering signals were given; and none were customarily given on that bridge. After the railroad train had passed, the drawbridge was seen opening,—and a green light set on the draw, showing that fact. The tug had maneuvered for delay as well as she could in the mean time, and when the draw was opened proceeded through it, using all reasonable skill; but through the delay in answering her signals and the cross set of the tide, the tow came in contact with the pier on one side of the draw, and was injured. *Held*, that the defendant was answerable for negligence in giving no answering signals, and for an unreasonable preference given to the railroad train, thereby unreasonably obstructing and embarrassing the navigation of the tug and tow.

In Admiralty. Libel by the Pennsylvania Railroad Company against the Central Railroad Company of New Jersey to recover damages for collision of a scow with a bridge abutment. Decree for libellant.

Robinson, Bright, Biddle & Ward, for libellant.
De Forest & Weeks, for respondent.

BROWN, District Judge. On the 15th of November, 1891, at about 5:30 A. M., the scow Senate, with a cargo of about 160 tons of brick, while proceeding up Newark bay in tow on a hawser from

the steam tug Winnie, bound for Newark, in going through the westerly passage of the draw of the Central Railroad bridge, came in contact with the chamfered end of the central abutment. The bow of the scow was square on deck, but sloping beneath. In the contact with the pier, a plank from its side was thrust through the bow of the boat below the water line about a foot inside of the sloping corner beam, which caused a leak, from which she sank soon after passing through the draw. The above libel was filed to recover the damages.

The libelants claim that this collision was not through any negligence of the tug, but through the negligence of the defendants in not opening the draw when signaled by the tug, and in compelling her to wait for a freight train, without giving her any answering signal to show their intention, thereby so embarrassing her in the handling of her tow, that, through the cross set of the tide, collision resulted, without any fault on the part of the libelants.

The evidence leaves no doubt that as respects the management of the tug, the signals given, and the trains passing, the account of the libelants is more accurate than that of the respondents. The defendants' evidence with regard to the passing of the trains, well illustrates how little reliance can be placed on the general recollection of persons in regard to ordinary occurrences under their immediate observation when their memory is not charged with the matter at the time. Several of the witnesses from the bridge testified most positively that no train went past within a couple of hours before the tug and tow went through, and that there was no detention or delay; whereas, it subsequently appeared, by incontrovertible evidence, that at least three trains had passed within an hour, and one of them at about the same time the tug captain stated.

The undoubted facts, therefore, are, that the tug, pursuing the usual course to go through the westerly passage of the draw, gave the usual signal of three whistles when about half a mile distant. No answering signal being received, and no evidence appearing that the draw was opening, the tug, after running 400 or 500 feet, gave a second signal, and after that saw a freight train coming from Singer's factory to the westward about two miles off. The tug then stopped and drifted till the train had passed, when a third signal of three whistles was given, and afterwards three more, after which the draw was seen to be turning open; whereupon the tug started up full speed in order to get her tow properly into shape for going into the passage; but in consequence of the waiting and drifting meantime, and of the set of the tide, the starboard corner of the scow struck with a heavy blow the sloping corner of the pier, some two or three feet from the angle, with the result above stated.

It was not the practice in the management of that draw to give any answering signals to vessels desiring to go through. In the daytime, vessels in passing are required to wait until they see the draw beginning to open; in the nighttime, a red light is exhibited when the draw is closed, and a green light when it is off; and vessels do not know that the draw is opening until the green light is seen.

The proprietors of a drawbridge over navigable waters of the United States, are bound to use it in such a manner as not unnecessarily to obstruct navigation, (*Blanchard v. Telegraph Co.*, 60 N. Y. 510; *The City of Richmond*, 43 Fed. 85, 88;) and this duty includes the use of all reasonable methods tending to avoid accident or collision. This principle is not disputed by the counsel for the respondents. Their defense and much of their evidence were to the effect that all reasonable facilities were in fact given to this tug; that the draw was open when the vessel was more than half a mile below; that there was no delay, no train, and no stopping of the tug. This defense, on the facts, I am obliged to discredit, as above stated; being satisfied that the libelants' account of the matter is correct.

With a freight train two miles distant, and a tug with a tow on a hawser coming up with the tide not over 1,500 or 2,000 feet away, the refusal to open the draw in order to give a preference to so distant a train, was an unreasonable and unjustifiable obstruction of the tug and tow. Its unreasonableness was increased by the omission to give any signal, which left the tug in uncertainty what to do, or what to expect. The practice of the bridge to give no answering signals, is one little to be commended, and is liable often to place the bridge in the wrong. The draw is worked by steam; and answering signals, such as are given upon other bridges, could be given without difficulty. True, signals are not made a statutory duty. But the practical necessity of such signals is manifest, particularly where there is a cross set of the tide; because without them it is impossible for the approaching vessel to know with any certainty whether she can safely continue on towards the draw, or whether she must stop and maneuver for delay. The embarrassment to a tug incumbered with a tow upon a hawser is still greater; and this is so evident, that I have no hesitation in holding that the omission either to open the draw when the tug is at a reasonable distance, or to give prompt notice by some practicable answering signal if the draw cannot then be opened, is negligence and misconduct; because it violates the rule that is obligatory upon all persons charged with duties concerning navigation, to use all reasonable and practicable means of avoiding collision and the attendant losses of life and property. *Edgerton v. Mayor*, 27 Fed. 230. The defendants neglected this duty in the present case; that was the efficient cause of the accident, and I do not find any lack of reasonable skill and diligence on the part of the tug.

Decree for the libelants, with costs, with an order of reference to compute the damages, if not agreed upon.

CENTRAL R. CO. OF NEW JERSEY v. PENNSYLVANIA R. CO.

(Circuit Court of Appeals, Second Circuit. December 5, 1893.)

1. NAVIGABLE WATERS—OBSTRUCTION BY RAILROAD DRAWBRIDGE—SIGNALS.

A railroad company, in maintaining a drawbridge over navigable waters, must exercise reasonable care, not only not to impede the safe

navigation of passing vessels, but to obviate any unnecessary delay thereto.

2. SAME—NEGLIGENCE—INJURY TO PASSING VESSELS.

Where the opening of a railroad drawbridge is so unreasonably delayed, after proper signals, that a signaling tug, with her tow, is unable to make the passage with safety, and in attempting to pass through, in the exercise of the best judgment and proper diligence of those navigating her, the tow is injured by collision with the bridge, the railroad company is liable.

Appeal from the District Court of the United States for the Southern District of New York.

In Admiralty. Libel by the Pennsylvania Railroad Company against the Central Railroad Company of New Jersey to recover damages for the collision of a scow with a bridge abutment. Decree for libellant. Respondent appeals. 59 Fed. 190, affirmed.

George Holmes, for appellant.

Charles Hough, for appellee.

Before WALLACE and LACOMBE, Circuit Judges.

PER CURIAM. In disposing of this appeal, we do not find it necessary to pass upon the question of the competency of the evidence received in the court below respecting the signal codes, or regulations adopted by other railway companies operating drawbridges in the vicinity of the appellant's bridge. It was the duty of the appellant, in exercising its right to maintain a drawbridge over navigable waters, to respect the rights of the public, and in this behalf to exercise reasonable care, not only not to impede the safe navigation of passing vessels, but also to obviate any unnecessary delay to such vessels. *Wiggins v. Boddington*, 3 Car. & P. 544. It is manifest that this duty cannot be properly discharged, in view of the character of the water way, and the extent of the commerce upon it, without employing and enforcing a system of signals by which approaching vessels can be informed, when at a safe distance from the bridge, whether they are at liberty to proceed, or whether they must maneuver for delay. In the present case, those in charge of the tug navigated her with all reasonable care, supposing, as they had a right to, that the draw would be opened seasonably to permit the tug and her tow to pass. When it became apparent that the draw was not to be opened, the tug stopped. Incumbered as she was with a heavy tow, and encountering the force of the tide, she was in an embarrassing situation when the draw began to open. There was danger that the tow would have been set by the tide against the east pier if the vessels had attempted to take the easterly passage. The pilot of the tug, in the exercise of his best judgment, took the westerly passage. We cannot find upon the evidence that he erred in doing so. Notwithstanding the exercise of proper diligence in trying to pass through the draw, the tow was brought in contact with the end of the central abutment, and sustained the injuries for which damages were awarded by the decree appealed from. We conclude that there was no fault on the part of the tug or of the

libelant's tow, and that the appellant is responsible for the injuries to the tow because of its neglect to seasonably open the draw, or to notify the vessels that it did not intend to do so when they were sufficiently far away to permit them to adopt proper precautions for their own safety. The decree is affirmed, with costs.

THE INVERTROSSACHS and THE JAMES McCaulley.

THE JAMES McCaulley v. THE PERCY BIRDSALL et al.

(Circuit Court of Appeals, Third Circuit. November 21, 1893.)

No. 14.

COLLISION—VESSEL AT ANCHOR—TUG AND TOW.

A heavy ship in light ballast, with a pilot aboard, while coming up the Delaware river in tow of a tug on a hawser 120 to 130 fathoms long, struck a schooner lying at anchor at Bombay Hook, a quarter of a mile west of mid-channel, the channel there being one mile wide for vessels of deep draft. The tug was competent to handle the ship, and was not in fault as to the course taken to pass the schooner, but the ship failed to follow her, and impeded her progress eastward by hanging on her port quarter. *Held*, that the collision was caused solely by the failure of the ship to properly follow the tug, and the ship was alone liable for the damage. 55 Fed. 683, modified.

Appeal from the District Court of the United States for the Eastern District of Pennsylvania.

In Admiralty. Libel by Elias Burr, master of the schooner Percy Birdsall, on behalf of her owners, against the ship Invertrossachs, for damage to the schooner by collision with the ship in tow of the steam tug James McCaulley. On petition of the claimant of the ship the tug was made a codefendant. The district court found both the tug and the ship in fault, and a decree against both was rendered in favor of the schooner, and in favor of the ship against the tug for half damages. 55 Fed. 683. The owner of the tug appeals. Reversed as to the decree against the tug, and decree directed against the ship for the full amount of the damages.

John F. Lewis, for appellant.

Horace L. Cheyney and J. Rodman Paul, (Biddle & Ward, on the brief,) for the Invertrossachs, appellee.

Curtis Tilton, for the Percy Birdsall, appellee.

Before ACHESON and DALLAS, Circuit Judges.

ACHESON, Circuit Judge. This is an appeal by the owner of the steam tug James McCaulley from the decree of the district court in admiralty against the appellant for one-half of the damages awarded to the libelant in a cause of collision. The libel was filed by the master of the schooner Percy Birdsall, on behalf of her owners, against the British ship Invertrossachs. The claimant of the ship filed a petition in accordance with admiralty rule 59, and brought in as a codefendant in the suit the tug James McCaulley.

The facts of the collision are these: Early in the morning of January 10, 1892, before daylight, the schooner Percy Birdsall came to anchor at Bombay Hook point in the Delaware river, well over to the western side of the channel,—a quarter of a mile west of mid-channel, according to the testimony of her master. At that place the channel for vessels of deep draft is about one mile wide. The schooner was lying nearly head down the stream. Her anchor light was properly set and kept burning. No fault is imputable to her. The ship Invertrossachs, with a Pennsylvania pilot on board, was coming up the Delaware river in light ballast, in tow of the tug James McCaulley, on a long hawser; about 40 fathoms of the ship's wire hawser being attached to a tow line 80 or 90 fathoms long leading from the stern of the tug. About 5 o'clock that morning, while it was yet dark, the ship Invertrossachs ran afoul of the schooner, the ship coming into the schooner nearly head on, and striking the starboard bow of the schooner just forward of her cat-head. The tug passed in safety on the schooner's port side.

The learned district judge held both the tug and the ship to have been in fault; "the former in running with her unwieldy tow so far westward in the channel, and in approaching so near the schooner before turning off; and the ship in failing to change her course, and follow the tug, until the collision was inevitable." The opinion of the court is very brief. It does not discuss the proofs at all. It does little more than announce conclusions. In respect to the ship it declares that "the evidence fully justifies the belief" that she "was negligently handled. The warning of her lookout was not properly heeded. She seems to have committed herself to the guidance of the tug, and to have paid little heed to the latter's movements." And it is added: "The fact that the ship was very heavy, and the tug's control of her very imperfect, imposed on both unusual vigilance, and rendered the duty of keeping well over to eastward the more imperative." In accordance with these views, the district court gave a decree against both the tug and the ship, and apportioned the damages one-half to each.

Now, we quite agree with the court below that the ship was negligent in the several particulars mentioned; but we are unable to concur in the conclusion that the tug was blameworthy.

The petition on behalf of the ship particularly specifies in what the alleged negligence of the tug consisted, but does not charge or intimate that she was in any fault in running too far westward in the channel. Nor does it appear that the Pennsylvania pilot, who was employed for the voyage up the Delaware river, and was aboard the ship, objected to the course up stream the tug was pursuing, or directed her to keep further eastward. Indeed, testifying on behalf of the ship, the pilot, in his examination in chief, says that there was plenty of deep water on either side of the schooner, and that "the best way to have steered the steamer would have been to starboard the wheel, and go to the west side of the schooner." We are not able to find in this record evidence to sustain a finding that the tug was negligent in running her tow too far westward in the channel. Neither do we discover good ground

for the suggestion that the tug's control of the ship was imperfect. In so far as the evidence touches the capacity of the tug, it indicates that she had ample power to handle the ship had the latter performed her duty in following. The testimony with respect to the difficulty the tug experienced relates to the misconduct of the ship in "hanging on" the tug's port quarter, and impeding her progress eastward when she was on that course to pass the anchored schooner.

Samuel Christy, the ship's lookout; William Finlayson, the helmsman; Arthur C. Caines, the mate who was on watch; and Albert G. Bennett, the pilot,—were examined on behalf of the ship.

The lookout testifies that he reported the schooner's light twice before the collision. That before his first warning the tug had sheered well off to starboard; he could not say exactly how long before; it might have been a minute or two. That he saw the light which proved to be that of the schooner a trifle on the port bow of the ship. That the schooner was then a "good ways off." That, seeing the ship did not alter her course, he "thought it time to sing out," and did so, but got no answer. That he then waited some time, (his estimate is five minutes,) and then gave a second warning, and still got no answer. That the collision occurred two minutes after the second report. That he saw no one on the deck of the ship until after the vessels had come together, when the pilot came forward on the forecastle head. He states that if the ship had followed the tug she would have cleared the schooner, "for she had plenty of time." Of all the witnesses aboard the ship the lookout had the best opportunity for observing what occurred and of forming a correct judgment. He seems to have been alert.

The helmsman corroborates the lookout as to the two warnings of lights ahead, and judges that the first report was four or five minutes before the collision. He states that from his position he could not see the schooner's light; that he did not know there was any particular reason for porting his helm; that he got no order to do so; that, acting on his own responsibility, he put his helm slowly to port about the time the lookout gave the second warning, which was as soon as he observed that the tug's position was changed, but he says that the tug might make a difference of a point or two in her course before he could tell; that when the first warning was given he saw none of the officers on deck; that between the first and second warnings the pilot came on deck out of the chart room, but gave him no orders. On cross-examination he states that if he had known the position of the object ahead, or had received proper orders when the light was first reported, the collision would have been avoided.

The mate states that he was on deck when the lookout first reported a light ahead, but not where he could see it; that he went on the starboard side of the poop deck, but could not there see it; that as soon as he got there the lookout reported the light the second time; that he sung out "all right," and ran across to the port side of the poop, and found there the pilot, who gave the order "hard aport," and that almost immediately thereafter the ship struck the

schooner. He says the interval between the first warning and the collision was so short that the ship could not have cleared the schooner, even if the helm had been put hard aport on the lookout's first report.

The substance of the pilot's statement is this: That he was standing in the chart room door, looking out, when the lookout reported a light; that he immediately went to the port side of the poop deck, and could see nothing; that he stopped there a few seconds, and then went to the starboard side, but saw no light; that after the lapse of a few seconds he walked back, and had got amidships, when a second report from the lookout came, and he immediately ran to the port side, and by leaning over the rail could see the light nearly ahead; that he then gave the order "hard aport," and "went to the starboard side, to see the position of the tug," and by the time he reached the starboard side the ship had struck the schooner. He expresses a positive opinion that between the time the tug sheered off and the time of the collision it was not possible for the ship to clear the schooner; but we regard his opinion as worthless, for it is plain from his whole testimony that he had not been paying any attention to the movements of the tug. The evidence is convincing that for at least one hour before the disaster he had left the navigation of the ship entirely to the lookout and helmsman.

As it was the ship that struck the schooner, while the tug passed at a safe distance, undoubtedly the burden of proof is upon the petitioner, the claimant of the ship, to establish the tug's alleged negligence in approaching too close to the schooner before turning off. But upon that issue the clear weight of the evidence, in our judgment, is against the ship, even if attention is confined to the witnesses who were aboard the ship, and were called on her behalf. It is, indeed, said that the lookout and helmsman were hostile to the ship; but of this there is not a particle of evidence. Their testimony impresses us as candid and truthful.

There is, however, other trustworthy testimony in exculpation of the tug. Swayne Lawson, the tug's mate, who was in the pilot house at the wheel, testifies that he sighted the light which turned out to be that of the schooner Percy Birdsall about 20 minutes before the collision, and at a distance, he thinks, of 2 miles, the light being then about one-half point on the port bow of the tug; that as soon as he saw the light distinctly, and 15 minutes before the collision, he commenced to change his course, porting his wheel, and going off eastward; and that he continued gradually so to haul off until he had the schooner's light on the tug's port bow two or three points, so that when abreast of the schooner the tug was off to the eastward a distance sufficient to give the tow ample clearance. He estimates the distance to have been 80 or 90 fathoms. He further states that, while the tug was thus steadily hauling off to the eastward, the ship kept "hanging on" the tug's port quarter, and did not steer after her; but he still thought "the ship would come up and follow the boat," and he "had no idea she was going to run into the schooner." There is nothing in the state-

ments of this witness, when his testimony is fairly read as a whole, to justify an inference that the tug made a sudden sheer. His whole account of the transaction is straightforward. In itself, it is probable; and it accords with all the unquestioned facts. The negligence of the ship, which is indisputable, sufficiently accounts for the disaster, and the proofs, taken altogether, we think exonerate the tug from the charge of having carelessly brought her tow in dangerous proximity to the schooner.

Little need be said with reference to the charge against the tug of negligence "in failing to sound her whistle, or to give any notice to those in charge of said ship of any change in the course of said tug." The weight of the expert testimony upon the question of the duty of the tug to signal to the ship is against the latter. We think the tug owed no such duty to her tow. Although not promptly following the tug, but "hanging on" her port quarter, the mate of the tug was justified in assuming that the ship, with the pilot aboard of her, would avoid the schooner, as she could easily have done had her officers been attentive to their duties.

Upon the whole case we are satisfied that the collision was altogether due to the negligence of those who were aboard the ship, and charged with her navigation, and that the tug was not in any wise in fault. Therefore the claimant of the ship is justly answerable for the entire damages.

The decree of the district court is reversed, and the case is remanded, with a direction to enter a decree for the libelant against the claimant of the ship *Invertrossachs* and his stipulator for the full amount of the damages, with interest from August 5, 1893, and costs in the court below and in this court.

THE M. KALBFLEISCH.¹

THE WM. FLETCHER.

PAUL v. THE M. KALBFLEISCH and THE WM. FLETCHER.

(District Court, E. D. New York. November 9, 1893.)

1. COLLISION—DAMAGES—OFFERS TO REPAIR—LOWEST OFFER.

One who prefers to have his damaged vessel repaired where she lies, though he knows of an offer to repair at a lower figure made by another shipwright, cannot recover as damages more than the amount of the lower figure, unless he can clearly show that his vessel would have been injured by removal to the new berth.

2. SAME—DEMURRAGE—INTEREST ON DEMURRAGE.

Interest is allowed on demurrage awarded for delay during negotiation in regard to repairs necessitated by collision.

In Admiralty. On exceptions to commissioner's report.

A loaded schooner in tow was brought in collision with another tow, without any fault of her own, and, upon suit brought, both the tugs were held liable for the damage caused. On a reference to ascertain the amount of libelant's damages, it appeared that

¹Reported by E. G. Benedict, Esq., of the New York bar.

the master of the schooner on the same day, Saturday, put his vessel on a dock to prevent injury to the cargo from the leaks. On Monday the owner of the vessel appeared, and negotiations were opened for settlement and repair. A survey was called, and held Tuesday; the owner, the agents for the two tugs, and three shipwrights,—one appointed for each vessel,—being present. An offer to repair according to the survey was made by G., on whose dock the vessel lay, and a lower offer by M., the surveyor called by one of the tugs, in writing. The surveyor called by the other tug went home, gave his measurements to a superior, and an offer to repair (which was much lower than either of the other offers) was sent by the firm A. & Co. to the agent of the second tug on Wednesday. At the time of the survey, P., the owner of the schooner, objected to having the vessel removed from the dock where she lay unless she was unloaded, fearing too great strain would be brought on the vessel. The offer of M. was shown to him; but he did not show the offer of G. to the agent of the second tug, nor did he see the offer of A. & Co., for on Wednesday, in answer to a message from P. sent through the agent of the first tug, the agent of the second tug told P. to go on, and libel for his damages. All negotiations being dropped, P., on Thursday, ordered G. & Co., on whose dock the vessel still lay, to do the repairs, giving him no particular directions, but to do no more than was necessary. The commissioner reported the amount of damages sustained, saying:

"I take as the cost of repair the sum for which an offer in writing to do the work was made at the time by a responsible firm, and add the cost of temporary repairs and transfer of the vessel from the dock where she lay to another dock, for full repair, as estimated. The judgment of the owner, that she could not be so transferred without injury, is not supported by evidence which convinces me that it was an accurate judgment. Some evidence was presented of another and still lower offer to repair the damage, but I do not think this was so brought to the knowledge of the owner as to require him to act on it. The other offer he saw and knew about, but preferred to have the vessel repaired where she lay. The expense of the dock, while the vessel lay awaiting negotiations about the repair to be closed, is allowed, and I see no reason for withholding demurrage for that time."

The commissioner allowed interest on the demurrage, following the case of *Milburn v. 35,000 Boxes*, 57 Fed. 237. Both parties excepted, the libellant claiming that the full amount of G. & Co.'s bill for repairs should be allowed; and the claimants, that only the amount of the third offer (that of A. & Co.) should be allowed, and no demurrage for the days of negotiation.

Alexander & Ash, for libellant.

Wilcox, Adams & Green, for claimant of the M. Kalbfleisch.

Hyland & Zabriskie, for claimant of the Wm. Fletcher.

Upon hearing before the court, all the exceptions were overruled, and the report confirmed as made.

THE ROBERT HOLLAND and PARANA.

POPPE et al. v. BIGELOW.

(District Court, E. D. Wisconsin. November 27, 1893.)

1. COLLISION—SAIL—STEAMER AND TOW—DUTY OF STEAMER.

A steamer with a long and unwieldy tow is bound to take especial care to keep out of the way of an approaching sail; and if, being on the open lake, she allows herself to come into dangerous proximity, and then miscalculates the course of the sail, and is too late in her maneuver, she must be held in fault.

2. SAME—TORCH—IMMATERIAL OMISSION.

The failure of a sailing vessel meeting a steamer to show a torch, as required by Rev. St. § 4234, is immaterial, when the night is clear, and her ordinary lights are distinctly seen from the steamer.

3. SAME—ERROR IN EXTREMIS.

A wrong maneuver by a sailing vessel at a time of peril and confusion brought about by the unwarrantably near approach of a steamer and tow will be regarded as an error in extremis.

In Admiralty. Libel by Albert Poppe and others against Anson A. Bigelow to recover damages for a collision. Decree for libelants.

Van Dyke & Van Dyke, for libelants.

Charles E. Kremer, for respondent.

SEAMAN, District Judge. On November 1, 1891, at about 5:15 A. M., a collision occurred between the schooner William Aldrich and the barge Parana, in tow of the steamer Robert Holland, (with the barge Stevenson,) at a point on Lake Michigan four to six miles off the west of Wisconsin shore, and five or six miles north of Cana Island light. The Aldrich was a three-masted schooner of 180 tons burden, laden with lumber, bound from Nahama, Mich., to Milwaukee, Wis. She had her three jibs, foresail, and mainsail set, and her mizzen furled, and was on a course of S. by W. $\frac{1}{2}$ W., when sighted. The wind was a good, fresh breeze, from the northwest. The steamer Holland had the barges Stevenson and Parana in tow, in the order named, all light, bound from Chicago to Washburn, Lake Superior, via straits of Mackinac. Their course, when the schooner was sighted, (erroneously stated by the answer as N. E.,) was N. N. E., according to the undisputed testimony. The Stevenson carried a foresail and staysail, and the Parana a foresail. This libel was filed by the owners of the schooner against the owner of the Holland and the Parana, upon claim that the collision happened solely from fault of the towing steamer, through violation of rule 20 of navigation regulations, in failing to keep out of the way of the sailing vessel, and especially in an alleged change of course to cross the bows of the schooner. The respondent denies all fault on the part of the steamer, and alleges fault of the schooner in the following particulars: (1) That she exhibited no torchlight to the steamer; (2) that she kept no proper lookout; (3) that she did not keep her course.

Although there are many contradictions in the testimony with the advantage as to numbers in favor of the respondent, the undisputed evidence shows that it was a clear, dark morning, and the lights

of each approaching vessel were distinctly seen and reported by each lookout. The lookout of the steamer reported a green light about a point on the starboard bow. He places it a mile or a mile and a quarter away. The mate says, "It was three or four miles away—oh, no, two or three miles away—when I saw it." From the schooner the lookout observed first the "bright light" of the steamer, and at about five miles her red light over his lee bow, which was duly reported. Each claims to have kept his course after these observations until they came into proximity. The witnesses for the respondent state that although the course of the tow was N. N. E., and that of the schooner W. $\frac{1}{2}$ W., there was quite an opening between, so that the course of the tow would lie to the windward or west of the schooner. On the other hand, the red light of the steamer was presented to the schooner, according to all of libelants' testimony, and it was their understanding that the tow intended to pass them to leeward. I think the diagrams produced at the hearing in behalf of the respondent, as well as those for the libelants, tend strongly to support the latter view,—that the course of the tow appeared pointed to the eastward of the schooner. Under the conceded facts of the collision, the only theory advanced by the respondent to avoid this conclusion is that the course of the schooner must have gradually veered to the westward, into the wind. There is no testimony to this effect, but the observations of the schooner's green light, as reported by the steamer's lookout, rather show a steady course, and such is the affirmative evidence for libelants. On the part of the steamer, the witnesses assert that her course was unchanged until nearly approaching the schooner, when the steamer's wheel was put a-starboard, changing her course to the westward about a point and a half. The distance between the approaching vessels at this time is variously stated by respondent's witnesses from twice the length of the tow to 100 feet. They also assert that when they passed the schooner was some five or six hundred feet to the leeward of the steamer, and that the schooner suddenly came up into the wind, and drove into the tow, passing the Stevenson, but striking the towline between that and the Parana, and thence onto the latter. The length of the Holland and tow is shown to have extended out about 1,800 feet. As to speed, the utmost of claim upon the part of the steamer is that each was about equal, and 7 miles an hour; but the preponderance of testimony indicates that the tow was somewhat faster, and the combined speed of approach about 15 miles an hour. There is no pretense that effort was made, or thought given, to check the speed of the steamer. They were upon the open lake, with ample sea room; and it was her place, under the navigation rules, to keep away from the legitimate course of the schooner. Her long and unwieldy tow—regarded by the law as one vessel, and that a steamer—required especial care to keep clear. *The Civilta*, 103 U. S. 699; *The Favorite*, 10 Biss. 539-541, 9 Fed. 709; *New York & B. Transp. Co. v. Philadelphia & S. Steam Nav. Co.*, 22 How. 461. It was incumbent upon her to so navigate as to avoid dangerous proximity, tending to alarm and confusion. *The Falcon*, 19 Wall. 75; *The Carroll*, 8 Wall. 302. The tow was drifting to leeward, making a passage to the windward more diffi-

cult. I am forced to the conclusion that those in charge of the steamer must have miscalculated the course of the schooner, and were too late with their maneuver to windward, whatever its extent, to avoid catastrophe; hence, that they were negligent, under all the circumstances shown. The facts here are clearly distinguished from those appearing in *The Wioma*, 5 C. C. A. 122, 55 Fed. 338, and other cases cited for respondent.

Relative to the faults charged against the schooner, I find as follows:

1. It is undisputed that the schooner exhibited no torchlight, and this is claimed to be in violation of a regulation appearing as section 4234, Rev. St. In view of the decision in *U. S. v. Rodgers*, (Nov. 20, 1893,) 14 Sup. Ct. 109, handed down by the supreme court since this hearing, holding that the term "high seas" applies to the open waters of the Great Lakes, and inferentially and logically to Lake Michigan, I am of opinion that section 4234 must be taken as modified by the act of March 3, 1885, which prescribes rules for navigation of all vessels "upon the high seas and in all coast waters," and, by section 2, repeals all other regulations for such navigation. But whether in force or not seems to be immaterial, upon the undisputed facts here. The lights of the schooner were burning, and distinctly seen, and it is not apparent how observations could have been helped by a torch. The morning was clear, and there were no conditions to obscure the lights, and the absence of a torch was immaterial. *The Pennland*, 23 Fed. 556; *The Margaret*, 3 Fed. 870.

2. The alleged want of a proper lookout on the schooner is contrary to the testimony. The lights appear to have been observed and duly reported by him, and I do not think the testimony warrants the inference argued by counsel for respondent, that he then paid no further heed to the light until the reported change of course by the steamer.

3. The only proof as to any change in the course of the schooner relates to a situation after she had passed the steamer, when it is alleged by the witnesses for respondent that she swung up into the wind, and thus drove onto the towlines and into the barge. This view is corroborated by the fact that the schooner was struck by the barge on her port bow at the cathead. At this moment there was peril and confusion, and it is not surprising that the testimony is conflicting. The wheelsman of the schooner says that he put the wheel hard to port when collision was inevitable, to save the blow as much as possible. He may be mistaken, and, in panic, may have put the wheel the other way, or it may be, as suggested in respondent's brief, that because of the condition of her centerboard, or other cause, the schooner did not mind her helm. In either view, this occurred in such proximity and such situation of imminent danger, produced by the wrong maneuvers of the steamer, that it must be regarded in extremis, and not taken as a fault to defeat recovery. *The Maggie J. Smith*, 123 U. S. 355, 8 Sup. Ct. 159; *The Elizabeth Jones*, 112 U. S. 514, 5 Sup. Ct. 468; *Bentley v. Coyne*, 4 Wall. 512; *The Chatham*, 3 C. C. A. 161, 52 Fed. 396.

Decree will be entered in favor of the libelants, and reference to ascertain and report the damages.

THE TEMPLAR.

BODE et al. v. THE TEMPLAR.

(District Court, N. D. California. December 28, 1893.)

No. 10,575.

1. MARITIME LIENS—STATE STATUTES—AUTHORITY OF MASTER AND PART OWNERS IN HOME PORT.

Where a state statute gives a lien on a vessel for repairs and supplies furnished in her home port, the same presumptions in favor of the master's authority to contract therefor on her credit arise as exist under the maritime law where repairs and supplies are furnished in a foreign port; and the same rule obtains as to the authority of part owners.

2. SAME—NOTICE—PENDENCY OF POSSESSORY SUIT.

The right to a lien given by a state statute to persons furnishing supplies or labor for repairs to a vessel, under contracts with her master and part owner, is not affected by the filing of a bill by other part owners for possession, after the contracts were made.

3. SAME.

The filing of a libel by part owners of a vessel for possession, or to restrain her leaving port until security is given for her return, which alleges her need of repairs, and a belief that, if she proceeds on her voyage, she may be condemned as unseaworthy, and excessive charges for repairs be imposed on libelants, is not notice that her master has no authority to contract on her credit for reasonable repairs and supplies in her home port, and does not prevent the acquirement of a lien therefor under a state statute. Code Civil Proc. Cal. § 813.

4. ADMIRALTY—DISTRIBUTION OF PROCEEDS OF VESSEL.

Where there are funds in the registry from the sale of a vessel in a possessory suit, the court has power to pay therefrom claims for repairs and supplies furnished to the vessel.

In Admiralty. Libel by M. W. Bode and others against the bark Templar for supplies and repairs. Decree for libelants.

A. P. Van Duzer, for libelants.

Andros & Frank, for respondent.

MORROW, District Judge. This is an action in rem against the bark Templar to recover for supplies furnished and repairs made upon the vessel in the port of San Francisco. The bark is an American vessel, and, at the time the libel was filed in the case, she was owned by residents of San Francisco. Prior to the filing of this libel, a disagreement arose between the owners as to her employment, and a libel of possession was filed by the part owners representing seven-sixteenths interest of the bark, alleging that the other part owners, holding the remaining nine-sixteenths interest, had constituted one Simon G. Benson (also a part owner) master of the bark, and that he was about to take her on a voyage to sea; that the bark was unseaworthy, and in need of considerable repairs, and was unfit to perform any voyage without such repairs, and libelants believed that, upon such voyage, said bark might be condemned as unseaworthy, and excessive charges for her repair be imposed upon the libelants. The libel prayed that the part owners holding the nine-sixteenths interest should be cited to show cause why Benson should not be restrained from proceeding to sea

with said bark until good and sufficient security had been given, to the amount of the value of the shares of the libelants, for the return of the vessel to the port of San Francisco. This last-mentioned libel was filed March 18, 1893, and, the majority owners not having furnished a bond for the possession of the vessel, the proceedings were still pending when the present libel was filed, April 15, 1893. It further appears that, on the 14th of March, the master engaged three seamen, March 21st, a mate, and March 23d, a cook. These parties went on board the vessel, and continued in her service for about a month, but, as they did not receive their wages, they also commenced proceedings in this court to recover the several amounts due them. The libel for the seamen's wages was filed May 5, 1893. This action was not resisted by the owners, and the default of all parties was accordingly entered. While these proceedings were pending, a petition was presented to the court representing that the vessel was being detained at great cost and expense on account of marshal's fees and wharfage charges, and other expenses, and that it would be to the interest of all parties that the vessel should be sold pendente lite, and the proceeds brought into court to await the final adjudication of the cause. The bark was accordingly sold, June 23, 1893, and the proceeds paid into the registry of the court. July 11, 1893, interventions were filed for supplies furnished the crew serving on board the vessel. September 1, 1893, by consent of all parties, the claims of the seamen were paid. The present action now involves the consideration of the claims of the libelants and interveners against the balance of the proceeds remaining in the registry of the court.

The libelants and interveners claim a lien under the provisions of section 813 of the Code of Civil Procedure of this state which provides as follows:

"All steamers, vessels and boats are liable: * * * For supplies furnished in this state for their use, at the request of their respective owners, masters, agents, or consignees." "For work done or materials furnished in this state for their construction, repair, or equipment. * * * Demands for these several causes constitute liens upon all steamers, vessels, and boats, and have priority in their order herein enumerated, and have preference over all other demands."

In the recent case of *The J. E. Rumbell*, 148 U. S. 1, 13 Sup. Ct. 498, the supreme court had before it a question relating to the priority of a claim for supplies and necessities furnished to a vessel in its home port, over a subsequently recorded mortgage. In considering this question, the court reviewed the authorities relating to maritime liens, and determined that, in the admiralty and maritime law of the United States, the following propositions had been established by the decisions of that court:

"For necessary repairs or supplies furnished to a vessel in a foreign port, a lien is given by the general maritime law, following the civil law, and may be enforced in admiralty." "For repairs or supplies in the home port of the vessel, no lien exists or can be enforced in admiralty, under the general law, independently of local statute." "Whenever the statute of a state gives a lien, to be enforced in rem against the vessel, for repairs or supplies in her home port, this lien, being similar to the lien arising in a

foreign port under the general law, is in the nature of a maritime lien, and therefore may be enforced in admiralty in the courts of the United States." "This lien, in the nature of a maritime lien, and to be enforced by process in the nature of admiralty process, is within the exclusive jurisdiction of the courts of the United States sitting in admiralty."

In the case at bar, the majority owners concede the right of the libelants to be paid the several amounts due them out of the fund in court, but the minority owners interpose the objection that it does not appear that the supplies or repairs furnished in this case were necessary, or that they were furnished on the credit of the vessel. It is also contended that the proceedings instituted by them on March 18, 1893, calling upon the majority owners to furnish good and sufficient security for their possession of the vessel, was notice to the world that the interests of the minority owners, at least, would not be liable for any debts that might be contracted for any supplies, repairs, or equipments furnished the vessel.

With respect to the objection that it has not been established that the supplies and repairs were necessary, and furnished on the credit of the vessel, it is to be observed that the articles and labor were furnished on the order of the master, who was a part owner, and consisted of utensils for use in the galley, materials and labor for calking and painting the vessel, and for the repair of sails, board of the crew, meat supplied for the crew on board the vessel, and for the services of a watchmaker in rating a chronometer. The testimony is to the effect that the utensils for the galley were furnished to the ship, and charged to the bark Templar; the materials for calking and painting were "sold to the ship," and charged to the bark Templar and owners; the bill for labor in calking was "charged to the bark Templar;" for the repairs of the sails, "credit was given to the ship and owners," and charged to the bark Templar and owners; the board of the crew was "charged to the bark Templar;" and the bill for meat was charged to the bark Templar and owners. To whom credit was given for rating the chronometer does not appear. All the charges appear to be reasonable, with one exception, to be noticed hereafter, and the character of the supplies and labor indicate that they were necessary for the vessel. The minority owners contend, however, that, as these supplies and labor were furnished at the home port of the vessel, this evidence is not sufficient; that the libelants and interveners must not only prove a necessity for the supplies and labor, but they must also prove that there was a necessity, at the time, to resort to the credit of the vessel to obtain such supplies and labor.

In the case of *The J. E. Rumbell*, supra, the same objection was made as in the present case. Although the question certified to the supreme court by the circuit court of appeals did not directly involve a consideration of the objection, nevertheless, it was assumed by the court, for the purpose of deciding the question of priority, that all the claims for supplies and repairs were contracted under such circumstances that a lien upon the vessel for their payment existed under the statute of Illinois, and should be enforced in admiralty by the courts of the United States against

the proceeds of the vessel, unless the mortgagees were entitled to a priority in the distribution; and it was accordingly held that the lien for necessary supplies and repairs did take precedence of a prior mortgage. The statute of this state provides that for services rendered on board of a vessel, or for supplies furnished, in this state, at the request of the master, owner, agent, or consignee, a lien is created upon the vessel, and, for work done or materials furnished in this state for the construction, repair, or equipment of a vessel, a lien is created without such request. These provisions do not, however, relieve such transactions from the limitations on the master's authority, as established by the maritime law. *Thomas v. Osborn*, 19 How. 30; *Pratt v. Reed*, Id. 359; *The Grapeshot*, 9 Wall. 129; *The Young Mechanic*, 2 Curt. 404; *The Lady Franklin*, 1 Biss. 557; *The Guiding Star*, 18 Fed. 263; *The Samuel Marshall*, 4 C. C. A. 385, 54 Fed. 396; *S. H. Harmon Lumber Co. v. Lighters Nos. 27 and 28*, 57 Fed. 664. The question remains as to what presumptions arise where the master, representing a majority of the part owners, contracts for supplies at the home port on the credit of the vessel.

In the case of *The Grapeshot*, *supra*, the supreme court held that—

"Where proof is made of necessity for the repairs or supplies, or for funds raised to pay for them by the master, and of credit given the ship, a presumption will arise, conclusive, in the absence of evidence to the contrary, of necessity for credit." "Necessity for repairs and supplies is proved where such circumstances of exigency are shown as would induce a prudent owner, if present, to order them, or to provide funds for the cost of them on the security of the ship." "The ordering, by the master, of supplies and repairs on the credit of the ship, is sufficient proof of such necessity to support an implied hypothecation in favor of the material man, or of the ordinary lender of money to meet the wants of the ship, who acts in good faith."

The question at issue in this case, however, was as to the lien of a bottomry bond executed in a foreign port by the master of the vessel for repayment of advances to supply the necessities of the ship, and it may be said that the case is not authority beyond that question.

In *Crawford v. Roberts*, 50 Cal. 235-241, the supreme court of this state held that—

"The master's power is presumed, in the absence of evidence to the contrary, to extend to making contracts for supplies in the home port, which shall bind the owners. *Provost v. Patchin*, 9 N. Y. 239, and cases there cited. Whatever the doctrine of the maritime law, by the analogies of the common law, the duties and relations of the master furnish presumptive evidence of his authority to purchase supplies."

In applying the rules of the maritime law, establishing a lien for repairs or supplies furnished in a foreign port, to the lien created by the statute of the state for repairs or supplies furnished to a vessel in her home port, the supreme court, in *The J. E. Rumbell*, *supra*, recognizes no difference in principle, and accords to the latter the same precedence that is accorded to the former. In commenting on the character of these two liens the court says:

"Each rests upon the furnishing of supplies to the ship on the credit of the ship herself, to preserve her existence and secure her usefulness, for the benefit

of all having any title or interest in her. Each creates a *jus in re*,—a right of property in the vessel,—existing independently of possession, and arising as soon as the contract is made, and before the institution of judicial proceedings to enforce it. The contract in each case is maritime, and the lien which the law gives to secure it is maritime in its nature, and is enforced in admiralty by reason of its maritime nature only."

It would seem to follow that if these liens are of the same maritime character, subject to the same limitations, and enforced by the same rules of procedure, the same presumptions must arise in favor of the master's authority to contract on the credit of the vessel for necessary supplies and repairs, and the same rule would obtain with respect to the authority of part owners. *The Two Marys*, 10 Fed. 923.

In the case at bar the claims are not based upon running accounts. The bark had not been to sea for nearly a year, and it does not appear that the libelants or interveners had given the owners alone any previous credit, or that they did so on this occasion. In these particulars the case differs from at least two of the cases cited where the lien was denied. Without evidence to the contrary, and upon the facts established in support of these claims, it seems to me that there is a presumption that such articles and labor as were furnished by the libelants and interveners in this case were necessary to fit the vessel for a voyage, and that it was necessary that the articles and labor should be obtained on the credit of the vessel. It may be further observed that the libel of Cornwell and Boole in the suit for possession distinctly alleged that considerable repairs were necessary, and that the bark was unfit to perform any voyage without such repairs. It is true, the libel did not specify what repairs were necessary; but the libelants in that case are the parties who now object to the payment of these bills, and they have not shown, as they might have done if it were true, that their allegations had reference to other and different repairs and supplies.

But it is urged that the possessory suit was notice to all the world that the control of the vessel was in controversy, and that the master's authority to contract on the credit of the vessel was at an end. There are two answers to this proposition: First. The libel for possession was filed, as before stated, March 18, 1893. Benson took charge of the vessel March 14, 1893, and before March 18th he had contracted for at least part of the supplies, and engaged labor to make some, if not all, repairs. Second. The complaint in the libel for possession was that the vessel was about to enter upon a voyage; that she was in need of repairs, and libelants believed that, upon such voyage, the bark would be condemned as unseaworthy, and excessive charges for repairs be imposed on libelants. It will be noted that the complaint was not that the vessel was being repaired, or about to be repaired, and furnished with supplies, in this port, nor was it objected that she was incurring, or about to incur, charges for which liens would attach. Moreover, the prayer of the libel was that the other part owners should show cause why Benson should not be restrained from proceeding to sea with the bark until good and sufficient security should be given, to the

amount of the value of the share of the libelants, for the return of the vessel to San Francisco. There was certainly nothing in the allegations of this libel to put the material men on notice that the master had no authority to contract, on the credit of the vessel, for reasonable repairs and supplies in this port.

There is, besides, another element in this case to be considered. This is not a controversy between creditors over remnants in the registry in the court. There are sufficient funds in the registry to pay these debts, and leave a small balance to the owners. If I am mistaken as to the presumptions that arise in favor of the libelants and interveners as to the necessity for the supplies and repairs, and that they were furnished on the credit of the vessel, I am certainly not mistaken as to the power of the court to entertain these claims as against the proceeds in the registry of the court. *Schuchardt v. Babbidge*, 19 How. 239; *The Lottawanna*, 21 Wall. 558; *The Guiding Star*, 18 Fed. 263; *The E. V. Mundy*, 22 Fed. 173; *The Island City*, 1 Low. 375. In the latter case, Judge Lowell declares the power of the court over the proceeds in the registry in the following language:

"When a ship has been sold, the admiralty court has jurisdiction to distribute the proceeds. *The Angelique*, 19 How. 239. It is not a question of admiralty jurisdiction, but of the power of the court to deal justly with a fund in its registry. On the day this case was argued, I ordered the moiety of a fine which had been recovered by indictment in the name of the United States to be paid to the informer. I had no jurisdiction, nor had any other court, of a suit by the informer against the United States; but I had the jurisdiction which all courts have to deal with funds in the registry according to the rights of those whose property has been converted into money by the order of the court, or who have, for any other reason, a lawful interest in the fund."

Under these authorities, it is clear that the libelants and interveners are entitled to have the equities of their claims recognized, and, as against only the objection of the minority owners of the vessel, they should be paid out of the proceeds in the registry of the court. The claims of the libelants and interveners will therefore be allowed and paid, as follows: *W. S. Ray & Co. Manufacturing Company*, galley utensils, \$48.23; *Pacific Marine Supply Company*, materials for calking and painting, \$73.47; *J. H. Farnham & Co.*, labor, materials, and cartage, etc., for calking, \$351.37; *A. Anderson*, boarding crew, \$36; *Witzman & Staiger*, meat supplied to crew, \$51.60.

The testimony relating to the bill of *E. E. Hitch*, for repairing sails, \$363.08, is to the effect that the repairs, to the extent that it is claimed that they were made, were unnecessary, and the charges unreasonable. It appears that the repairs were reasonably worth \$75. The claim will therefore be allowed for that sum. The claim of *Dillon & Co.* for rating chronometer, assigned to *M. W. Bode* for collection, is not supported by sufficient evidence, and it is rejected. The claim of the board of state harbor commissioners, for \$438.30, for wharfage incurred while the vessel was in the custody of the marshal, will be paid, as an expense of the marshal, for the sum of \$316.10. A decree will be entered accordingly.

P. SCHWENK & CO. v. STRANG et al.

(Circuit Court of Appeals, Eighth Circuit. December 4, 1893.)

No. 313.

1. REMOVAL—LOCAL PREJUDICE—AFFIDAVITS.

A removal should not be granted, under the act of 1887-88, upon an ex parte affidavit, merely alleging the existence of local prejudice, without stating any facts tending to show it.

2. SAME—NOTICE.

Parties to be affected by the removal should have reasonable notice of the application, and opportunity to contest it.

Appeal from the Circuit Court of the United States for the District of Nebraska.

In Equity. Suit commenced in a state court by P. Schwenk & Co. against A. L. Strang, A. L. Strang & Co., the Norfolk Waterworks Company, J. H. Millard, the Omaha National Bank, the Shickle, Harrison & Howard Iron Company, and C. G. Miller. The cause was removed to the United States circuit court on the ground of local prejudice, and the complaint was afterwards dismissed. Complainant appeals. Reversed.

H. C. Brome and R. A. Jones, for appellant.

Before CALDWELL and SANBORN, Circuit Judges.

CALDWELL, Circuit Judge. This action was commenced in the district court of Madison county, Neb. The defendant the Shickle, Harrison & Howard Iron Company filed its petition in the circuit court of the United States for the district of Nebraska for the removal of the suit to that court on the ground of prejudice and local influence. The petition and affidavit for removal make only this averment in relation to the alleged prejudice and local influence:

"Affiant further says that on account of prejudice and local influence the said petitioner will not be able to obtain justice in the said district court of Madison county, in the state of Nebraska, or in any of the said courts in the state of Nebraska to which, on account of local influence or prejudice, the said defendant may, under the laws of the state of Nebraska, have a right to remove said cause, and that if said cause be tried in the district court of said Madison county, Neb., or in any other district court of the said state of Nebraska, said petitioner is liable to suffer pecuniary loss and damage on account of such prejudice and local influence."

Upon this showing, and without notice to the plaintiff or the other defendants, the circuit court entered an order removing the cause into that court. Afterwards, the plaintiff appeared in the circuit court, and filed affidavits denying that there was any prejudice or local influence against the defendant, and moved to remand the cause to the state court, which motion was overruled.

The question presented for our consideration is whether the showing made in the affidavit filed by the defendant warranted the circuit court in removing the cause from the state court. The affidavit states only a conclusion. Not a fact is stated, from which prejudice or local influence could be inferred. It is not shown that any officer or agent of the defendant was ever in the county or

state, or that a single citizen of the county or state ever heard of the existence of the company, or that the plaintiff is popular or influential in the county, or favorably known, or known at all, to the people of the county. In a word, the affidavit does not contain a hint of any fact or circumstance from which any court could say that it had been made to appear that, from prejudice or local influence, the defendant would not be able to obtain justice in the state court. The grounds upon which the affiant arrived at the conclusion to which he swears are not disclosed. His residence is not disclosed. It does not appear that he ever was in Madison county, or knows a single citizen of the county, or knows anything about the sentiments and feelings of the people of the county towards the plaintiff or the defendant. If he had stated the facts upon which he founded his conclusions, the court could then have determined whether his deductions were sound.

It not unfrequently occurs, as every judge who has had much experience on the circuit knows, that affidavits like the one under consideration are filed when it is perfectly obvious that the only prejudice that has any existence in fact is the prejudice of the affiant against the people of the county, of whom he knows nothing, and whose impartiality and fairness he impeaches without the slightest foundation of fact. Instances are not wanting where such affidavits had no better foundation than an earnest desire on the part of the defendant to harass and delay the plaintiff in his suit. It was the knowledge of these facts that induced congress to change the law on this subject. Under the statute in force prior to the present act, the removal of a cause from the state to the federal court upon the ground of prejudice or local influence was effected by simply filing an affidavit in the state court stating that the party "has reason to believe, and does believe, that from prejudice or local influence he will not be able to obtain justice in such state court." Rev. St. U. S. § 639. No inquiry into the truth of the affidavit was permissible. Under the act of 1887 the application for the removal on the ground of prejudice or local influence must be addressed to the circuit court; and the language of the act is that, "when it shall be made to appear to the said circuit court that from prejudice or local influence he will not be able to obtain justice in such state court," etc. It will be observed that this act does not provide, as did the act of 1867, that the cause shall be removed upon filing an affidavit alleging in general terms the existence of prejudice or local influence. Nothing at all is said about an affidavit. The requirement is that, "when it shall be made to appear" to the circuit court that from prejudice or local influence the defendant will not be able to obtain justice in the state court, etc.

How must this fact be made to appear? Obviously, in some of the recognized modes by which facts are proved in courts of justice. It is not made to appear by the simple declaration in an ex parte affidavit that it does exist. That declaration proves nothing, and is evidence of nothing but the opinion of the affiant, and the issue is not one to be determined by the opinion of an expert. An opin-

ion or conclusion expressed in an ex parte affidavit, which does not disclose the facts upon which the conclusion is founded, has no probative force. The court cannot abdicate its functions, and transfer to the maker of such an affidavit the high duty imposed upon it by law, of judging after inquiry and deliberation. The judicial faculty cannot be farmed out in this manner. Before the court can remove the cause, it must be made to appear that the fact exists upon which the right to the removal depends. The statute contemplates a judicial inquiry into the alleged fact. The court must take the responsibility of determining and adjudging judicially that prejudice exists, before it can order the removal. Its judgment on this question must be reached by the customary and approved judicial methods.

An ex parte affidavit, which states no fact, but simply the affiant's opinion or conclusion, is sometimes made sufficient by statute for certain purposes. The act of 1867 is an example of such a statute. But in the absence of a statute such an affidavit ought not to be accepted as satisfactory evidence of the existence of any fact upon which the judgment of a court is to rest. When the court is charged with the duty, as it is under the act of 1887, of ascertaining and determining for itself the existence or nonexistence of prejudice or local influence, it ought not to accept an ex parte affidavit, such as was filed in this case, as sufficient evidence, or indeed as any evidence, on the point. To give effect to such an affidavit is practically to nullify the act of 1887, and revive the act of 1867. The question should be determined by the court as it would determine any other issue of fact arising in the progress of the case, affecting the rights of the parties to the suit. The parties to be affected by the action of the court should have reasonable notice of the application for removal, and an opportunity to contest it. When notice to the party adversely interested is practicable, the court should not, in any case, rest its judgment on a mere ex parte showing. Such hearings are often deceptive and misleading, and for this reason are not favored. When the court comes to act upon the application, it may receive evidence upon the point by affidavits which state facts, or by depositions, or by oral examination of witnesses.

The conclusion we have reached is supported by the opinion of Mr. Justice Harlan in *Malone v. Railroad Co.*, 35 Fed. 625. That case is cited approvingly by the supreme court in *Re Pennsylvania Co.*, 137 U. S. 451, 11 Sup. Ct. 141, and in *Fisk v. Henarie*, 142 U. S. 459, 468, 12 Sup. Ct. 207. In the last case cited, Mr. Chief Justice Fuller, speaking for the court, said:

"The prejudice or local influence must be made to appear to the circuit court; that is, the circuit court must be legally satisfied, by proof suitable to the nature of the case, of the truth of the allegation that by reason of those causes the defendant will not be able to obtain justice in the state courts.
* * *

The judgment of the circuit court is reversed, and the cause remanded, with directions to that court to remand the same to the state court from which it was removed.

FULLER et al. v. MONTAGUE et al.

(Circuit Court of Appeals, Sixth Circuit. November 6, 1893.)

No. 97.

1. EQUITY—LACHES.

In 1892, nearly 30 years after attaining majority, complainants claimed an interest in land, asserting that in 1844 such interest had been fraudulently conveyed by their uncle, cotenant with their father, who died in 1846. They were aware that their father had owned such interest, but accepted their uncle's assurance that it had been conveyed to him, until 1887, when they discovered the facts relied on to sustain their claim. *Held*, that there was such laches as would preclude relief against bona fide purchasers in possession for over 30 years. 53 Fed. 204, affirmed.

2. PARTITION—WHO MAY MAINTAIN.

A suit for partition cannot be maintained by persons not having the legal title to the lands, against persons in possession claiming adversely on a bill seeking to establish complainants' title and to invalidate that of defendants, on the ground of fraud with which defendants are not connected. Per Swan, District Judge.

Appeal from the Circuit Court of the United States for the Southern Division of the Eastern District of Tennessee.

In Equity. Bill by John P. Fuller, James H. Fuller, and Simeon Fuller against Theodore G. Montague and others to establish an interest in lands, and for partition. One defendant demurred, and the others joined in a motion to dismiss the bill. Demurrer sustained, and bill dismissed. 53 Fed. 204. Complainants appeal. Affirmed.

Statement by SWAN, District Judge:

The bill in this cause is nominally for partition. The appellants were complainants in the court below. They allege that they are the children and sole heirs at law of Simeon Fuller, Jr., who died intestate in the year 1846, seised in fee simple of the undivided one-half of the following lots or parcels of land, viz. lot No. 54, Chestnut street, the north half of lot 38, Chestnut street, and the south half of lot 37, Market street, as said lots are numbered and described on the original plot of Chattanooga, Hamilton county, Tenn. That the lands were purchased by appellants' father, Simeon Fuller, Jr., and their uncle, Moses Pressley, and conveyed to them jointly in 1839 by the commissioners of Chattanooga, and the conveyance was duly recorded in the office of the register of Hamilton county. That Fuller and Pressley held them as tenants in common until the former's death, in 1846, complainants being then between four and seven years of age. That the lands remained vacant and unoccupied until after Fuller's death. That "the said undivided interest has never been conveyed to any one by the said Simeon Fuller, Jr., his heirs or legal representatives, nor has the title in any way been alienated from him or them * * * and the same is now held by your orators, his only heirs at law, these never having alienated the same, nor been actually ousted therefrom, nor have they been in any way notified of any repudiation or adverse claim or holding; and they expressly deny that there has been any legal or valid adverse possession whatever to be charged against them, or any effective repudiation of their holding in tenancy in common, even till this day. * * * That the records of the Hamilton county registry office clearly show your orators' title, and have always given, and now give notice to all the world that the interest of their ancestor, Simeon Fuller, Jr., has never passed, nor his title been divested, from him nor his heirs. * * * That the said Simeon Fuller, soon after the joint purchase aforesaid, was absent in a distant state, and that he intrusted to Moses Pressley, his cotenant, the care and oversight of the property thus held as an investment,

to pay taxes thereon, and to do whatsoever might be necessary to realize the object of such investment, he having full faith in the skill and integrity of his brother-in-law; and the said Pressley for some time fulfilled faithfully the terms of the express trust and his obligations as a tenant in common with your orators' ancestor, and so your orators' ancestor continued to repose confidence in him during life. * * * But your orators say that the said Moses Pressley, two years before the death of Simeon Fuller, namely, in 1844, and while the latter was an invalid, had sold his own interest in said lots to M. Whitley, of Walton county, Ga., and in betrayal of his obligation to Simeon Fuller as cotenant, and under the said express trust so conferred upon him, and undertaken by him and acted upon, he so executed the deed to said Whitley as to include apparently the interest of the said Simeon Fuller therein, and as to purport to convey the entire title, without, however, naming or even referring to the said Simeon Fuller's interest. And the said Pressley, for the purpose of concealing the fraud thus committed upon the rights of Simeon Fuller, and thus effectuate the fraudulent wrong, connived and conspired with the said grantee, Whitley, to hide the fraudulent conveyance for seven years, and withhold it thus from registration during the period of the statute of limitations, supposing that this statute would run in secret, and bar an action in seven years; and accordingly the said deed was so concealed until the year 1851,—seven years, and five years after the death of Simeon Fuller. Then, and not until then, it was acknowledged and registered. * * * That their ancestor never did know, and had no means of knowing, of the existence of the said fraudulent deed, and had no suspicion of the unfaithfulness of his relative and cotenant, and neither had your orators afterwards. * * * That said conveyance was wholly fraudulent, and the same was fraudulently concealed. That there was never any open repudiation by the said Pressley of his trust or of his obligation as cotenant with said Simeon Fuller. * * * That before said deed was registered, and ever afterwards, the wrongdoer continued to conceal, by various acts and devices, the cause of action existing in said fraudulent conveyance from the knowledge of your orators, and for this purpose abused their infant minds and the natural confidence of your orators in him, particularly by misrepresentations, chiefly to the effect that he had owned lands together with their father, but before his death their father had sold them all to him. Your orators being wholly incapable of understanding any kind of business, and relying upon the word of their uncle, and, besides, residing with him at a great distance from Chattanooga, in the state of Georgia, grew up under the influence of such misrepresentations without the least idea or suspicion that they had any rights in the matter. Nothing ever occurred to suggest such idea or suspicion until the year 1887, when your orator, John P. Fuller, while, at the request of Mrs. Pressley, widow of the said Moses Pressley, examining some old papers to which your orators had never before had access, discovered the original deed of the commissioners of Chattanooga to Simeon Fuller and Moses Pressley, and, not finding any deed from his father to Moses Pressley, he for the first time suspected that something was wrong, and his reflections led to an investigation whereby the fraud was discovered." Complainants deny laches. Such, mainly in their own language, is the story of the wrong complained of, and the means by which it was effected.

The bill avers that the defendants derive title to the premises in controversy under the said deed to Whitley through a series of mesne conveyances, and that "all the successive grantees under the said deed have had full record that the interest of Simeon Fuller has never in any manner been conveyed, even the said Whitley deed not mentioning that interest in express terms." It claims that the defendants are chargeable with notice of the fraud committed, and with knowledge of want of title. This claim is based on the record of the commissioners' deed to Fuller and Pressley, and the fact that no conveyance by Fuller of his interest appears of record in Hamilton county.

The prayer is that "the court will grant complainants jointly an equitable partition with said defendants, * * * and other proper relief."

The bill was filed November 1, 1892, against the 12 defendants, most of

whom held, in severalty, parcels of the various lands of which partition is sought.

One of the defendants demurred to the bill for want of equity and on the ground of the laches of complainants. The other defendants united in a motion to dismiss the bill on the same and other grounds. The demurrer was sustained, the motions were granted, and the bill was dismissed. From that decree this appeal was taken, and it is prosecuted in forma pauperis, under the act of congress approved July 20, 1892.

The opinion of Judge Key dismissing the bill is reported in 53 Fed. 204.

J. C. & Frank L. Wells, for appellants.

Wheeler & McDermott, W. G. M. Thomas, W. L. Eakin, J. H. McLean, and R. P. Woodward, for appellees.

Before TAFT, Circuit Judge, and SEVERENS and SWAN, District Judges.

SWAN, District Judge, (after stating the facts.) 1. This bill makes no charge of fraud against either of the defendants. The wrong of which it complains is alleged to have been perpetrated by Pressley, their uncle, and Whitley, his grantee. The first died as early as 1887, if not before that time, as appears from the bill. Whether or not Whitley was living when this suit was brought is not stated. If the facts pleaded make a case of equitable cognizance, it would seem that Pressley's legal representatives, and Whitley, if living, should be made parties, as it is their fraudulent conduct which is to be investigated. *Gaylords v. Kelshaw*, 1 Wall. 81; *Lewis v. Cocks*, 23 Wall. 471; *Judson v. Courier Co.*, 25 Fed. 708.

2. The value of the property in controversy is nowhere alleged in the bill. By section 1 of the act of March 3, 1887, defining the jurisdiction of the courts of the United States, it is provided that "the circuit courts of the United States shall have original jurisdiction concurrent with the courts of the several states of all suits of a civil nature at common law or in equity where the matter in dispute exceeds, exclusive of interest and costs, the sum or value of two thousand dollars * * * in which there shall be a controversy between citizens of different states." The record must show affirmatively that the jurisdictional value is involved, (*Parker v. Latey*, 12 Wall. 390; *Hunt v. Blackburn*, 127 U. S. 774, 8 Sup. Ct. 1395;) but, as this omission is apparently remediable in fact, we shall require that the necessary showing on that point be made and filed, and shall dispose of the case as if the record contained the proper allegation of value.

3. In the interpretation of this bill it is scarcely necessary to invoke the rule that the construction of a pleading shall be adopted which is most unfavorable to the party pleading, since every person, it must be assumed, states his case as favorably to himself as possible. From the averment that "the lots were vacant and unoccupied" at the time of Fuller and Pressley's purchase, "and so remained until after the death of the said Simeon Fuller," it is a fair and natural inference that since Fuller's death these lands have been in possession of Whitley and his grantees and their successors. This inference is confirmed by the fact that complainants do not

claim that they are, or ever have been, in possession. Its force and effect are in no degree impaired by the allegation that complainants "are tenants in common with the defendants in and to the premises described," for this averment of title is not of a fact, but of the consequence of facts. Story, Eq. Pl. § 730. The allegation that complainants "have never been actually ousted therefrom, [i. e. the premises in dispute,] nor have been in any way notified of any repudiation or adverse claim or holding," is clearly and studiously limited to the effect of the admitted possession of Whitley and his successors in ownership, and is merely a denial that such possession and occupancy are legally sufficient against the complainants as tenants in common, against whom, in a contest with a cotenant, it is held that an actual ouster must be proved. *Barnitz's Lessee v. Casey*, 7 Cranch, 456.

When the facts are undisputed, their effect is a question of law. The supreme court of Tennessee, whose decision as a rule of real property is binding upon us in this case, in *Weisinger v. Murphy*, 2 Head, 174, held that, "if one tenant in common assumes to convey the entire land, his deed will be a color of title, and possession under it for seven years will be adverse to the right and title of the cotenants, and bar their action to the land conveyed. It is an actual ouster and disseisin of the cotenant, which he is bound to notice; and, in order to create this adverse relation, no formal or other notice from the vendee is necessary." Cited and approved in *Burns v. Headerick*, 85 Tenn. 102, 2 S. W. 259. The fact, therefore, that complainants have never been notified of any repudiation or adverse claim or holding is manifestly immaterial, while from the facts pleaded, the legal conclusion is inevitable that the complainants have been ousted and disseised of the property. The denials that "there has ever been any legal or valid adverse possession whatever to be charged against them, [the complainants,] or any effective repudiation of their holding in tenancy in common, even till this day," are also plainly the statements of conclusions, and not of facts, and are repelled by the facts pleaded. Adverse possession is, where there is no conflict of facts, a legal question, (*Bradstreet v. Huntington*, 5 Pet. 438;) and a fortiori the denial that "legal or valid adverse possession can be charged against" a litigant is, though verified by his oath, merely the pleader's estimate of the force of the facts on which it is asserted. The alleged want of "effective repudiation" of complainants' holding in tenancy in common has no greater force, and is also open to the inference that there has been a repudiation in fact of the existence of such tenancy. The protestation that complainants have not been guilty of laches or slept upon their rights is in the same category with the allegations just discussed. The pleading must state facts from which the court can infer diligence. A demurrer admits only those matters of fact which are well pleaded. Mere averments of legal conclusions are not admitted by it, unless the facts and circumstances set forth are sufficient to sustain the allegation. *Dillon v. Barnard*, 21 Wall. 430; *Gould v. Railroad Co.*, 91 U. S. 536.

Discarding from consideration, therefore, these legal conclusions, and accepting the just inferences drawn from the bill, the substance of the facts it alleges is that complainants' ancestor, Simeon Fuller, Jr., became in 1839, by the recorded deed of the commissioners of Chattanooga, a tenant in common with Pressley of the lands in question, and held that interest until his death, in 1846; that in 1844 his cotenant, Pressley, without his consent or knowledge, conveyed the entire tract to one Whitley, and, in concert with him, fraudulently withheld that deed from registration until 1851; that defendants derive title by mesne conveyances from Whitley and his grantees and their successors, who have been in possession, claiming the entire tract, since Fuller's death, in 1846, and are now in possession under such claim; that Pressley's conveyance to Whitley, and his subsequent withholding of the deed from registration, was a fraud upon Simeon Fuller and his heirs, who were then infants of the ages of from four to seven years, and that this fraud was perpetuated by Pressley's false representations, which dissuaded complainants from inquiring into the facts because they confided in his integrity and relationship; that complainants had no knowledge of the fraud or of their father's interest in the lands until 1887. Complainants have been disseised for 48 years. The question now arises whether a suit in equity for partition can be maintained on the facts stated, either under the system of equity administered in the courts of the United States, or under the laws of the state of Tennessee and the decisions of its supreme court.

The federal system of chancery practice follows that of the high court of chancery of England, and "does not deal with or decide questions of controverted title. Its purpose is to make a division among the parties before the court of real estate in which they had interests or estates that were in controversy as among themselves." *Gay v. Parpart*, 106 U. S. 689, 1 Sup. Ct. 456; *McCall v. Carpenter*, 18 How. 302; *Rich v. Bray*, 37 Fed. 273. This doctrine is in accordance with the great weight of American authorities, where the title is legal, and no ground of equitable jurisdiction appears beyond that of granting partition. *Wilkin v. Wilkin*, 1 Johns. Ch. 111; *Phelps v. Green*, 3 Johns. Ch. 302; *Coxe v. Smith*, 4 Johns. Ch. 271; *Clapp v. Bromagham*, 9 Cow. 530; *Brownell v. Brownell*, 19 Wend. 367; *Brock v. Eastman*, 28 Vt. 658; *Thomas v. Garvan*, 4 Dev. 223; *Walker v. Laflin*, 26 Ill. 472; *Whitten v. Whitten*, 36 N. H. 326; *Hoffman v. Beard*, 22 Mich. 59; *Lambert v. Blumenthal*, 26 Mo. 471; *Fenton v. Steere*, 76 Mich. 405, 43 N. W. 437; *Stuart v. Coalter*, 4 Rand. (Va.) 74; *Martin v. Smith*, 1 Harp. 106; *Warfield v. Gambrill*, 1 Gill. & J. 503; *Stevens v. Enders*, 13 N. J. Law, 271; *Maxwell v. Maxwell*, 8 Ired. Eq. 25; *Garrett v. White*, 3 Ired. Eq. 131; *Shearer v. Winston*, 33 Miss. 149; *Foust v. Moorman*, 2 Cart. (Ind.) 17.

The statutes of Tennessee and the decisions of the supreme court of that state are explicit to the same point. By section 3993 of the Code of Tennessee (chapter 2, Of Real Actions) it is provided that "any person having an estate of inheritance, or for life, or for years, in lands and holding and being in possession thereof as tenant in

common or otherwise, with others, is entitled to partition thereof, or sale for partition under the provisions of this chapter." In the construction of this and prior cognate legislation it has been held that a partition cannot be decreed in equity, where there is adverse possession, until complainants' title be established at law. Therefore, a bill filed by one heir of the grantee, alleging that his coheir had sold the land to the defendant who was in possession, and praying partition, was dismissed on demurrer, complainant not having established his title at law. *Trayner v. Brooks*, 4 Hayw. (Tenn.) 295; *Carter v. Taylor*, 3 Head. 30. The legal title must be clear of dispute. *Bruton v. Rutland*, 3 Humph. 435; *Hickman v. Cooke*, Id. 642, 643. In *Nicely v. Boyles*, 4 Humph. 177, it is said:

"A bill for partition is not a bill to settle title, but a bill to divide that which belongs to tenants in common or joint tenants, among them in severalty; and, if the title be disputed, partition will not be made until the dispute is settled in an appropriate form of action. A bill of partition is not this."

See, also, *Whillock v. Hale*, 10 Humph. 65. In *Groves v. Groves*, 3 Sneed, 189, 190, the complainants filed a bill for partition. "The defendants," say the court, "claim title to the whole as vendees of the common ancestor, and by virtue of long adverse possession, (17 years.) How far their possession would avail them under the statutes of limitations or raise a presumption of deeds are questions that would properly come up in a court of law in an action of ejectment. The complainants must establish their rights as tenants in common before they can ask partition. This proceeding is not intended to try titles and dispose of questions proper for an action of ejectment, and thus usurp the jurisdiction of a court of law. * * * Whatever right the complainants have must be established in a court of law, and then, if successful, they will be tenants in common and have a right to partition."

It is clear, therefore, that neither under the equitable jurisdiction vested in the federal courts, nor under the statutes of Tennessee nor yet according to the decisions of its court of last resort, have the complainants any standing in a court of equity for a partition. Their bill is purely an ejectment bill, and, unless the defendants are connected with the fraud charged, we may properly apply to it the language of Chief Justice Marshall in *Smith v. McIvor*, 9 Wheat. 534:

"The facts alleged are all examinable at law, and a court of law is as capable of deciding on them as a court of equity. In such a case the existence of some fact which disables the party having the law in his favor from bringing his case fairly and fully before a court of law has been generally supposed to be indispensable to a court of equity. Some defect of testimony, some disability which a court of law cannot remove, is usually alleged as a motion for coming into a court of equity. But in the case at bar the case alleges nothing which can prevent a court of law from exercising its full judgment. No defect of testimony is alleged; no discovery is required; no appeal is made to the conscience of the defendant. Facts are alleged which have precisely the same operation in a court of law as in a court of equity, and the bill does not even insinuate that they cannot be proved at law."

See, also, *Whitehead v. Shattuck*, 138 U. S. 146, 11 Sup. Ct. 276.

It is insisted, however, that the fraud of Pressley and Whitley, and its concealment, constitute a claim to relief of which a court of equity alone can take cognizance, so that, in the language of complainants' brief, "aside from the matter of partition, the court has legitimate possession of the case, and can hold it for every purpose, legal questions and all." While the principle referred to as authorizing equitable jurisdiction of incidental matters cognizable at law is well recognized, it has its limitations which exclude this controversy. The first objection to its application here is that Pressley and Whitley, the parties charged with this fraud, are not before the court. It is clear, also, that the aid of this court is sought, not for the purpose of dividing the property, but of acquiring it, since complainants are out of possession, and the defendants in, claiming the entire property adversely; and in these conditions the complainants' proper remedy is at law. *Hall v. Law*, 102 U. S. 466. Defendants, because of the fraud of others, cannot be deprived of their constitutional right to a trial by jury by a colorable suit for partition. *Hipp v. Babin*, 19 How. 271. It is well said by Mr. Justice Daniel in *Magniac v. Thomson*, 15 How. 302:

"Equity may be invoked to aid in the completion of a just but imperfect legal title, or to prevent the successful assertion of an unconscientious and incomplete legal advantage, but to abrogate or assail a perfect and independent legal right it can have no pretension. In all such cases equity must follow, or, in other words, be subordinated to, the law."

Great stress is laid by complainants on the registration of the commissioners' deed to Fuller and Pressley, as depriving defendants of the character of innocent grantees, and tainting their possession with mala fides. To use the language of appellants' brief, the charge is that defendants "participate in the fraud by accepting the benefits of it to the exclusion of complainants as accessories after the fact." This is specious, perhaps, but unsound. It is the only imputation made against the good faith of the defendants, and requires us to determine the sufficiency of the facts to establish fraud on the part of the defendants. Its infirmity is that it is not justified by the parts of the bill descriptive of Pressley's fraudulent conveyance, nor does the purchaser of a once imperfect title, whose defects time has apparently healed, become by such purchase alone in any sense a fraudulent grantee. Indeed, the bill itself, in its effort to exculpate complainants from the charge of laches in bringing suit, states that "he [Pressley] so executed the deed to Whitley as to include apparently the interest of the said Simeon Fuller therein, and as to purport to convey the entire title, without, however, naming or even referring to the said Simeon Fuller's interest." If this tends to excuse complainants' professed ignorance and delay, it equally avails to shield defendants from the charge of buying with knowledge a clouded title. But, if defendants had actual or constructive notice that Fuller was once tenant in common of the lands with Pressley, that knowledge did not legally or equitably preclude them from buying the property, when, by the law of Tennessee, time and adverse possession had not only barred his right of entry and action, but extinguished his title, and transferred it to defendants'

vendors. *Love v. Love's Lessee*, 2 Yerg. 290; *McLain v. Ferrell*, 1 Swan. 48-54; *Norvell v. Gray's Lessee*, Id. 96; *Chaney v. Moore*, 1 Cold. 50; *Woodward v. Boro*, 16 Lea, 678.

Although the statutes of Tennessee make the record of a deed "notice to the world" of the rights of the grantee, such record does not operate to nullify the statute of limitations (section 3459 of the Code of Tennessee,) vesting a claimant who has held seven years' adverse possession of lands, under a conveyance purporting to pass the fee, "with a good and indefeasible title in fee." When that time has ran against the disseised party, the efficacy of the record of his deed as notice expires with his title, and such adverse occupant is vested with a new estate, which others may rightfully purchase. So firmly is he intrenched that in *York v. Bright*, 4 Humph. 312, where a bill in equity filed to restrain an action of ejectment charged that complainant was the equitable owner of the land in controversy, and that defendant fraudulently procured a deed to be made to himself by the holder of the legal title, and the proof showed that defendant had been in possession of the land for 20 years, claiming it as his own by an unregistered deed, the court held:

"The statute of limitations is already a bar to the suit. The fact that the defendant procured the deed by fraud, if it were so, and fraudulently obtained possession, would make no difference. The statute makes no exception of fraud, and will run in favor of a possession and title obtained by fraud."

And so is *Jackson v. Hodges*, 2 Tenn. Ch. 285.

To sustain the charge of fraud against defendants, the facts must place them in such relation to the complainants or the lands as to make their holding in contravention of some equity subsisting between them and the complainants. The derivation of their title remotely from Pressley and Whitley is not of itself, under the circumstances of this case, sufficient to asperse their good faith or divest their legal rights. *Ringo v. Binns*, 10 Pet. 269, 281.

Nor does the concealment of Pressley's fraud by withholding this deed from registration seven years, and the infancy of complainants at the time of its commission, aid their case. We are not cited to any provisions of the Code of Tennessee prescribing the time within which suit must be commenced when the cause of action has been fraudulently concealed, and we may assume that the general doctrine obtains in that state that, where the party defrauded remains ignorant of it without any fault or want of diligence or care on his part, the bar of the statute does not begin to run until the fraud is discovered. The utmost effect of the concealment of the deed was to preserve the cause of action for such reasonable time after its registration as would enable complainants to ascertain the facts and institute suit for redress. There is no arbitrary period applicable to all cases within which the defendant party must take action. The facts in each case must measure the diligence and activity which equity makes the condition of its aid. This test is also fatal to complainants' case. Conceding that the disability of infancy condoned their inaction during their minority, and assuming that they were also entitled to the additional period of three

years after majority to bring suit, granted by section 3451 of the Code of Tennessee to those under disability when the cause of action accrued, their laches are inexcusable. The eldest complainant became of age in 1860, and the youngest in 1863. In the 30 years which have since elapsed, complainants have been supine and dormant, though the adverse possession of others was itself notice that they held the land under a title, the character of which they were bound to ascertain. *Lea v. Copper Co.*, 21 How. 493-498; *Landes v. Brant*, 10 How. 348, 375. They knew that their father once had an interest in lands in and about Chattanooga, yet in all that time made no inquiry or investigation, but rested content with their uncle's assurance that it had been conveyed to him. During all this time the defendants and their predecessors in ownership have been encouraged by lapse of time and the silence of complainants to invest their means in the purchase and improvement of the land and the payment of taxes thereon, in ignorance of any defect of title not remedied by time and their possession. Now that the capital and enterprise of others has made valuable their abandoned inheritance, complainants ask the aid of a court of equity to wrest it from its possessors. Upon their own confession, they have remained inactive and acquiescent for five years after they had discovered the fraud, and then sought their remedy, not against the wrongdoers or their estates, but against those whom their negligence and delay has misled and lulled into security. Neither poverty, absence from the state, nor ignorance can palliate such laches or justify relief. *Bowman v. Wathen*, 1 How. 189, 195; *Wood v. Carpenter*, 101 U. S. 135, 139; *Norris v. Haggin*, 136 U. S. 386, 10 Sup. Ct. 942.

In the consideration of the questions presented by appellants we have necessarily reviewed the facts, and while our decree might be rested on the ground that complainants have mistaken their remedy, in justice to defendants, who are entitled to have this stale claim forever quieted, we also hold that there is no equity in the case made by the bill, and affirm, with costs, the decree of the circuit court dismissing it.

Decree affirmed.

TAFT, Circuit Judge, and SEVERENS, District Judge, agree with the foregoing opinion in so far as it is based on the ground of laches.

GOOD TEMPLARS' LIFE ASS'N v. UNITED LIFE INS. ASS'N.

(Circuit Court, S. D. New York. December 27, 1893.)

EQUITY JURISDICTION—REMEDY AT LAW.

Where life insurance is transferred from one company to another by a contract which provides for the payment of a balance out of the income from the quarterly dues, this charges the payment upon such income, and the enforcement of the charge is a matter of equity jurisdiction.

In Equity. Suit by the Good Templars' Life Association against the United Life Insurance Association to enforce payment of money. On demurrer to the bill. Overruled.

J. K. Hayward, for plaintiff.
 Wilber & Oldham, for defendant.

WHEELER, District Judge. The contract upon which this bill is brought provides for the transfer of about \$700,000 of actual insurance upon the lives of members from the orator to the defendant, for which the defendant was to pay, pro rata, \$2,000 in six months, \$1,000 in nine months, and the balance of \$1,500, more or less, "from the income for dues received from said business quarterly thereafter as the same shall accrue, until fully paid, and proper settlement shall be rendered." The bill is demurred to because the remedy is said to be at law. If the amount to fall due was to be computed merely by comparing the actual amount of insurance with the basis of \$700,000, and the time of falling due, merely, was to be fixed by the quarterly collections, the recovery could be only personal, for so much money due at those times, and the remedy would be at law. It would be as complete and adequate there as it could be anywhere. *Nutting v. Atwood*, (Super. N. Y.) 23 N. Y. Supp. 816. But here the balance of \$1,500, more or less, is by the terms of the contract to be paid from the income for dues, and this payment is thereby charged upon this income. A court of equity can enforce this charge, while at law it cannot be made available. The remedy at law is not, therefore, plain, adequate, and complete, as is required to oust jurisdiction in equity. Rev. St. U. S. § 723.

Demurrer overruled; the defendant to answer over by February rule day.

COFFIN et al. v. CITY OF INDIANAPOLIS et al.

(Circuit Court, D. Indiana. January 6, 1894.)

No. 8,888.

1. EQUITY JURISDICTION—BANK DEPOSITS.

Plaintiffs, being successful bidders for an issue of city bonds, deposited a sum of money in a bank, and took a certificate of deposit, payable to the city officials. The money was to be returned on the completion of the purchase, and to be forfeited in case plaintiffs failed to complete it. Plaintiffs, however, discovered that the bonds were invalid, and sued the city and the bank to obtain a return of the certificate, and a decree entitling them to the money. *Held*, that the suit was cognizable in equity.

2. MUNICIPAL CORPORATIONS—POWERS—BONDS.

Power to issue bonds to replace in the treasury money already used in paying prior bonds is not conferred by a grant of authority to issue "refunding bonds" or original bonds to procure money for use in the "legitimate exercise of the corporate powers," and for the payment of legitimate corporate debts.

3. SAME.

Where a number of bonds, purporting to be "refunding bonds," are issued as one series, but part of them are not in fact refunding bonds, and are illegal, their illegality attaches to the whole issue; and one who bids for them as refunding bonds cannot be compelled to take even the amount that might have been legally issued.

4. CONTRACT—CONSTRUCTION—BID FOR “REFUNDING BONDS.”

One who, pursuant to an advertisement of sale, makes a bid for municipal “refunding bonds,” cannot be required to take part of the amount in other bonds, though equally valuable.

In Equity. Suit by William Edward Coffin and Walter Stanton against the city of Indianapolis and the Merchants’ National Bank of Indianapolis. Heard on demurrer to the bill. Overruled.

Miller, Winter & Elam, for complainants.

John E. Scott and Elliott & Elliott, for defendants.

BAKER, District Judge. The questions for consideration are presented by the demurrer interposed by the city of Indianapolis to the bill of complaint. The complainants, after showing the requisite diverse citizenship of the parties, allege, in substance: That they are bankers and brokers, doing business in the city of New York, and as such are dealers in municipal bonds and other securities. That, by the charter of the city of Indianapolis, provision is made for the borrowing of money, the making of loans, and the selling of bonds, as follows:

“Sec. 30. The common council shall have power to borrow money to an amount not exceeding two (2) per cent. of the taxable property of such city, as the same may appear on the tax duplicate of such city for the year in which such loan shall be effected; provided, that the entire money borrowed shall not at any time exceed two (2) per cent. of the taxable property of such city. Such loans may be made only for the purpose of procuring money to be used in the legitimate exercise of the corporate powers of such city, and for the payment of legitimate corporate debts. Sec. 31. Such ordinance for loans may authorize the issuance of bonds or other city obligations, negotiable or not, bearing interest at a rate not exceeding six (6) per cent., and running not to exceed thirty years. Such ordinances shall provide for the time and manner of advertising the sale of such bonds or other securities, and of the receipt of bids for the same, together with the mode and terms of sale. All duties with regard to the preparation, advertisement, negotiation, and sale of such bonds and other securities shall be performed by the head of the department of finance. Said officer, after causing such bonds to be properly executed, shall deliver the same to the city treasurer, taking his receipt therefor, and, upon the conclusion of the contract for the sale of such bonds or other securities, shall certify to the treasurer the amount which the purchaser is to pay for the same, together with the name of the purchaser. And thereupon it shall be the duty of the treasurer to receive from the purchaser the amount so certified, by the head of the department of finance, and to deliver the bonds or other securities to the purchaser, taking his receipt therefor. The treasurer and the head of the department of finance shall thereupon each make a report of his proceedings to the mayor. Sec. 32. Temporary loans may be authorized by ordinance of the common council in anticipation of the revenue of the city for the current and following year, and payable within that period, but the aggregate amount of such temporary loan in any fiscal year shall not exceed the amount of the city levy for the same year. No temporary or other loan upon the revenue of any current or succeeding year shall be made until all temporary loans upon the revenue of any preceding year shall have been fully paid. Sec. 33. The common council shall have power to authorize the issue and sale of refunding bonds, in order to raise money to take up any outstanding bonds of such city, or to exchange with the holders of such outstanding bonds. The same shall be governed by the provisions of the second preceding section, so far as the same are applicable. Sec. 34. No order or warrant shall be drawn against the funds of such city, in the hands of the treasurer, or other officer, unless an appropriation has been

made by ordinance of money for such purpose which is not exhausted, or unless the same shall be for a salary fixed by statute, or ordinance, or for the payment of any judgment which such city is compelled to pay. Sec. 35. All bonds or other city securities offered for sale, pursuant to the provisions of this act, may bear annual interest not exceeding six (6) per cent., may run not longer than thirty years, and may contain an option allowing such city to redeem the same at earlier specified dates, in whole or in part, if so directed in the ordinance authorizing such issue."

That on the 24th day of May, 1893, said city was indebted in the principal sum of \$600,000, evidenced by 600 bonds of \$1,000 each, to become due and payable July 1, 1893. That on or about April 1, 1893, said city was indebted in a certain other sum of \$21,000, evidenced by 21 other bonds, of \$1,000 each, known as the "Sellers Farm Issue" of bonds, which \$21,000 of bonds were by said city, on April 1, 1893, duly paid, discharged, and canceled, so that after that date the same were no longer an indebtedness of the city. That on the 23d day of May, 1893, an ordinance known as "General Ordinance 30, 1893," was enacted by the common council of said city, and approved by the mayor. The ordinance authorized the head of the finance department to refund certain of the indebtedness of the city, amounting to \$600,000, represented by certain outstanding bonds, known as "Series A" and "Series B," which would become due July 1, 1893; "and to issue and sell bonds of said city to replace in the treasury the sum of \$21,000, used in paying the bonds of said city, known as the "Sellers Farm Issue," which became due April 1, 1893. The head of the finance department was authorized, for the purpose of refunding said indebtedness, and replacing in the city treasury said sum of \$21,000, to prepare and sell 621 bonds of the city, of \$1,000 each, which should bear the date of July 1, 1893, and should be designated "Indianapolis Refunding Bonds of 1893." The head of the finance department was required to advertise for bids for the sale of said bonds. It was ordered that the city comptroller should award such bonds, or, if he should see fit, a part thereof, to the highest and best bidder therefor, and that he should have the right to reject any and all bids or proposals, or any part thereof, and should have the right to accept a part of any bid, he being the sole judge of the sufficiency or insufficiency of any bid. It was further ordered that the person to whom the bonds, or any part thereof, should be awarded, should, within 10 days thereafter, deposit with the city comptroller a certified check on some reliable bank, payable to the order of the treasurer of said city, for a sum equal to 5 per cent. of the face of the bonds so awarded; and that said check should, upon the completion of the sale of the bonds for which it was deposited, be returned to the successful bidder; and, in case the successful bidder should fail to complete the purchase of the bonds so awarded, he should forfeit the check so deposited to the city. That on May 24, 1893, the city, in pursuance of said ordinance, caused public notice to be given that sealed bids would be received by said city until Friday, May 26, 1893, at 9 o'clock A. M., for the whole or any part of said \$621,000 of bonds of said city; said notice being as follows:

"\$621,000.

"Refunding Bonds of the City of Indianapolis.

"Department of Finance, Office of the City Comptroller.

"Indianapolis, Ind., May 24, 1893.

"Sealed bids will be received by the city of Indianapolis, Indiana, until Friday, May 26, 1893, at 9 o'clock A. M., for the whole or any part of \$621,000 refunding bonds of said city, to be dated July 1, 1893. Said bonds will be of the denomination of \$1,000 each, with coupons attached; will draw interest at the rate of 4½ per cent. per annum, payable semiannually, on the 1st day of January and July; the principal payable in thirty (30) years, without option, and both principal and interest payable at the office of Winslow, Lanier & Co., New York. These bonds are issued for the purpose of taking up \$600,000 of city bonds due July 1, 1893, and to put back into the city treasury \$21,000, paid out to redeem bonds due April 1, 1893. Bids for the purchase of said bonds should be indorsed 'Proposals for Refunding Bonds,' and directed to the city comptroller, Indianapolis, Indiana. The proposals will be opened May 26, 1893, at 9 o'clock A. M., and the bonds awarded to the highest and best bidder, the city reserving the right to reject any and all bids. Successful bidders will be required within ten days from the date of the award to deposit with the city comptroller a certified check on some reputable bank, payable to the city treasurer, for 5 per cent. of the face value of the bonds awarded, as an earnest of good faith, which check would be returned to the maker should the bonds be taken up at the proper time; otherwise, it will forfeit to the city. The bonds will be delivered at the office of Winslow, Lanier & Co., New York, July 1, 1893, and must be paid for on that day.

William Wesley Woolen, Comptroller."

That complainants presented to said city a bid for said bonds, as follows:

"We will purchase \$621,000 city of Indianapolis 4½ per cent. thirty-year refunding bonds, or as many as you can legally issue, and pay par for the same.
Coffin & Stanton."

That the complainants were the highest and best bidders, and thereupon said \$621,000 of bonds were awarded to them by said comptroller. That on May 26, 1893, the complainants, assuming that it would be shown that all of said bonds were refunding bonds and were legal, deposited with the Merchants' National Bank of Indianapolis, Ind., the sum of \$31,050, being 5 per cent. upon said sum of \$621,000, the total amount of said bonds then and there so assumed to be awarded to complainants, and received therefor a certificate of deposit, bearing date May 26, 1893, payable to the order of the city treasurer of said city, and delivered the same to the comptroller of said city, who was the head of the department of finance, said deposit being made as an earnest of good faith, and the same was received and is now held by said city. That the entire amount of \$621,000 of bonds so proposed to be issued and sold were prepared and executed, ready for delivery, as a single series, no discrimination being made as to any particular part being used for any particular purpose, but all consisting of a single loan for the purpose of refunding the \$600,000 of outstanding bonds, and for replacing in the city treasury the sum of \$21,000, which had been long before paid out in the extinguishment of said Sellers farm bonds. That the complainants are advised by counsel, and upon such advice charge the fact to be, that said issue of bonds is not legal, for the reason, among others, that said city had no authority

under its charter to issue bonds for the purpose of replacing moneys in the treasury which had theretofore been paid out in the legitimate expenses, or in the discharge of the legitimate debts of the city. That the charter does not contemplate the making of loans and the selling of bonds for such purpose. That the replacing of funds in the treasury which have been used in the discharge of former obligations of the city is not a legitimate exercise of corporate powers, or the payment of legitimate corporate debts; and that by reason of the fact that said bonds for refunding purposes, and for replacing said money in the treasury, are in a single issue, undistinguishable as to identity or purpose, the entire series is illegal, unauthorized, and invalid. That when the complainants made their bid, and until they discovered and were advised of said illegality, they were at all times ready, willing, and anxious to take said bonds, and were prepared to do so. That said city insisted and insists that said issue of bonds is regular, legal, and said bonds valid refunding bonds, and that complainants were and are bound by their bid to accept and pay for the same; and that, complainants having declined so to do, the city claimed and is now insisting upon a forfeiture of said money so deposited with said Merchants' National Bank. That, in pursuance of said policy, the city has presented said certificate of deposit to the Merchants' National Bank, and demanded payment of the same. That said bank is ready, willing, and able to promptly pay said certificate of deposit, but has declined to pay the same to said city because complainants, upon the discovery of such illegality in the issue of said bonds, notified the bank that it must not pay such certificate, and that the same would be and was claimed to be the property of complainants. That the bank is merely a stakeholder as between the parties, having no interest in said controversy, and is only deterred from paying said certificate of deposit by the dispute between said parties. That said certificate of deposit is in the custody of the city, and for that reason complainants are unable to set out a copy of it, but aver that it is in the usual form, and calls for the payment of the sum of \$31,050, on its return to the bank properly indorsed. That complainants have called on the city to surrender said certificate of deposit to them, but said city refuses, and pretends and claims that it, and not the complainants, is entitled to the same, and to the moneys represented by it, and is demanding payment thereof. That said bank is reluctant to withhold payment of the certificate after demand made, and there is danger that said city may transfer said certificate, which is negotiable paper, to some person not cognizant of the facts, who may take the same for value, and obtain an equity for the payment of the money. As these complainants are informed and believe, and therefore charge, that said city has threatened to so transfer the same, and is now threatening to sue said bank on said certificate. That such suit by the city against the bank would not settle the controversy between the city and the complainants, but would result in the necessity for more suits, and the payment of the money to the city would subject the complainants to great inconvenience and irreparable damage. That all said actings and

doings are in violation of complainants' rights, and contrary to equity and good conscience. The prayer is that the city be required to show why it should not surrender said certificate to complainants; that complainants be decreed to be entitled to the same, and to the moneys called for therein; that, pending the litigation, the city be enjoined from transferring or disposing of said certificate otherwise than to complainants, and from commencing any suit to collect said certificate; that said bank be enjoined from paying the same to the city or other party than complainants; and for all such further relief as may be proper in the premises.

It is insisted by the solicitor for the city that the complainants have a plain, adequate, and complete remedy at law, and for this reason their bill ought to be dismissed. It is argued that an action for money had and received would lie against the city to recover the money in question. It is doubtful whether the complainants could maintain such an action against the city upon the facts disclosed in the bill. It is not necessary, however, to decide this question, as, in my opinion, the bill of complaint is sustainable in equity. It shows that the complainants deposited with the Merchants' National Bank the sum of \$31,050, and received a certificate of deposit therefor, which was made payable to the treasurer of the city of Indianapolis; that the complainants delivered the certificate of deposit to the city comptroller to secure the performance of their bid for the purchase of the \$621,000 of city bonds; that it was agreed that the certificate of deposit should be returned to complainants upon their compliance with the terms of their bid; and, upon their failure to do so, that it should become forfeited to the city. It is alleged that the complainants have at all times been ready and willing to perform the terms of their bid, but that the city has not and cannot perform its part of the contract. It is also alleged that the city, notwithstanding its default, has demanded of the Merchants' National Bank that it pay to it the money evidenced by said certificate of deposit, and is threatening and intends to compel the payment thereof to it. The city is the payee named in the certificate of deposit, and it thus has the legal title to the money. Its legal title, however, as between itself and the complainants, is open to inquiry. The sum of \$31,050 deposited with the bank was the money of the complainants, and in equity it continued to belong to them until their equitable right and title thereto should become forfeited to the city by failure to comply with the terms of their bid. The attempt of the city to gain possession of the money before the complainants were in default was in plain violation of their equitable rights in the money so deposited. The complainants were under no obligation to wait until the city had consummated its threatened wrong, but had a clear and undoubted right to invoke the aid of a court of equity to prevent the wrong, and to reclaim the money so belonging to them in equity and good conscience, and to compel the city to redeliver to them the certificate of deposit. Both the city and the bank are necessary parties to enable the court, in a single suit, to award the complainants the full measure of relief to which they are entitled. The suit is

one to determine the title to a fund between the holder of the legal title and the equitable owner, and the bank is a necessary party to enable it in safety to pay the money to the equitable owner, without the presentation of the certificate of deposit. A suit in equity is not only the proper, but it is the only appropriate, proceeding to determine the rights of an equitable claimant of a fund against the holder of the legal title. In the present case the complainants are the equitable owners of the money on deposit in the Merchants' National Bank, and they allege facts which, if true, show that the city has not now, and never can acquire, any right to the fund in controversy. The city's assertion of a right to the fund is inequitable, and in plain violation of the terms of the contract by virtue of which it received the certificate of deposit. The complainants are not required by any rule of law or by any principle of fair dealing to permit the city to withdraw the money from the bank by the wrongful use of the certificate of deposit which it holds. A court of equity is the proper one to prevent the threatened wrong, and to determine the ultimate rights of the parties to the fund in controversy.

The city advertised for proposals for the purchase of \$621,000 refunding bonds. The complainants' bid was for refunding bonds. The bid was in these words:

"We will purchase \$621,000 city of Indianapolis $4\frac{1}{2}$ per cent. thirty-year refunding bonds, or as many as you can legally issue, and pay par for the same.
Coffin & Stanton."

This bid was accepted, and the city awarded to complainants the whole \$621,000 of bonds, as refunding bonds which it could lawfully issue. The complainants, acting upon the award, as constituting an award of \$621,000 of refunding bonds, which could lawfully be issued as such, deposited the money in controversy with the Merchants' National Bank as an earnest of their good faith. "It is a general and undisputed proposition of law," says Dillon, (1 Dill. Mun. Corp. § 89,) "that a municipal corporation possesses and can exercise the following powers, and no others: First, those granted in express words; second, those necessarily or fairly implied in or incident to those essential to the declared objects and purposes of the corporation, not simply convenient, but indispensable." It is the settled law of Indiana that a city organized under the law of the state cannot issue and sell its bonds, to raise money by way of loan, unless expressly authorized so to do. *City of Aurora v. West*, 22 Ind. 88; *State v. Hauser*, 63 Ind. 155; *Rushville Gas Co. v. City of Rushville*, 121 Ind. 206, 23 N. E. 72. Such, also, is the settled doctrine of the supreme court of the United States. *Brenham v. Bank*, 144 U. S. 173, 12 Sup. Ct. 559. And, in case of doubt touching the existence of the power on the part of a city to issue and sell its bonds to raise money by way of loan, such doubt must be resolved against the existence of the power. See authorities *supra*. As illustrating the strictness with which municipal powers to contract a bonded debt are construed, it has been held that under a power to subscribe for stock, and to borrow money to pay for the

same, an issue and exchange of bonds for the stock are not authorized. *Scipio v. Wright*, 101 U. S. 665; *Horton v. Town of Thompson*, 71 N. Y. 513. The power of the city to issue and sell the bonds in question, if it exists, must therefore be found in the above-quoted provisions of its charter. Section 30 authorizes the making of original time loans, not exceeding 2 per cent. of the taxable property of the city. It provides that such loans "may be made only for the purpose of procuring money to be used in the legitimate exercise of the corporate powers of such city, and for the payment of legitimate corporate debts." Section 31 provides the details of loans, such as the character of bonds, manner of issue and sale, rate of interest, and the like. Section 32 provides for temporary loans, and plainly has no bearing on the present controversy. Section 33 provides for the issue and sale of refunding bonds. It is the only section which authorizes such bonds, and it clearly defines the purpose for which they may be issued:

"Sec. 33. The common council shall have power to authorize the issue and sale of refunding bonds, in order to raise money to take up any outstanding bonds of such city, or to exchange with the holders of such outstanding bonds. The same shall be governed by the provisions of the second preceding section, so far as the same are applicable."

Section 34 forbids the drawing of warrants on the funds of the city except for certain specified purposes. Section 35 limits the rate of interest and the time for which bonds may be issued. In view of the language of section 33, there is no room for doubt in regard to the securities embraced by the words "refunding bonds." The language of the statute contains its own interpretation. Refunding bonds are of two sorts: First, those which are issued and sold to raise money to take up outstanding bonds of the city; or, second, those which are issued by the city to the holders of its outstanding bonds in exchange therefor. By the express terms of the statute, refunding bonds cannot lawfully be issued for any other purpose. Six hundred of the bonds, of \$1,000 each, awarded to the complainants, were to be issued and sold to raise money to pay off and take up a like amount of the outstanding bonds of the city. To this extent, and for this purpose, the city had the undoubted authority to issue and sell its bonds. The contention is that 21 of the bonds of \$1,000 each, constituting an integral and undistinguishable part of the 621 refunding bonds awarded to complainants, are not refunding bonds, and are not within the terms of their bid and of the award made by the city. It is further contended that the city had no power to issue and sell the 21 bonds included in its contract with complainants, because the bonds were to be issued and sold for a purpose not authorized by its charter. The bill alleges:

"That on or about the 1st day of April, 1893, said city was indebted in a certain other sum of \$21,000, evidenced by twenty-one bonds of said city, of \$1,000 each, known as the 'Sellers Farm Issue' of bonds, which \$21,000 of bonds were by said city, on said 1st day of April, 1893, duly paid, discharged, and canceled, so that after that date the same was no longer an indebtedness of said city."

It is further alleged that the—

"Entire amount of \$621,000 of bonds so proposed to be issued and sold by said city were prepared and executed ready for delivery, and were so executed as a single series, no discrimination being made as to any particular part thereof being used for any particular purpose, but all consisting of a single loan, for the purpose of refunding the \$600,000 of outstanding bonds, and for replacing in the general treasury of said city the sum of \$21,000, which had been, as above stated, long before paid out from said general treasury in the extinguishment of said Sellers farm bonds."

The Sellers farm bonds, having been duly paid, discharged and canceled, ceased to be outstanding bonds of the city. Having ceased to exist, the city possessed no lawful power to issue and sell bonds in order to raise money to take them up. It follows, therefore, that the bonds in question, to the amount of \$21,000, are not refunding bonds. Not being refunding bonds, they are not within the terms of the complainants' bid, nor the city's award. The complainants had an undoubted right to stand upon the terms of their bid, and refuse to accept any bonds unless they were the refunding bonds of the city. Refunding bonds stand upon a different, and often a more secure, foundation than bonds issued for an original loan. The bonds to be refunded were issued before there was any limitation on the amount of the issue, and would therefore, when refunded, not be subject to that limitation. *Aetna Life Ins. Co. v. Lyon Co.*, 44 Fed. 329. And, if there were irregularities in the refunding issue, the holders of the refunding bonds might be subrogated to the rights of the holders of the original bonds. But it is sufficient to say that a court of equity has no power to compel the complainants to accept any bonds, although equally valuable, which are not embraced within the terms of their bid. The 21 bonds in question were not refunding bonds. If issued as refunding bonds, they would have been ultra vires and void. And, in my opinion, these bonds would have been invalid as original bonds. Section 30 of the charter provides for the making of original loans, and concludes with this limitation of power:

"Such loans may be made only for the purpose of procuring money to be used in the legitimate exercise of the corporate powers of such city, and for the payment of legitimate corporate debts."

This limitation evidently means that, when the city proposes to borrow money, the ordinance shall state the purpose of the loan, in order that it may appear that the money procured is to be used in the legitimate exercise of corporate powers, or for the payment of legitimate corporate debts. If the city may issue and sell its bonds to raise money without stating any lawful purpose for which the money is to be used, then the bonds would be valid if the money was used for a legitimate corporate purpose, and invalid if the money was illegitimately used. Such a construction would place upon the purchaser of the bonds the burden of seeing to the rightful application of the money, if he would maintain their validity. The city, in the present case, has rightfully recognized the necessity of stating the purpose of the issue and sale of the bonds. Is the purpose stated as to \$21,000 of the bonds a legitimate one?

As we have already said, these bonds were not to be issued and sold for the payment of a legitimate corporate debt, because there was no debt to be paid. The Sellers farm debt had been paid, and the bonds evidencing the same had been canceled and discharged. Thereafter the debt ceased to exist. Is the raising of money, by the issue and sale of bonds, for the purpose of putting back in the treasury a sum equal to what had been used in the payment of a debt of the city, "a legitimate exercise of the corporate powers of such city?" If the city may issue and sell its bonds to replace in the treasury the money paid out on account of the Sellers farm debt, it may issue and sell its bonds to replace in the treasury all the moneys ever paid out by it on account of its debts and liabilities. In my judgment, the issuance and sale of bonds for such a purpose is not within the scope of its legitimate corporate powers. The city cannot issue and sell its original bonds except for the purpose of raising money to pay some legitimate debt or liability, or to meet some future liability or obligation incurred, or to be incurred, in the legitimate exercise of its corporate powers. The bonds in question, to the extent of \$21,000, must be held to be unauthorized and illegal.

It is insisted by the solicitor for the city that, conceding that the bonds in question, to the amount of \$21,000, are illegal, the residue of them are legal and valid refunding bonds, and, therefore, that the complainants were bound to take them. In this, we think, the solicitor is in error. The award by the city and the acceptance by the complainants were of the \$621,000 of refunding bonds. The bill shows that the city tendered all of the bonds in a lump, and demanded their acceptance, and threatened, upon failure to accept, to forfeit the entire deposit. The complainants refused to accede to the tender and demand, and rightfully. The complainants could not be in default in respect of the \$600,000 of bonds, because they were never separately tendered to them. They could not accept what was never offered. But, if they had been separately tendered, complainants were not bound to accept them. Their bid and the city's award were of \$621,000 of refunding bonds. They had a right to stand upon the terms of the contract, and could not be compelled to take either more or less than \$621,000 of the bonds. The bonds were all of one series. Each one was as much a refunding bond as any other, and each one was as much a bond for replacing money in the treasury as any other. If, then, to the extent of \$21,000, they were tainted, the taint permeated the entire issue, because the legal were incapable of discrimination from the illegal. This is not a case where bonds partly legal and partly illegal have been placed upon the market, and purchased by parties in good faith. In such a case it is the duty of the court, in furtherance of justice, to uphold such bonds to the extent that it may have been lawful to issue them, and to hold invalid only the excess. Here the question is raised before the bonds are issued. The real question for decision is, will a court of equity compel a purchaser to consummate his bid and pay for bonds, where a part of the issue is illegal? A court of equity will not lend its aid to consummate an

illegal or unconscionable transaction. It would be unjust and inequitable to compel the complainants to take bonds, a portion of which are illegal. The illegality is of such a character as to preclude the city from carrying out the terms of its contract. It is the duty of the court in such a case to relieve the party not in default by restoring the status quo. This can only be done by ordering the return of the certificate of deposit, and requiring the bank to pay the money to complainants. From these views it follows that the demurrer must be overruled, and it is so ordered.

CHAVENT v. SCHEFER et al.

(Circuit Court, S. D. New York. January 6, 1894.)

JUDGMENTS—RES JUDICATA—CORPORATIONS.

A decree distributing the assets of a dissolved corporation, and discharging the trustees, prevents a creditor, who was a party to the suit, from maintaining a subsequent bill against the trustees to reach unpaid stock subscriptions.

In Equity. Suit by Philippe Chavent against Carl Schefer and others, trustees, to reach unpaid subscriptions to the stock of a corporation. Heard on a plea in bar. Plea sustained.

Lorenzo Semple, for orator.

Robert Hunter McGrath, Jr., for defendants.

WHEELER, District Judge. According to the bill, the defendants were stockholders, who had put in a plant towards, and had not really paid for, their stock in full, and were the trustees, of the Town of Union Mill Company, a corporation of New Jersey, of which the orator was a creditor; and which became insolvent and was dissolved, and its assets were divided ratably among its creditors, including him, leaving a balance of \$3,361.47 due him. The corporation act of 1875, as amended by the supplementary acts, provides:

"Where the whole capital of the corporation shall not have been paid in, and the capital shall be sufficient to satisfy the claims of its creditors, each stockholder shall be bound to pay on each share held by him the sum necessary to complete the amount of such share, as fixed by the charter of the company, or such proportion of that sum as shall be required to satisfy the debts of the company."

The bill is brought in behalf of the orator and all other creditors to reach the true balance of the unpaid subscriptions. The defendants have pleaded that in a suit between the orator and the Town of Union Mill Company in the court of chancery of New Jersey, upon the petition of the orator to be paid in full his judgment against the defendants, trustees of that company, it "appearing to the court that said trustees had sold and disposed of all the property of said company in winding up its affairs after its dissolution, and that there remained in their hands, as such trustees, after the payment of their necessary disbursements and the preferred debts against said

company, the sum of eleven thousand two hundred and six dollars and twenty-two cents, (\$11,206.22,) to be distributed among the unsecured creditors, and that there is due to said unsecured creditors, respectively, the following amounts, that is to say: To the said complainant the sum of forty-eight hundred and fifty-three dollars and thirty cents," and to the defendants various sums,—it was "ordered and decreed by the chancellor that said trustees pay, out of said moneys so in their hands to be distributed, in the first place the sum of two hundred dollars (\$200) to the counsel of said complainant, and the sum of two hundred dollars (\$200) to the counsel of said trustees; and that they distribute and pay the residue of said moneys so remaining in their hands in manner following, that is to say: To said complainant the sum of fourteen hundred and ninety-one dollars and eighty-three cents, (\$1,491.83,) and to said Schefer, Shramm, and Vogel the sum of ninety-one hundred and fourteen dollars and fifty-six cents, (\$9,114.56,) and to said Luckmeyer and Schefer the sum of one hundred and ninety-nine dollars and eighty-three cents, (\$199.83;)" and "that, upon payment to said complainant of said sum of fourteen hundred and ninety-one dollars and eighty-three cents, said trustees be finally and fully discharged from all further liability to said company, or the stockholders or creditors thereof."

This plea has been argued, and its validity seems to depend upon whether what is sought to be reached now should have been carried into that decree, and is merged in what was decreed there, so as not to have been left to become the subject of another decree. Whatever was a part of and belonged with what was adjudicated upon as a subject of recovery there should have been brought in and made a part of the decree, and, whether actually brought in or not, became merged in the decree as passed upon, or waived. *Cromwell v. County of Sac*, 94 U. S. 351. The parties here were all before the court of competent jurisdiction there. The subscriptions for stock really unpaid were assets of the corporation for the payment of debts at the suit of creditors, or those standing in their right, although the corporation itself might not have been in a plight to recover them. *Sawyer v. Hoag*, 17 Wall. 610; *Scovill v. Thayer*, 105 U. S. 143. These subscriptions were a part of, and belonged with, the assets which the orator had a right to have, and did have, marshaled for the payment of his debt, and would, if his claim had been maintained, have by so much increased the amount to be distributed to him. *Case v. Beauregard*, 101 U. S. 688. Whether then brought in or not, they appear to have been so merged or waived as not to be proper subjects for another decree elsewhere.

Plea adjudged sufficient.

WASSON v. HAWKINS.

(Circuit Court, D. Indiana. January 5, 1894.)

No. 8,922.

BANKS—INSOLVENCY—DEPOSITS FRAUDULENTLY RECEIVED.

Where money and checks are unsuspectingly deposited in a bank, which is known by its managing officer to be hopelessly insolvent, a few minutes before closing hour on the last day on which it does business, and the checks are subsequently collected by the bank's clerk, the whole of the deposit is charged with a trust, and an equal amount may be recovered from the receiver, who retains the specific money among the general mass of the bank's funds.

In Equity. Suit by Hiram P. Wasson against Edward Hawkins, receiver of the Indianapolis National Bank, to recover the amount of certain deposits. On demurrer to the bill. Overruled.

Duncan & Smith, for complainant.

Frank B. Burke and John W. Kern, for defendant.

BAKER, District Judge. The questions for decision in this case arise upon a demurrer to the bill of complaint. The bill shows that for many years prior to the 24th day of July, 1893, complainant had been engaged in business in the city of Indianapolis; that on that day, and for many years prior thereto, he had been a depositor in the Indianapolis National Bank; that Theodore P. Haughey then was, and from the organization of the bank had been, its president; that for many years, as such president, he had been intrusted by the directors of said bank with its absolute control and management; that its cashier was never consulted, either by the president or the board of directors, in any of the matters of management, and his duties, as prescribed by the directors and the president, were simply clerical; that on said 24th day of July, 1893, said bank was utterly and hopelessly insolvent, and unable to continue its business longer for a single day, which was fully known to its said president, who was on said day present in said bank watching its operations; that complainant was ignorant of the fact that said bank was insolvent or in danger of insolvency, and, had he known that it was insolvent or in danger of insolvency, he would not have deposited therein any sum of money whatever; that said bank and its president, who had sole and exclusive management of its affairs, well knew that complainant did not know of the insolvency of said bank, and well knew that he believed it was solvent, and able to meet on demand the claims of its depositors in the usual course of business, and further well knew that, if complainant had knowledge of the true condition of said bank, he would not deposit any money therein; that said bank and its president well knew that complainant, relying upon its solvency, was regularly, from day to day, making large deposits of money in said bank; that said bank and its president, well knowing the premises aforesaid, fraudulently concealed from the complainant the insolvency of said bank, and did not in any way warn him of his danger in depositing money therein;

that on said 24th day of July, 1893, the complainant, within less than five minutes of the hour at which said bank closed its business for the day, viz. 3 o'clock P. M., deposited in said bank, in money, the sum of \$1,642.50, and the further sum of \$504.14 in the checks of various persons, drawn upon other banks in the city of Indianapolis; that all of said checks were received as cash, and credited to complainant's account on his pass book and upon the books of the bank as so much cash; that said bank closed its doors and business for the 24th day of July, 1893, at the hour of 3 o'clock P. M., and never thereafter opened them for business, and never thereafter transacted any business whatever; that no part of said moneys were paid out by said bank prior to its suspension, but the same remained in said bank until the appointment of the defendant as receiver thereof; that the checks so deposited were on the morning of July 25, 1893, collected by a clerk then in the employ of said bank, and the proceeds held in the bank until the appointment of the defendant as receiver, when such proceeds were delivered into his hands as such receiver; that said receiver received and retained possession of the moneys so deposited, and of the moneys arising from the collection of the checks so deposited; that, before bringing suit, complainant demanded of the defendant, as receiver, the moneys and the proceeds of the checks so deposited, which demand was by the defendant refused.

The bank was insolvent, and was known by its president, who had sole management of it, to be insolvent. The knowledge of the president was the knowledge of the bank. *Martin v. Webb*, 110 U. S. 7, 3 Sup. Ct. 428; *Bank v. Walker*, 130 U. S. 267, 9 Sup. Ct. 519. It fraudulently concealed its insolvency from the complainant, who was ignorant of it, and, believing it to be solvent, he deposited, in the bank, bank notes and checks to the amount of \$2,146.64 within five minutes of its final collapse. The reception of the money and checks, under such circumstances, was a fraud upon the plaintiff, and entitled him to rescind the transaction, and recover back his deposit from the bank. The keeping of the bank open, and the conducting of its business in the usual manner, constituted a representation to its customers of the solvency of the bank, upon which they had the right to rely; and, if the bank was known to be insolvent by the officers who were charged with its management, the concealment of that fact from a person about to make a deposit would constitute a fraud upon him. The title acquired by the bank to the money and checks deposited under such circumstances would be voidable at the election of the depositor, who could bring suit to recover his deposit without any previous demand. The bank would become a trustee ex maleficio, and would hold the deposit for the use of the depositor, and subject to his right of reclamation. *Railway Co. v. Johnston*, 133 U. S. 566, 10 Sup. Ct. 390; *Cragie v. Hadley*, 99 N. Y. 131, 1 N. E. 537; *City of Somerville v. Beal*, 49 Fed. 790; *Peck v. Bank*, 43 Fed. 357. In the case of *Cragie v. Hadley*, supra, it was held that the acceptance of a deposit by a bank hopelessly insolvent constituted such a fraud as entitled the depositor to his drafts or their proceeds.

In Anonymous Case, 67 N. Y. 598, the court say: "This is not like the case of a trader who has become embarrassed and insolvent, and yet has reasonable hopes that by continuing in business he may retrieve his fortunes. In such a case he may buy goods on credit, making no false representations, without the necessary imputation of dishonesty. *Nichols v. Pinner*, 18 N. Y. 295; *Brown v. Montgomery*, 20 N. Y. 287; *Johnson v. Monell*, 41* N. Y. 655; *Chaffee v. Fort*, 2 Lans. 81. But it is believed that no case can be found in the books holding that a trader who was hopelessly insolvent, knew that he could not pay his debts, and that he must fail in business, and thus disappoint his creditors, could honestly take advantage of a credit induced by his apparent prosperity, and thus obtain property which he had every reason to believe he could never pay for." And it was decided that "in the case of bankers, where greater confidence is asked and reposed, and where dishonest dealings may cause widespread disaster, a more rigid responsibility for good faith and honest dealing will be enforced than in the case of merchants and other traders;" and that "a banker who is, to his own knowledge, hopelessly insolvent, cannot honestly continue his business, and receive the money of his customers; and, although having no actual intent to cheat and defraud a particular customer, he will be held to have intended the inevitable consequences of his act, i. e. to cheat and defraud all persons whose money he receives, and whom he fails to pay before he is compelled to stop business."

It is insisted by counsel for the receiver that, though the money and checks were obtained by fraud, the title to them vested in the bank; and that the only relation subsisting between the plaintiff and the bank was that of creditor and debtor; and that he cannot reclaim the money and checks, because money has no earmark, and cannot be identified; and that the plaintiff has no lien on the fund in the receiver's hands entitling him to priority or preference over the other creditors of the bank. It was said by Lord King in *Deg v. Deg*, 2 P. Wms. 414, that "money had no earmark, inasmuch that if a receiver of rents should lay out all the money in the purchase of land, or if an executor should realize all his testator's estate, and afterwards die insolvent, yet a court of equity could not charge or follow the land." See, also, *Cox v. Bateman*, 2 Ves. Sr. 19. And bank notes and negotiable bills have been represented as possessing the same quality. But the notion that money, because it had no earmark, could not be followed into or charged upon land in the hands of the trustee or his executor, arose from some misconception, and could not be supported. In *Miller v. Race*, 1 Burrows, *452, Lord Mansfield exposed this misconception, and pointed out the true reason why money could only be pursued under particular circumstances. He observed:

"It has been quaintly said that the reason why money cannot be followed is because it has no earmark; but this is not true. The true reason is upon the currency of it; it cannot be recovered after it has passed in currency. So, in case of money stolen, the true owner cannot recover it after it has been paid away fairly and honestly upon a valuable and bona fide consideration; but, before money has passed in currency, an action may be brought for the money itself. Apply this to the case of a bank note. An action may lie against

the finder, it is true, and it is not at all denied, but not after it has been paid away in currency; and this point has been determined, even in the infancy of bank notes."

Lord Ellenborough, in *Taylor v. Plumer*, 3 Maule & S. 562, 575, observed:

"The dictum that money has no earmark must be understood as predicated only on an undivided and undistinguishable mass of current money; but money kept in a bag, or otherwise kept apart from other money, guineas, or other coin marked (if the fact were so) for the purpose of being distinguished, are so far earmarked as to fall within the rule which applies to every other description of personal property while it remains in the hands of the factor or his general legal representative."

The true distinction, therefore, between money, bank notes, or negotiable bills, and other chattels, would seem to be that the former, for the protection of commerce, cannot be followed into the hands of a bona fide holder to whom they have passed in due course of business, while other chattels affected by a trust may, in general, be pursued and reclaimed. The ancient notion that money could not be followed, even as between trustee and cestui que trust, because money had no earmark, has given way to a more just and enlightened doctrine. Money, bank notes, and negotiable bills may be followed by the rightful owner, where they have not been circulated or negotiated, or if the person to whom they have passed has express notice of the trust. *Miller v. Race*, 1 Burrows, *452; 1 Smith, Lead. Cas. (5th Amer. Ed.) 597, (*250); *Taylor v. Plumer*, 3 Maule & S. 562, 575; *King v. Egginton*, 1 Term R. 370; *Ryall v. Rolle*, 1 Atk. 172; *Pennell v. Deffell*, 4 De Gex, M. & G. 372; *In re Hallett's Estate*, 36 Eng. R. 779, 13 Ch. Div. 696; *National Bank v. Insurance Co.*, 104 U. S. 54.

The only difference between money, and notes and bills, is that money is not earmarked, and therefore cannot be traced except under particular circumstances, while bills and notes, having a number and date, may generally be identified with less difficulty. It is conceded that, if plaintiff could identify the particular coins and bank notes which he had deposited, he would have the right to withdraw them from the mass of coins and bank notes which passed into the hands of the receiver; but it is insisted that inasmuch as the money deposited by him has, like water, flowed into the common mass, and so become incapable of identification, the right to pursue and reclaim it is lost, although it is admitted that the very coins and bank notes deposited by him constitute a part of the common mass. It is charged in the bill, and admitted by the demurrer, that the identical coins and bank notes deposited by the plaintiff remained in the bank when it stopped business, and came into the hands of the receiver, who now has them in his possession as a part of the general mass of coins and notes held by him as such receiver. In such a case the identification is sufficient to entitle the depositor to follow and reclaim the deposit made by him. Although the identical coins and bank notes cannot be ascertained, yet, as it is admitted that so much in coins and bank notes belonging to the plaintiff is in the common mass, he is entitled, in equity and good conscience, to take so much out. If he does not withdraw from the common

mass the very coins and bank notes deposited by himself, no injustice is done, for he leaves an equitable amount of his own in place of every coin or bank note deposited by another. *Pennell v. Deffell*, 4 De Gex, M. & G. 372; *In re Hallett's Estate*, 36 Eng. R. 779, 13 Ch. Div. 696; *Cragie v. Hadley*, 99 N. Y. 131, 1 N. E. 537; *National Bank v. Insurance Co.*, 104 U. S. 54; *Frelinghuysen v. Nugent*, 36 Fed. 229; *Peters v. Bain*, 133 U. S. 670, 10 Sup. Ct. 354; *Bank v. Dowd*, 38 Fed. 172; *Atkinson v. Printing Co.*, 114 N. Y. 168, 21 N. E. 178; *In re North River Bank*, (Sup.) 14 N. Y. Supp. 261.

And the proceeds of the checks are governed by the same principle, because the identical coins and bank notes realized from their collection constitute a part of the common mass in the receiver's hands. The mere fact that the plaintiff became a creditor of the insolvent bank through the fraud of its president, and that the bank became a trustee *ex maleficio*, would give him no right to preference over other creditors, unless he can trace and identify his money as a part of the common mass. But when it is shown by indubitable proofs, or is admitted, as in the present case, that the identical bank notes and coins so obtained by fraud constitute a part of the common mass of bank notes and coins in the hands of the receiver, in my judgment, the modern and better doctrine is that the depositor may take out of the common mass so much as he has put in. *Lewin, Trusts*, 1092, 1093.

From these considerations, it follows that the demurrer must be overruled, and it is so ordered.

CHICAGO & N. W. RY. CO. v. PRESCOTT.

(Circuit Court of Appeals, Eighth Circuit. December 4, 1893.)

No. 316.

1. RAILROAD COMPANIES — ACCIDENTS AT CROSSINGS — CONTRIBUTORY NEGLIGENCE.

It is a question for the jury whether it is contributory negligence for a person driving a gentle horse to follow other vehicles across a track behind a standing train, which obstructs all but about 14 feet of the crossing, when invited to do so by the company's flagman.

2. SAME—ASSUMPTION OF RISK.

The doctrine of voluntary assumption of risks does not apply to the case of one who exercises ordinary care in attempting to pass by the rear of a standing train, which wrongfully obstructs most of the street.

3. SAME—STREET CROSSINGS—RIGHT TO OBSTRUCT.

The mere grant of a license to lay a railroad track across a public street gives no authority to stand cars thereon, so as to obstruct the crossing, for such periods as may suit the company's convenience; and whether it had a right to do so, in any particular instance, is a question for the jury, if the circumstances are such that reasonable persons might entertain different views as to whether the blockade was justifiable.

4. NEGLIGENCE—PROXIMATE CAUSE—SHYING OF HORSE.

Where the shying of a horse brings a vehicle into collision with the rear end of a train which wrongfully obstructs most of the street crossing, such shying cannot be regarded as the sole, proximate cause, and the jury is justified in finding that the obstruction directly contributed to the accident.

In Error to the Circuit Court of the United States for the Northern District of Iowa.

At Law. Action by E. H. Prescott against the Chicago & Northwestern Railway Company to recover damages for personal injuries. Verdict and judgment for plaintiff. Defendant brings error. Affirmed.

N. M. Hubbard, N. M. Hubbard, Jr., and F. F. Dawley, for plaintiff in error.

Charles A. Clark and John C. Leonard, for defendant in error.

Before CALDWELL and SANBORN, Circuit Judges, and THAYER, District Judge.

THAYER, District Judge. This is a writ of error to reverse a judgment which was recovered by the defendant in error in a suit brought by him against the Chicago & Northwestern Railway Company. The facts on which the recovery was predicated are not in dispute, and they are, substantially, as follows: The defendant company maintains and operates a double track railroad through the city of Cedar Rapids, Iowa, and for some distance within the limits of that city its tracks are laid in and along Fourth street, and across First avenue, at the point where Fourth street crosses that avenue. The passenger depot of the defendant company is located at the southwest corner of First avenue and Fourth street. On the morning of April 4, 1890, the plaintiff, with his two sons, was driving down First avenue, towards Fourth street, in a one-horse delivery wagon. As they approached the railroad crossing on Fourth street, they found the street partially blockaded by one of the defendant company's west-bound passenger trains, which had recently arrived from the east. First avenue, at that point, is about 80 feet wide, from curb to curb; but so much of the street was taken up by the standing passenger train that it only left a roadway about 14 feet in width between the rear end of the train and the east sidewalk, for the passage of vehicles. After the plaintiff reached the crossing, he halted on the north side of the train for a few moments, whereupon the defendant company's flagman, who was standing on the track at the rear end of the train, said: "Hurry up. Come on. You are all right." The gates across First avenue were at the time elevated, and several vehicles that were going in the same direction as the plaintiff had already crossed the tracks in safety. The engine of the passenger train was detached therefrom, and had moved to an adjoining track to take up a mail car which was to be coupled to the train; and a switch engine was standing on the same track as the passenger train, at the rear end thereof, and about 40 or 50 feet distant from the rear car. Under these circumstances, the plaintiff attempted to cross the tracks by the narrow roadway at the rear end of the train. While making such attempt, his horse, for some reason, suddenly shied to the right, bringing the wagon in contact with the buffers of the rear car. By reason of the sudden shock, plaintiff was thrown

from his seat to the ground, and sustained serious injuries, for which a jury awarded him damages in the sum of \$1,500.

It is contended by the defendant company that as the plaintiff had an unobstructed view of the entire situation at the time he attempted to cross the tracks, and as the situation was not altered before the accident happened by any act of the defendant company, he should be held to have voluntarily assumed whatever risk was incurred in making the crossing, and should also be adjudged guilty of contributory negligence. These propositions were submitted to the trial court in the form of instructions, and its refusal to so charge constitutes one of the errors complained of. In view of all of the circumstances to which we have adverted, we find ourselves unable to hold, as a matter of law, that the plaintiff was guilty of contributory negligence. The passageway at the rear end of the train was wide enough to permit a team to be driven through, with ordinary safety. Other vehicles had passed through before the plaintiff attempted to cross the tracks. The plaintiff testified that the horse which he was driving was an old and gentle horse, that had been driven about the city for seven or eight years by himself for the purpose of delivering groceries, and was not in the habit of jumping or shying when in proximity to cars or engines. Moreover, the plaintiff was invited by the defendant's flagman to make the crossing, which was an assurance that the train would not be immediately moved, and that the crossing could be made in safety. Under these circumstances, it was clearly the duty of the trial court to submit the question of contributory negligence to the determination of the jury. In other words, on the state of facts disclosed by the record, the plaintiff's attempt to cross the tracks on the occasion in question cannot be said to have been attended by such obvious dangers to life or limb that all reasonable men would declare him to have been guilty of culpable negligence. *Railway Co. v. Ives*, 144 U. S. 408, 12 Sup. Ct. 679; *Hoye v. Railway Co.*, 62 Wis. 672, 23 N. W. 14; *Railway Co. v. Killips*, 88 Pa. St. 405; *Railway Co. v. Hutchinson*, 120 Ill. 587, 11 N. E. 855; *Directors, etc., v. Wanless*, L. R. 7 H. L. 12; *Wheelock v. Railway Co.*, 105 Mass. 203; *Eddy v. Powell*, 1 C. C. A. 451, 49 Fed. 814.

With reference to the further contention of counsel,—that the plaintiff voluntarily assumed the risk of crossing the tracks, and should be precluded from recovering on that ground,—it seems sufficient to say that the rule invoked has no application to the present case. As the jury found that the plaintiff exercised ordinary care and circumspection in attempting to drive around the rear end of the train, the railway company is not released from liability for an injury occasioned by a negligent obstruction of the street, which rendered plaintiff's act necessary, merely because the plaintiff had full knowledge of the situation when he undertook to make the crossing. The doctrine of "voluntary assumption of a risk," as distinguished from contributory negligence, is generally applied in cases arising between employer and employee, where an employee, without any valid excuse for so doing, voluntarily undertakes to work with a tool or an appliance which is known to be

defective, and by so doing assumes the risk of getting hurt, and thereby releases his employer from liability. It is no doubt true, as a general proposition, that a person is not entitled to claim compensation for an injury which he has sustained by voluntarily encountering a known danger, which there was no occasion to encounter, and that might as well have been avoided. But this general proposition must be accepted with the qualification that where one negligently places an obstruction in a public street, which occasions an injury to a traveler upon the highway, he will not be absolved from liability to the injured party merely by showing that the latter had knowledge of the obstruction before the injury was sustained. In all such cases, to relieve the wrongdoer from liability for the injury, it must be made to appear that the injured party failed to exercise ordinary care in attempting to pass by the obstruction at all, or in the manner in which the attempt was made. The streets and sidewalks of large towns and cities are frequently obstructed to some extent, and it is not an uncommon occurrence to find defects therein. People who reside in such places often have occasion to travel over defective streets, and to drive around temporary obstructions that are found in the public thoroughfares; and they cannot be expected to refrain altogether from using a street which they find it convenient or necessary to use, because it is not as safe as it might be, or wholly free from obstructions. In a given case the circumstances may be such as to justify a man in attempting to drive over a defective street, or past an obstruction therein, though in so doing he incurs some risk. It cannot be held, therefore, as a matter of law, that a person who travels over a defective street, with knowledge of the defects therein, or who drives by an obvious obstruction in a public thoroughfare, thereby assumes the risk of injury, and is precluded from recovering against one who is responsible for the defect, or who has negligently caused the obstruction. The better view is that a person is not deprived of the right to recover damages, in such cases, unless it is made to appear that, in view of all the circumstances, he failed to exercise that degree of care which persons under similar circumstances ordinarily exercise, and was therefore guilty of contributory negligence. *Bridge Co. v. Bevard*, (Pa. Sup.) 11 Atl. 575; *Kendall v. City of Albia*, (Iowa,) 34 N. W. 833; *Millcreek Tp. v. Perry*, (Pa. Sup.) 12 Atl. 149; *Dewire v. Bailey*, 131 Mass. 169; *City Council of Montgomery v. Wright*, 72 Ala. 411; *Railway Co. v. Gasscamp*, 69 Tex. 545, 7 S. W. 227; *Spearbracker v. Town of Larrabee*, 64 Wis. 573, 578, 25 N. W. 555; *Kelly v. Railroad Co.*, (Sup.) 9 N. Y. Supp. 90; *Beach*, Contrib. Neg. § 37. From what has been said, it follows that no error was committed by the circuit court in refusing the several instructions to which we have heretofore referred.

It is next insisted that the trial court erred in refusing to charge, as it was requested to do, that there was no evidence that the railway company "unnecessarily blocked the crossing, nor for an unreasonable or unlawful length of time." In support of this contention, it is claimed that the court should have declared, as a matter of law, that under the circumstances disclosed by the testimony,

the railway company had an undoubted right to obstruct travel on First avenue for the length of time that it appears to have occupied the crossing on the morning of the accident, and that there was no evidence tending to show that the company was guilty of any fault or neglect. It is not claimed, however, and the record does not disclose, that there was any local law or ordinance of the city of Cedar Rapids, then in force, which permitted the company to halt its trains on First avenue, or to occupy the crossing for any greater length of time than would ordinarily be consumed in moving a train of cars across the street. The contention on the part of the railway company that it had the right to stop its trains on the crossing, and to temporarily obstruct travel, seems to be founded altogether on the fact that it had been authorized to lay its tracks for the movement of its trains in and along Fourth street and across First avenue. But as the streets of a city are primarily designed for the use of persons who have occasion to pass over them, either on foot or with vehicles, it cannot be inferred that a license to lay a railway track across a street in a large city or town carries with it the right to use the crossing for the purpose of standing trains of cars thereon for such period as happens to suit the convenience of the railway company, or to use the highway as a depot yard. We would not be understood as holding that a railway company cannot, under any circumstances, lawfully halt a train across a public thoroughfare, over which it has been permitted to lay its tracks, so as to obstruct travel thereon. A case might be supposed where it would, no doubt, be justified in so doing. But when a railway company assumes to stop a train across a public street in a large town or city, without express authority for so doing, it must be prepared to show, as against one who has sustained a special injury by the obstruction of the street,—especially if it is a street that is heavily burdened with traffic,—that there was some overweening necessity which rendered the blockade justifiable. And, according to well-established rules, the issue as to whether a street was rightfully obstructed, should be submitted to the jury, if the circumstances attending the blockade are such that reasonable persons might entertain different views as to whether the action of the company was justifiable. *Gahagan v. Railway Co.*, 1 Allen, 190. In the case at bar the evidence tended to show that First avenue, where it is crossed by the defendant company's tracks, was more heavily burdened with traffic than any other street in the city of Cedar Rapids. The blockade occurred in the daytime, during business hours, and may have lasted six or seven minutes, and possibly longer. The engine of the passenger train had stopped in front of the depot, a short distance east of a switch, so that it might move through the switch to an adjoining track, and pick up a mail car. This left the rear end of the train on the crossing, which it effectually blockaded for some 60 or 70 feet. In view of these facts, we are not prepared to say that all reasonable persons would necessarily conclude that the railway company was without fault; that it exercised its right of transit across the street in a reasonable manner, and with due regard for the rights of the public. It seems to have been

using the highway, when the accident occurred, as a depot yard,—to stand its cars, and to make up its train,—and it can hardly be contended that, under a license to lay its tracks across the street, it could lawfully devote the highway to such uses. Nor was it a valid excuse for the obstruction of the street that the depot had been located at the corner of Fourth street and First avenue, and that trains coming from the east, when halted at the station, would necessarily project to some extent into the avenue. It was the defendant's duty to so locate its depot that trains could be halted thereat without obstructing travel on the public thoroughfares, and it cannot plead the faulty location of its depot or switches as a justification for incommoding the public. *State v. Morris & E. R. Co.*, 25 N. J. Law, 441; *State v. Chicago, M. & St. P. Ry. Co.*, 77 Iowa, 443, 42 N. W. 365; *Jones v. Railway Co.*, 107 Mass. 264. We are therefore constrained to hold that the issue concerning the negligence of the railway company was properly submitted to the jury, and that no error was committed in refusing the instructions to which we have last above referred.

With respect to the suggestion that the injuries complained of were immediately occasioned by the sudden shying of the horse which the plaintiff was driving, it is only necessary to say that the shying of the horse cannot be regarded as the sole, proximate cause of the injury. The obstruction which had been placed in the highway directly contributed to the accident, and the jury was justified in so finding. *Andrews v. Railway Co.*, 77 Iowa, 672, 42 N. W. 513; *Skjeggerud v. Railway Co.*, 38 Minn. 56, 35 N. W. 572; *Corey v. Railroad Co.*, 32 Minn. 457, 21 N. W. 479.

The result is that the judgment of the circuit court must be affirmed, with costs; and it is so ordered.

JOHNSON CO. v. PACIFIC ROLLING MILLS CO.

(Circuit Court, N. D. California. November 27, 1893.)

1. PATENTS—INVENTION—RAILWAY CHAIRS.

There is no invention in riveting clips to a railway chair, when the prior art includes chairs of substantially the same form, having the clips integral with the chair, and pressed out of it.

2. SAME—RAILWAY CHAIRS.

The Entwisle patent, No. 364,996, for a railway chair, is void for want of invention.

In Equity. Suit for infringement of letters patent No. 364,996, issued June 14, 1887, to Edward B. Entwisle, for an improvement in railway chairs. Bill dismissed.

William F. Booth, for complainant.

Wheaton, Kallock & Kierce, for respondent.

McKENNA, Circuit Judge, (orally.) This is a suit for an infringement of a patent for a new article of manufacture, described as a "railway chair." It consists of a box chair, to which are riveted

side clips, one on either side of the chair, set staggered with reference to one another. In one claim of the patent it is described as follows:

"As a new article of manufacture, a railroad rail chair of the hollow or box form described, provided with two side clips, as B, B, diagonally riveted, one on each side, to the sides of said chair. * * *"

The defendant's device is an imitation, and undoubtedly infringes. But it is claimed the plaintiff's article is not an invention. Railway chairs existed in substantially, if not precisely, the same form as plaintiff's, having clips set diagonally one to the other, but, instead of being riveted on, are integral with the chair, being pressed out of it. The change plaintiff made was to rivet the clips. I do not think the change involved invention. It caused no change in use or operation. It is claimed that it was a cheaper chair, and could be made in a blacksmith shop, while the other required a machine shop. The evidence of cheapness or of making is not very satisfactory.

The bill is dismissed.

BLAIR et al. v. ADAMS et al.

(Circuit Court, W. D. Texas, San Antonio Division. December 7, 1893.)

No. 338.

BASTARDS—CAPACITY TO TRANSMIT ESTATES.

A statute declaring that bastards "shall be capable of inheriting from and through their mothers and of transmitting estates * * * in like manner as if they had been lawfully begotten of such mothers" (Rev. St. Tex. art. 1657) gives a bastard no capacity to transmit his estate, through his deceased mother, to her surviving brothers and sisters.

At Law. Action of trespass to try title brought by Millie V. Blair and others against F. M. Adams and others. Heard on demurrer to an intervening petition. Demurrer sustained.

John R. Peel, for plaintiffs.

John A. Green, F. Vandervoort, and Bethel Coopwood, for defendants.

Floyd McGown, for interveners.

MAXEY, District Judge. This is a suit in the ordinary form of trespass to try title, instituted by plaintiffs to recover of defendants a tract of land containing 480 acres, patented by the state to John Acklin, assignee of Antonio Balle, October 18, 1861. John McGee and others have filed their petition of intervention, in which they assert title to the land as heirs at law of John Acklin. To the petition of intervention the defendants demur. The facts alleged in the petition of intervention, to which the demurrer applies, are as follows: John Acklin was the bastard son of one Polly McGee, having been born to her out of wedlock. The mother never married, and died prior to her bastard son. At her death she left surviving her neither father nor mother, nor other child or children except the son, John. She also left at her decease several brothers and sisters. The bastard son subsequently died,

leaving neither wife nor children. But several of the brothers and sisters of the mother survived the bastard, and these brothers and sisters, and the children of such of them as are deceased, are the interveners herein, claiming to inherit the land through the bastard's deceased mother. The precise question arising upon the demurrer is this: Was the bastard son capable of transmitting his estate, through his mother, to her brothers and sisters? The statute upon which counsel for interveners base their right of recovery was enacted March 18, 1848, under the title of "An act to regulate the descent and distribution of intestates' estates." The act contains 14 sections, the eleventh of which—the one invoked by interveners—reads as follows:

"Bastards shall be capable of inheriting from and through their mothers and of transmitting estates, and shall also be entitled to distributive shares of the personal estates of any of their kindred on the part of their mothers, in like manner as if they had been lawfully begotten of such mothers." Hart. Dig. art. 602; Rev. St. Tex. art. 1657.

The particular estate in controversy is real property. The word "inherit," used in the statute, confers upon the bastard the right to take an inheritance; and although, at common law, "inheritance" is a word technically applicable to an estate in land, it obviously has a more enlarged signification, as employed in the statute. The word, as used in the statute, embraces all classes of property,—real, personal, and mixed; and the right to inherit imports the capacity to take, not only land, but, in addition thereto, personal and mixed property. Thus, in sections 2 and 4 of the act above mentioned it is provided that "when any person having title to any estate of inheritance, real, personal or mixed, shall die intestate, as to such estate," etc. The statute leaves no doubt as to the meaning of the legislature in employing the words "inherit" and "inheritance," and they should be construed according to the legislative intent, regardless of their common-law meaning. Bearing in mind the legal import of the words "inherit" and "inheritance," the first inquiry presented is, from whom, or how, does the bastard inherit? At common law, says Mr. Blackstone, the rights of bastards "are very few, being only such as he can acquire; for he can inherit nothing, being looked upon as the son of nobody, and sometimes called 'filius nullius,' sometimes 'filius populi.' Yet he may gain a surname by reputation, although he has none by inheritance. * * * The incapacity of a bastard consists principally in this; that he cannot be heir to any one, neither can he have heirs, but of his own body; for, being nullius filius, he is therefore of kin to nobody, and has no ancestor from whom any inheritable blood can be derived." 1 Ham. Bl. marg. p. 459; 1 Minor, Inst. 457, 458. But agreeably to the more humane and natural doctrine of the Spanish civil law, which existed in Texas in 1836, the mother of the bastard was permitted—the latter dying, leaving neither wife nor children surviving—to inherit his estate. *Pettus v. Dawson*, 82 Tex. 18, 17 S. W. 714. For discussion of the rights and disabilities of bastards under the civil law, see note appended to *Steven-son v. Sullivant*, 5 Wheat. 262 et seq. However, on January 20,

1840, the congress of Texas adopted the common law as the rule of decision in the republic. Hart. Dig. art. 127. But the harsh disabilities imposed by the common law upon bastards survived to their full extent only a few days in the republic, since the congress on January 28, 1840, enacted a statute in the following words:

"Bastards shall be capable of inheriting or of transmitting inheritance on the part of their mother, and shall also be entitled to a distributive share of the personal estate of any of their kindred on the part of their mother, in like manner as if they had been lawfully begotten of such mother." Hart. Dig. art. 587.

Thus the law remained until March 18, 1848, when the eleventh section of the act of that year, above recited, was adopted by the legislature of the state, then but recently admitted into the Union; and notwithstanding more than 50 years have elapsed since the passage of the first act, changing the common-law rule, the diligence of counsel has not been rewarded by finding a single case decided by the supreme court of this state in which the statute has been construed.

Returning to the act of 1848, section 11 may be conveniently subdivided into three distinct clauses: (1) Bastards shall be capable of inheriting from and through their mothers in like manner as if they had been lawfully begotten of such mothers; (2) bastards shall be capable of transmitting estates in like manner as if they had been lawfully begotten of such mothers; (3) and bastards shall also be entitled to distributive shares of the personal estates of any of their kindred on the part of their mothers in like manner as if they had been lawfully begotten of such mothers.

Under the statute of Virginia, which provides that, "bastards also shall be capable of inheriting or of transmitting inheritance, on the part of their mother, in like manner as if they had been lawfully begotten of such mother," the courts of that state have uniformly so held as to confer upon the bastard the capacity to inherit estates, real and personal, from the mother and any of her kindred, lineal and collateral, and transmit to the mother and such kindred in like manner as if he had been lawfully begotten of the mother. He is thus given a mother, uterine brothers and sisters, and other kindred on the part of the mother, but quoad the father he is regarded as quasi nullius filius. *Garland v. Harrison*, 8 Leigh, 368 et seq.; *Hepburn v. Dundas*, 13 Grat. 219; *Bennett v. Toler*, 15 Grat. 588. But is the Texas statute susceptible of such construction? Possibly so, could the third clause be eliminated from the section. It would then read, "Bastards shall be capable of inheriting from and through their mothers and of transmitting estates, in like manner as if they had been lawfully begotten of such mothers." The legislature, however, did not intend to emancipate the bastard from all the incapacities to which he was subject at common law, but to release him only in part from the rigorous disabilities of that system, and this intent is evidenced by the language employed in the third clause. That clause, while conferring upon the bastard an inheritable capacity which he did not possess at common law, nevertheless limits that capacity to

the right to take only personal property from the kindred on the part of the mother, whereas, under the first clause, he inherits from and through the mother real and personal estate. The correct exposition of the expressions "from and through the mother," in the first clause, and "any of their kindred on the part of the mother," in the third, construed in connection with the preceding words of the respective clauses, I understand to be this: The words "from and through the mother" confine the bastard's general right of inheritance—that is, the right to take generally all classes of property—to the mother and her lineal ascendants, while the words "any of their kindred on the part of the mother" embrace solely the mother's collateral relations, and import capacity in the bastard to take only personal estates from such collaterals. The intent of the legislature is clearly manifested as distinguishing between the lineal kindred of the bastard, on the one hand, and his collateral relations on the other, and in either case he takes the estate as if he were the legitimate child of the mother. Thus construed, effect is given to each clause of the section; and any other interpretation would, it is thought, be illogical and inconsistent. Such being the scope and effect of the section, as it involves the bastard's right to inherit, the next question to be considered is, to whom is the bastard capable of transmitting estates, or how are the estates of bastards transmitted?

His capacity to transmit arises from the language of the second clause of the section. Bastards, it says, shall be capable of transmitting estates in like manner as if they had been lawfully begotten of such mothers. They transmit inheritances, by the words of the clause, not "on the part of the mother," as authorized by the Virginia statute, nor to and through the mother. But they are rendered capable of transmitting estates as if legitimate, or in like manner as if lawfully begotten of the mother. To illustrate how an estate is transmitted by legitimates under the act of 1848, let it be supposed that A., a legitimate son, dies intestate, leaving surviving him neither mother, wife, children, nor their descendants, but only father and brothers and sisters. In the case supposed, the estate is divided into two moieties, one of which passes to the father, and the other to the brothers and sisters, of the intestate. Hart. Dig. arts. 576, 577. Now, in the hypothetical case, if the bastard intestate be substituted for the legitimate, and his estate descend as if he were a legitimate child, he would then be capable of transmitting one-half of his estate to a father supposed to have no existence, for the bastard never had a father. The *reductio ab absurdum* is apparent, which only demonstrates that the legislature never intended to confer upon bastards such general and unrestricted capacity of transmission. Let us now examine the position of counsel which assumes that the bastard may transmit realty to his collateral relations on the part of the mother. Take the supposed case already stated. The son, A., dies intestate, seised of real property, leaving no kindred, lineal or collateral, except brothers and sisters. Under the act of 1848 the estate would pass, in case of legitimates, to the brothers and sisters of the

intestate, and their descendants. The bastard then would transmit to his uterine brothers and sisters real estate, when we have already seen he could only inherit from them a distributive share of personalty. If that construction be correct, it would result that the legislature, in the passage of the act of 1848, was more solicitous of the welfare of the collateral kindred of bastards than of their own. But the primary purpose of the lawmakers was to relieve the bastard to the extent of conferring upon him inheritable rights and capacities which he did not enjoy at common law, leaving legitimate children in the position where other provisions of the statute placed them. The construction, therefore, contended for by counsel, does not commend itself to the court as reasonable or consistent, and cannot be received as the true one.

Lastly, it is said that the bastard should be at least capable of transmitting estates to his mother, and through her to his lineal kindred. The argument is plausible, but not convincing. It would be unreasonable to vest him with capacity to transmit his entire estate, consisting of real and personal property, to his maternal lineal kindred, to the utter exclusion of collaterals, since the third clause of section 11 of the statute expressly confers upon him the right to take personal property from the latter. But, if the last proposed construction were permissible, it would not benefit the interveners, as they are classed among the collateral relations. I think that neither of the constructions insisted upon embodies a correct exposition of the statute; and, while any interpretation may be obnoxious to criticism, my conclusion is that the second clause of the section renders the bastard capable of transmitting estates only "to their line, as descendants in like manner as if they were legitimate." Touching the constructions contended for by counsel, this court may say with equal propriety as the supreme court in *Barnitz v. Casey*, 7 Cranch, 468.

"There are certainly intrinsic difficulties in admitting either of these constructions. If the legislature have proceeded on a mistake, it would be dangerous to declare that a court of law were bound to enlarge the natural import of words in order to supply deficiencies occasioned by that mistake. It would be still more dangerous to admit that, because the legislature have expressed an intention to form a scheme of descents, the court were bound to bring every case within the specified classes. In the present case, equal violence would be done to the ordinary use of the terms employed by adopting the construction contended for by either party."

If the legislature intended that the bastard should transmit his estates to any of his kindred, except lineal descendants, it would have been an easy task to use words clearly expressive of such intent. If the intention was present in the legislative mind, but proper words were not used to express the intention, an instance of *casus omissus* arises, the correction of which courts will remit to the wisdom of the lawmaking power. The construction adopted by the court does not leave the bastard in the position to which he was assigned by the common law. His capacity of transmission is materially enlarged. At common law, being *nullius filius* and without heritable blood, he could transmit estates only to his own lawful issue, on the principle that he was the first purchaser, who is defined by Black-

stone to be "he who first acquired the estate to his family, whether the same was transferred to him by sale or by gift, or by any other method, except only that of descent." 2 Ham. Bl. marg. p. 220.

But under the statute he possesses a greater capacity,—greater in that he may not only transmit to his children, as first purchaser, acquisitions which result to him from his own thrift and industry, but he may go further, and transmit to them estates which he may have inherited from his lineal and collateral kindred in the modes above pointed out. The case of *Curtis v. Hewins*, 11 Metc. (Mass.) 294, may be referred to as instructive upon this point. The statute of Massachusetts provides that an "illegitimate child shall be considered as an heir of his mother, and shall inherit her estate, in like manner as if he had been born in lawful wedlock." In that case it was held that the provision did not apply to grandchildren, and therefore, the illegitimate child dying before his mother, his children were denied the right to inherit her estate. Under the statute of Texas, as construed by the court, the bastard's children, under like circumstances, would inherit the estate of his mother. The construction placed upon the eleventh section of the act of 1848 is in harmony with the conclusion reached by the supreme court in their interpretation of the Virginia statute, and the reasoning of the court applies with such pertinency to the Texas statute that a copious extract therefrom will be here inserted. Referring to that statute, to the phraseology of which attention has already been directed, it is said by the court:

"In the construction of this section, it is never to be lost sight of that the appellants are to be considered as bastards, liable to all the disabilities to which the common law subjects them as such, except those from which the section itself exempts them. Though illegitimate, they may inherit and transmit inheritance on the part of the mother in like manner as if they had been lawfully begotten of the mother. What is the legal exposition of these expressions? We understand it to be that they shall have a capacity to take real property by descent, immediately or through their mother, in the ascending line, and transmit the same to their line, as descendants, in like manner as if they were legitimate. This is uniformly the meaning of the expression 'on the part of the mother or father,' when used in reference to the course of descent of real property, in the paternal or maternal line. As bastards, they were incapable of inheriting the estate of their mother, notwithstanding they were the innocent offspring of her incontinence, and were therefore, in the view of the legislature, and consonant to the feelings of nature, justly entitled to be provided for out of such property as she might leave undisposed of at her death, or which would have vested in her as heir to any of her ancestors, had she lived to take as such. The current of inheritable blood was stopped in its passage from and through the mother so as to prevent the descent of the mother's property, and of the property of her ancestors, either to her own illegitimate children, or to their legitimate offspring. The object of the legislature would seem to have been to remove this impediment to the transmission of inheritable blood from the bastard in the descending line, and to give him a capacity to inherit in the ascending line, and through his mother." *Stevenson v. Sullivan*, 5 Wheat. 260.

In that case illegitimate brothers were denied the right to inherit from their legitimate brother. And in *Bent v. St. Vrain* the supreme court of Missouri, in the construction of a like statute, following *Stevenson v. Sullivan*, denied the right of the mother to inherit the estate of her bastard son. 30 Mo. 268. The courts of

Kentucky have consistently adhered to the rule laid down in *Stevenson v. Sullivant*, which will appear by reference to *Sutton v. Sutton*, 8 S. W. 337; *Jackson v. Jackson*, 78 Ky. 390; *Croan v. Phelps*, (decided March 25, 1893,) 21 S. W. 874; and the authorities cited in those cases. Reference is also made to an elaborate note appended to *Simmons v. Bull*, 56 Amer. Dec. 258, on the "policy of ancient common law towards bastards, and rights of, generally."

Being of opinion that the bastard, John Acklin, was without capacity to transmit his estate, through his deceased mother, to her surviving brothers and sisters, the demurrer will be sustained, and it is so ordered.

MARSHALL et al. v. OTTO et al.

(Circuit Court, D. Nevada. December 11, 1893.)

No. 572.

1. EQUITY PLEADING—PLEAS—WAIVER.

The right to rely on a plea in abatement is waived by including in the same pleading an answer to the merits.

2. COURTS—STATE AND FEDERAL—CONFLICTING JURISDICTION.

The pendency of a prior suit in a state court is not a bar to a suit in a federal court, even on the same cause of action.

3. JUDGMENT—RES JUDICATA—DISMISSAL.

A judgment of dismissal by consent, which shows on its face that it is not the result of an adjustment of the controversy, is not a bar to a subsequent suit. *Merritt v. Campbell*, 47 Cal. 542, distinguished.

4. PLEDGE—WAIVER—ATTACHMENT.

The levy of an attachment by a pledgee upon property in the hands of its pledge holder, and its consent to the levy of a similar attachment by another creditor of the pledgor, is not a waiver of the pledge, or of the pledge holder's right of possession, as against purchasers having notice thereof, when such attachment is made on the ground of defendant's nonresidence, and for the purpose of preventing the pledgor from fraudulently placing the property in the possession of his wife under a bill of sale.

5. RECEIVERS—DISCHARGE—EFFECT OF.

An order discharging a receiver of personal property, and authorizing him to restore it to one of the parties, does not of itself determine the right of possession, the same being made without notice to the opposite party, and before any decision on the merits.

At Law. Action by James Marshall and the Bullion & Exchange Bank against A. Otto and M. Healey for claim and delivery of personal property and for damages. Judgment for plaintiffs.

Statement by HAWLEY, District Judge:

On December 29, 1890, M. E. Spooner made, executed, and delivered to the Bullion & Exchange Bank, in Ormsby county, Nev., a chattel mortgage of 200 head of horses, more or less, branded S on the left shoulder, including 3 thoroughbred stallions and the increase of the stock; also, 600 head of cattle, more or less, branded SP on the right hip, with all the increase thereof, situated in Ash Valley, Lassen county, Cal.,—to secure the payment of a certain promissory note for \$20,000, given for amount of Spooner's overdraft accounts at the bank, payable on or before three years after date, with interest payable monthly thereon at the rate of 9 per cent. per annum. No possession of the property was taken at the time of the execution of the mortgage. This mortgage was recorded in the county re-

recorder's office of Lassen county on January 9, 1891. On the same day of the execution of the chattel mortgage, M. E. Spooner made, executed, and delivered to the Bullion & Exchange Bank a deed of certain real estate situate in Lassen county, Cal., designated as the "Spooner Ranch," containing 1,860 acres, more or less. This deed was intended as a mortgage to further secure the payment of the same note, debt, and account as set forth in the chattel mortgage, and was recorded in the recorder's office of Lassen county at the same time. On the 12th of August, 1892, M. E. Spooner was indebted to the bank in the sum of \$11,055.39, and desired further advances to be made to him, which the bank refused to make unless better security was given. Several days were spent in negotiations between the parties, which finally resulted in the execution of a written agreement on the 12th of August, which was signed by the bank and M. E. Spooner, and attached to the chattel mortgage. This agreement reads as follows: "We, the undersigned parties to the annexed instrument, hereby agree and designate James Marshall, Esq., as a pledge holder, to take possession of the personal property described in said instrument, and hold the same as a pledge to secure the payment of the note and debt set out therein, and we hereby authorize and instruct said James Marshall to take immediate possession of said personal property, (cattle and horses,) and hold the same for such purpose as is provided in the laws of California." Section 2988 of the Civil Code of California provides that "the lien of a pledge is dependent on possession and no pledge is valid until the property pledged is delivered to the pledgee, or to a pledge-holder as hereinafter prescribed." Section 2993 provides that "a pledgor and pledgee may agree upon a third person with whom to deposit the property pledged, who, if he accepts the deposit, is called a pledge-holder."

On the 19th of August, 1892, James Marshall, the pledge holder, took possession of 160 head of horses, 2 stallions, and 60 colts, of the value of \$2,400, and 326 head of cattle and 100 calves, of the value of \$3,912, making a total of \$6,312; said property being upon the Spooner ranch, or range, in Ash Valley, Lassen county, branded with the Spooner brands, being the property included and described in the chattel mortgage given by M. E. Spooner to the bank. On the 24th of August, 1892, after the pledge holder had taken possession of the personal property, and when he was in the possession thereof under the terms of the agreement appointing him a pledge holder, M. E. Spooner made, executed, and delivered to his wife, Clara Spooner, a bill of sale of said personal property. On the same day M. E. Spooner made, executed, acknowledged, and delivered to his wife a deed of the Spooner ranch, which was thereafter recorded in the recorder's office of Lassen county. At the time of the execution of the bill of sale and the deed, and for some time prior thereto, Mrs. Clara Spooner had knowledge of her husband's indebtedness to the bank, of the execution of the deed of the Spooner ranch, and of the chattel mortgage executed by her husband and delivered to the bank, and of the appointment of the pledge holder, and of the fact that the pledge holder was then in the possession of the personal property. At that time, however, she claimed that the pledge holder was not in the possession of the personal property, and thereafter, in various ways, endeavored to get rid of the pledge holder, and to obtain the possession of all of said personal property, and asserted her right of possession thereto. On the 7th of September, 1892, Mrs. Clara Spooner made an inventory of her separate property, which included the personal property then in the possession of the pledge holder, and duly recorded the same in the recorder's office of Lassen county.

On the 24th of September, 1892, the Bullion & Exchange Bank brought suit against M. E. Spooner in the superior court of Placer county, Cal., to recover the sum of \$11,996.86, which it alleged was due from Spooner to the bank upon his checks, and upon open, overdraft accounts. A writ of attachment was obtained in said suit upon the affidavit of Tremor Coffin, who was a director of, and one of the attorneys for, the bank, setting forth the fact that the indebtedness was due upon an express contract for the direct payment of money, and "that the defendant is now, and was at the time said contract was made, a nonresident of the state of California."

On the same day—September 24, 1892—one R. Munro, as the administrator of the estate of J. M. Short, commenced suit in the same court against M. E. Spooner for \$8,978.44, and caused a writ of attachment to be issued therein. These writs of attachment were taken by Mr. Coffin to Lassen county, Cal., and were there delivered to F. P. Cady, the sheriff of Lassen county, with written instructions to said sheriff from the attorneys in both of said suits to execute the same "by taking into actual custody all personal property heretofore owned and claimed by said Spooner, and being in Lassen county, state of California, whether the same be claimed by third parties or not;" also, to levy the writs upon a portion of the Spooner ranch which, it is claimed, was inadvertently omitted from the description in the deed. These instructions were obeyed, and the property mentioned therein attached, and actual possession of the personal property taken by the sheriff, on the 28th day of September, 1892. On October 3, 1892, Mrs. Clara Spooner commenced an action against Sheriff Cady for the recovery of the personal property, alleging that the same was wrongfully taken from her possession, without her consent, and for damages.

On the 25th of October, 1892, the Bullion & Exchange Bank brought suit in the superior court of Lassen county against M. E. Spooner to foreclose the mortgage upon the Spooner ranch, and upon the personal property,—horses, cattle, hay, and grain,—for the sum of \$12,146.50, the amount then alleged to be due and owing and unpaid upon the note and mortgage. Clara Spooner, wife of M. E. Spooner, ——— Munro, the administrator of the estate of ——— Short, and Anthine Presau, were made parties defendant, as each of them asserted and claimed an interest in the property. It was alleged in the complaint, among other things, that M. E. Spooner had fraudulently misrepresented the amount and value of the property; that in September, 1892, he had fraudulently conspired with his wife to defraud the bank; that his wife claimed to own all the property, and threatened to sell and dispose of the same, and to remove the horses and cattle away from the ranch and from Lassen county. Upon the filing of this complaint the court, without notice to defendants, upon motion of plaintiffs, made an order appointing F. D. Cady, the sheriff of Lassen county, receiver of the real estate and personal property, and said sheriff then took possession of said property as receiver. On November 15, 1892, after the defendants had answered, the court, upon motion of defendants, without notice to plaintiff, made an order removing and discharging the receiver, and authorized and directed him to deliver to the defendant Clara Spooner the possession of all the property, which order was obeyed by the receiver.

On the 18th of November, 1892, Otto & Healey, the defendants in this action, bought the personal property,—horses and cattle, hay and grain, and the farming implements,—on the Spooner ranch, from Mrs. Clara Spooner, for the sum of \$9,700, and took possession thereof. They paid \$4,000 in cash, and gave two duebills for the balance,—one for \$2,700, due in January, 1893; the other for \$3,000, due in April, 1893. The sum of \$200 was thereafter paid on one of the duebills. Neither of the duebills has since been presented to them, and no payments have been requested or made thereon. Prior to the time of the purchase of the property, Otto & Healey had actual knowledge of the pending litigation, and were informed that the bank had a claim on the property which was unsettled. On the 6th of February, 1893, on motion of plaintiffs, the attorneys for defendants consenting thereto, and waiving their costs, the court in Placer county dismissed the attachment suit of Bank v. Spooner, and entered the following judgment: "It is therefore ordered, adjudged, and decreed that the above action be, and the same is hereby, dismissed; each of the parties hereto paying his own costs."

On March 21, 1893, the present suit was commenced in this court by James Marshall, the pledge holder, and the Bullion & Exchange Bank, as plaintiffs, against the defendants, Otto & Healey, for the possession of the personal property,—horses and cattle, hay and grain,—on the Spooner ranch, and for the value thereof in case delivery cannot be had. On May 10, 1893, the defendants appeared in this court, and filed their answer, denying plaintiffs' right to the possession of the property, or any part thereof; denying that plaintiffs ever demanded the return of the property to them, or that plain-

tiffs have been damaged; and alleged title and right of possession in themselves. Their answer sets up the bringing of the various suits before mentioned, and pleads the judgment in the superior court of Placer county, and the pendency of the foreclosure suit in Lassen county, as a plea in abatement, and plea in bar, of this action. These pleas were not separately set up in a preliminary answer, but were pleaded in the answer with other matters setting up a defense to the merits of the action. On August 3, 1893, upon motion of plaintiffs' counsel, the order and judgment of dismissal in the Placer county attachment suit was amended so as to read as follows: "It is therefore ordered, adjudged, and decreed that the above action be, and the same is hereby, dismissed." The Bullion & Exchange Bank paid the taxes on the real estate and personal property for the year 1892, and the defendants paid the taxes on the personal property for the year 1893. The plaintiffs in this action are residents and citizens of the state of Nevada, and the defendants are residents and citizens of the state of California.

Trenmor Coffin, (Goodwin & Dodge, of counsel,) for plaintiffs.
James R. Judge, (A. L. Shinn, of counsel,) for defendants.

HAWLEY, District Judge, (after stating the facts.) 1. As to the pleas. The defendants, by answering to the merits, have waived their right to rely upon their plea in abatement. It is a well-settled rule of practice in the national courts that matters in abatement can, in general, only be set up by plea or demurrer, and that a defendant, by answering, waives any such objection. 1 *Fost. Fed. Pr.* § 125, and authorities there cited; *Story*, *Eq. Pl.* § 708; *Livingston v. Story*, 11 *Pet.* 393; *Wickliffe v. Owings*, 17 *How.* 51; *Pierce v. Feagans*, 39 *Fed.* 588. Rule 9 of this court is conclusive upon this question:

"All matters in abatement shall be set up in a separate preliminary answer, in the nature of a plea in abatement, to which the plaintiff may reply or demur; and the issue so joined shall be determined by the court before the matters in bar are pleaded. And when any matter in abatement, other than such as affects the jurisdiction of the court, shall be pleaded in the same answer with matter in bar, or to the merits, or simultaneously with an answer of matter in bar, or to the merits, the matters so pleaded in abatement shall be deemed to be waived."

The pendency of a prior suit in a state court cannot be pleaded in bar of a suit in the circuit court of the United States, even if it is for the same cause of action. The two courts, though not foreign to each other, belong to different jurisdictions in such sense that the doctrine of the pendency of the suit is not applicable. This rule is now almost universally applied in all cases where the pendency of the prior suit is in another state or district from that in which the national court is held. *Sharon v. Hill*, 22 *Fed.* 28; *Washburn & Moen Manuf'g Co. v. H. B. Scutt & Co.*, *Id.* 710; *Pierce v. Feagans*, 39 *Fed.* 588; *Rawitzer v. Wyatt*, 40 *Fed.* 609; *Stanton v. Embry*, 93 *U. S.* 554; *Gordon v. Gilfoil*, 99 *U. S.* 178; 1 *Fost. Fed. Pr.* § 129.

But if the pleas in abatement and in bar were properly before the court upon their merits, they could not be sustained, because the causes of action and the parties thereto are different. The suit in Placer county was for a money demand against M. E. Spooner. The suit in Lassen county was to foreclose a mortgage upon real and personal property. This is a suit in the nature of replevin, to

recover the possession of certain personal property which it is claimed was wrongfully taken from the possession of the pledge holder, who was acting under and by virtue of the appointment by M. E. Spooner and the Bullion & Exchange Bank, and for the value of said personal property in case delivery of possession could not be had, and damages for the detention thereof. It is true that the debt due from M. E. Spooner to the bank constitutes the foundation of all the suits; but the causes of action are not the same. The suit in Placer county was improperly brought, and could not have been sustained. The judgment of dismissal, as first entered, "each of the parties hereto paying his own costs," might, under the rule announced in *Merritt v. Campbell*, 47 Cal. 542, have amounted to a retraxit, and, if it had not been amended, it could have been pleaded in bar to another suit afterwards brought in another court of the same state, upon the same cause of action. But the plaintiff therein, upon being informed of the terms of the judgment, moved the court to amend it so as to conform to the intention of the parties, and it was amended so that the final judgment of dismissal reads: "It is therefore ordered, adjudged, and decreed that the above action be, and the same is hereby, dismissed." This entry shows upon its face that the judgment of dismissal was not the result of an adjustment of the subject-matter in controversy in that suit, and takes the case out of the rule announced in *Merritt v. Campbell*, which was based upon the ground that each party was adjudged to pay his own costs; and, for obvious reasons, the doctrine as therein set forth ought not to be extended beyond the limits fixed by that authority. *Landregan v. Peppin*, 94 Cal. 465, 29 Pac. 771.

The pendency of the foreclosure suit in the superior court of Lassen county constitutes no bar to the prosecution of this action. Any judgment that may be rendered in this case will not in any manner interfere with any judgment that has been, or may hereafter be, rendered in that case. They are entirely different causes of action, and each suit has its own appropriate remedy. If the defendants have wrongfully taken the possession of the property from the plaintiffs, they can be required to restore the possession thereof to the plaintiffs, so that it may be retained by them, to abide any judgment that may finally be rendered in the foreclosure suit; and, if possession of the property cannot be given, the plaintiffs would be entitled to recover the value thereof; otherwise, the foreclosure of the mortgage, if eventually ordered in the superior court, might become an absolute nullity by the wrongful act of the defendants in this action, and plaintiffs might be left entirely remediless in the premises. The defendants acquired their rights, if any they have, in the premises, subsequent to the commencement of the foreclosure suit, and, if they rightfully obtained the possession of the property, they are entitled to a judgment in their favor for the costs.

2. As to the merits. It appearing to the satisfaction of the court, from the evidence submitted in this case, that the pledge holder took the possession of the property with the consent and written

authority of the parties to the chattel mortgage, it follows that unless the plaintiffs, by some act of theirs, have legally parted with the possession thereof, or done some act which legally deprived them of the possession and right of possession thereto, they are entitled to recover in this action. It is earnestly contended by defendants that the issuance of the writ of attachment in the Placer county suit, and levying the same upon the property, amounted to a waiver and abandonment of the possession of the pledge holder, and deprives the bank of any lien or right of possession which the plaintiffs might previously have had to the property. It is also claimed that the fact of the bank's consenting to the levy of the attachment in *Munro v. Spooner* had the same effect. It is further asserted that Mrs. Clara Spooner rightfully obtained the possession of the personal property by the order of the court discharging the receiver in the foreclosure suit, and directing him to deliver the personal property to her. In determining the effect of these proceedings, in connection with other minor matters discussed by counsel, the position in which the various parties stand, in relation to the property and of their rights, claims, and interest therein, must be clearly and constantly kept in view, for every case must stand or fall upon its own particular facts. There is no dispute as to the fact that M. E. Spooner is indebted to the bank. It was asserted by defendant's counsel in the oral argument that the debt is not yet due, and that the foreclosure suit was prematurely brought; but in this connection he said that, when the debt became due, it would be paid; but be that as it may, for the question whether the debt is due or not, or whether it will finally be paid, is not involved in this case. The question here is whether the plaintiffs in this action are entitled to the possession of the personal property. In deciding this question, the primary fact is the existence of the debt of M. E. Spooner to the bank. The particular amount of the debt is not involved. The next important question is the fact that neither Mrs. Clara Spooner nor the defendants, Otto & Healey, were creditors of M. E. Spooner, nor were they innocent purchasers, for value, of the property. They are not entitled to any rights, and are not in a position to claim any privileges, that could not be asserted and maintained by M. E. Spooner. They stand in his shoes.

It may be conceded, for the purposes of this case, that the conduct and action of the bank, as above stated, were such as to prevent it from asserting any claim, or lien, or right of possession to the property as against creditors of M. E. Spooner, or innocent purchasers for value, who had obtained any claim or rights to the property. To such effect are the authorities of *Citizens' Bank v. Dows*, 65 Iowa, 460, 27 N. W. 459; *Wingard v. Banning*, 39 Cal. 543; and other authorities cited by defendants. But the facts of this case take it out of the rule announced in such cases.

Would M. E. Spooner be entitled to claim and hold the property? Could M. E. Spooner claim that the levying of the attachments upon the personal property defeated the lien and right of possession of plaintiffs? The affidavit for the attachment in the suit of *Bank v. Spooner* was not based upon the ground that the plaintiffs

in the suit had no lien upon real or personal property, but it was procured upon the ground that the defendant was a nonresident of the state of California. The commencement of the Placer county suit was wholly unwarranted in law, unauthorized by the facts, and cannot be justified upon any ground. Counsel, in bringing that suit, evidently misconceived the remedy which the plaintiffs were entitled to, and thereafter sought to rectify the mistake by procuring a dismissal of the case. But a party who imagines he has two or more remedies, or who misconceives his rights, is not to be deprived of all remedy because he first tries a wrong one. *Peters v. Ballistier*, 3 Pick. 505; notes to *Fowler v. Bank*, [21 N. E. 172,] 10 Amer. St. Rep. 488; *Bunch v. Grave*, 111 Ind. 357, 12 N. E. 514. Mr. Coffin testified that he was induced to institute the suit, and to cause the levy of the attachment, upon information which he at the time believed to be reliable, to the effect that Mrs. Spooner had wrongfully obtained the possession of the property from the custody of the pledge holder, and was attempting to remove the same from the state of California, and that the object of bringing the suit was to prevent such action on her part, and enable the bank to regain the possession of the property so as to subject it to the lien of the chattel mortgage. The evidence shows that the suit would not have been brought except for the steps taken by M. E. Spooner in conveying the property to his wife, and her action in endeavoring to remove the pledge holder from the possession of the property, and to obtain possession of the same. The bringing of the suit and the levy of the attachment were not the result of the voluntary action of the bank, but were caused by the wrongful act of the mortgagor and pledgor of the personal property, and he is not in a position to take any advantage of such proceedings upon the part of the bank; this, upon the familiar principle that a party cannot take advantage of his own wrong in order to relieve himself from the payment of a just debt. The general principles herein announced are as applicable, in my opinion, to the case of *Munro v. Spooner*, as to the case of the bank, although the facts are somewhat different.

The order of the court in the foreclosure suit, directing the receiver to deliver the property to Mrs. Clara Spooner, cannot be considered as an adjudication of the rights of the parties to the possession of the property. If her possession was wrongful, the restoring the possession to her in that manner did not make it rightful. The fact of the appointment of the receiver did not, of itself, determine that the bank was entitled to the possession, and the fact that the receiver was discharged does not, of itself, determine that the bank was not entitled to the possession. The appointment of the receiver might have been wrongfully obtained, although the bank was lawfully entitled to the possession of the property, and the order discharging the receiver might have been properly made, on the ground that his appointment was irregularly or wrongfully obtained, without in any manner determining who was legally entitled to the possession of the property. In *Von Roun v. Superior Court*, 58 Cal. 358, the court said:

"The appointment of a receiver works no injury to the least right of any one. It would be strange if it did. The receiver is the hand of the law, and the law conserves and enforces rights; never destroys them. His appointment determines no right, and in no way affects the title of any party to the property in litigation."

See, also, 3 Pom. Eq. Jur. § 1336. The views herein expressed dispose of all the objections raised against the right of the plaintiffs to recover in this action.

The only question remaining is as to the right of plaintiffs to recover the hay and grain upon the Spooner ranch. The testimony was to the effect that it was orally agreed between the parties that the pledge holder should take possession of the hay and grain; but in weighing the testimony it seems only to go to the extent of authorizing the possession of the hay and grain for the purpose of feeding the stock, (horses and cattle.) It is doubtful whether this testimony was admissible for any purpose. Under all the facts of this case, the judgment will be confined to the personal property mentioned in the agreement appointing the pledge holder.

While some of the parties who are interested in the disposition of this case have been wrangling over the possession of the property, and others have been bitterly engaged in much unnecessary litigation, the cattle in controversy, brute creatures as they are, have been pursuing a much better course, and perhaps setting all the parties a good example, by quietly chewing the cud of peace, and all the stock, in a more compromising spirit than has so far been evinced by any of the parties, has been peacefully eating the hay and grain, and has had the benefit of at least a portion thereof. The plaintiffs are entitled to recover the possession of the horses and cattle, and, if recovery cannot be had, they are entitled to recover the value thereof, to wit, the sum of \$6,312, and the costs of this suit.

The clerk will enter judgment accordingly.

BULLION & EXCHANGE BANK v. OTTO et al.

(Circuit Court, D. Nevada. December 11, 1893.)

No. 573.

STATUTE OF FRAUDS—MORTGAGE—PAROL AGREEMENT FOR POSSESSION.

When a parol agreement whereby a mortgagor of lands is to surrender possession to the mortgagee has been executed by actual delivery, the statute of frauds cannot be set up by one who, with notice, acquires possession under a lease from a subsequent grantee of the mortgagor.

At Law. Action by the Bullion & Exchange Bank against A. Otto and M. Healey to recover possession of real estate and the rents and profits thereof. Judgment for plaintiff.

Trenmor Coffin, (Goodwin & Dodge, of counsel,) for plaintiff.
James R. Judge, (A. L. Shinn, of counsel,) for defendants.

HAWLEY, District Judge, (orally.) The principles involved in this case are in many respects substantially the same as in No. 572,

and need not be again stated or discussed. In this case the testimony shows that James Marshall, acting for M. E. Spooner and the Bullion & Exchange Bank, under an oral agreement between said parties, took possession of the real estate known as the "Spooner Ranch," to hold and keep possession thereof for the bank as the mortgagee of said property. The defendants in this suit thereafter, on the 18th of November, 1892, obtained the possession of the real estate under an agreement or lease from Mrs. Clara Spooner, and have ever since been in the possession thereof. At the time of the commencement of the foreclosure suit the plaintiff filed in the recorder's office of Lassen county a notice of lis pendens of said suit, and the same was duly recorded. The other facts, so far as applicable, are the same as stated in *Marshall v. Otto*, 59 Fed. 249.

It is claimed that the oral agreement of M. E. Spooner with the bank, to deliver the possession of the real estate, was within the statute of frauds. But the question is not whether the oral agreement could have been enforced if M. E. Spooner had refused to deliver the possession. The statute only affects the parties to the agreement. The facts are that M. E. Spooner delivered the possession to Marshall for the mortgagee, and, the agreement having been executed, it is valid between the parties. The defendants are certainly not in a position to urge the statute of frauds as a defense to this suit. *Book v. Mining Co.*, 58 Fed. 106. The right to make such an oral agreement is well settled, and the effect of such an agreement, and of the possession taken thereunder, is clearly and correctly stated in *Spect v. Spect*, 88 Cal. 440, 26 Pac. 203. The question presented in that case was whether a mortgagor who had placed his mortgagee in possession of the mortgaged premises could maintain ejectment against him while the debt for which the mortgage was given remained unsatisfied, even though an action by the mortgagee for the recovery of the debt is barred by the statute of limitations. The court, after quoting section 2927 of the Civil Code, which declares that "a mortgage does not entitle the mortgagee to the possession of the property, unless authorized by the express terms of the mortgage; but after the execution of the mortgage the mortgagor may agree to such change of possession without a new consideration,"—said:

"The right of the mortgagee to take possession of the mortgaged premises does not depend upon the statute. The mortgagor could at all times, even by a parol agreement, give to his mortgagee this additional security. *Fogarty v. Sawyer*, 17 Cal. 589; *Edwards v. Wray*, 11 Biss. 251, 12 Fed. 42. In taking such possession, the mortgagee does not thereby acquire any estate in the land, or obtain for his mortgage any higher character, or any different or greater protection, than it would otherwise have possessed. In any action to enforce the mortgage, or to collect the debt for which it was given as security, the mortgagee has no additional rights by reason of the fact that he is in possession of the mortgaged premises with the consent of the mortgagor. Such possession does, however, give him rights in addition to those conferred by the mortgage. It is an additional security for the debt, which he is entitled to retain in accordance with the terms under which it was received. This right to retain the possession of the land is not coincident with a right to foreclose his mortgage, or dependent upon such right, but depends solely upon the existence of the debt. The possession of the land is a special security for the

debt, distinct and separate from the mortgage, which has been conferred by an act of the debtor, and the right to retain the same is independent of, and distinct from, any right springing from the mortgage."

I find the rental value of the property to be worth \$900 per annum. The plaintiff is entitled to be restored to the possession of the real estate, and to recover the rental value from the time defendants wrongfully obtained possession thereof, at the rate of \$75 per month; and judgment will be entered accordingly.

CONNECTICUT FIRE INS. CO. OF HARTFORD v. HAMILTON.

(Circuit Court of Appeals, Sixth Circuit. November 6, 1893.)

No. 4.

1. **INSURANCE—DEMAND FOR APPRAISAL.**

A joint demand for a joint appraisal by twelve insurance companies is not within the terms of the policy of one of the companies, providing for an appraisal by two persons, one to be selected by the company, and the other by the insured, who, in case of disagreement, were to call in a third. Such policy stipulates for a separate appraisal.

2. **SAME—PROOFS OF LOSS—WAIVER.**

A policy of fire insurance provided that a loss should be paid 60 days after notice and proofs; that the amount should be appraised in a certain manner, and the appraisers' report should be made part of the proofs of loss; and until such proofs should be produced and appraisals permitted the loss should not be payable. Proofs of loss were furnished by the insured, to which the insurer objected because of the amount claimed. After negotiations between the parties concerning the manner of appraisal, the insurer promised to submit a form of appraisal, which it failed to do, but retained the proofs for over 60 days. *Held*, that the insurer could not afterwards object to the sufficiency of the proofs. *Severens*, District Judge, dissenting. 46 Fed. 42, affirmed.

3. **SAME—APPRAISAL.**

When it is stipulated in a fire insurance policy that, in case the amount of loss shall not be agreed upon by the parties, it shall be determined by appraisers chosen by them, and that their appraisal shall form a part of the proofs of loss, until the production of which the loss shall not be payable, it is the duty of the insured, in case of disagreement, and the stipulation is not waived by the insurer, to obtain such an appraisal, and no right of action arises until he has obtained it, or made reasonable effort to do so and failed. *Per Severens*, District Judge.

4. **SAME—SALE PENDING APPRAISAL.**

It, in such a case as is last supposed, the policy gives the insurer the right within 60 days after the reception of such proofs of loss to take the damaged property at the appraisal value, the insured has no right, while negotiations for an appraisal are pending, and while only 33 days from the transmission of the original proofs of loss have elapsed, to sell in parcels and dispose of the damaged property; and if he does so he cannot maintain his action on the policy. *Per Severens*, District Judge.

In Error to the Circuit Court of the United States for the Western Division of the Southern District of Ohio.

At Law. Action by Robert Hamilton against the Connecticut Fire Insurance Company of Hartford on a fire insurance policy. Upon suggestion of the death of the plaintiff, Cora B. Hamilton and John W. Bryant, his executors, were substituted in his place and

stead. A verdict was directed for plaintiffs, (46 Fed. 42,) and judgment for plaintiffs was entered thereon. Defendant brings error. Affirmed on reargument.

Thomas A. Logan, for plaintiff in error.

Joseph Wilby, for defendants in error.

Before TAFT, Circuit Judge, and SEVERENS and SWAN, District Judges.

SEVERENS, District Judge. Robert Hamilton brought his suit in the circuit court for the southern district of Ohio to recover upon a policy of insurance issued by the plaintiff in error, for a loss sustained by him in consequence of fire, occurring on the 16th of April, 1886, in a warehouse at Covington, Ky., whereby his stock of tobacco there stored was damaged. This stock was insured also by 11 other companies. The policy of the Connecticut Fire Insurance Company contained this stipulation:

"Loss or damage to property partially or totally destroyed, unless the amount of said loss or damage is agreed upon between the assured and the company, shall be appraised by disinterested and competent persons, one to be selected by the company and one by the assured; and, when either party demand it, the two so chosen may select an umpire to act with them in case of disagreement, and if the appraisers fail to agree they shall refer the difference to such umpire, each party to pay their own appraiser and one-half the umpire's fee; and the award of any two in writing shall be binding and conclusive as to the amount of such loss or damage, but no appraisal or agreement for appraisal shall be construed under any circumstances as evidence of the validity of said policy, or of the company's liability thereon. When personal property is damaged, the assured shall put it in best order possible, and make an inventory thereof, naming the quantity and cost of each article; and upon each article the damage shall be separately appraised,—if a building, by an estimate in detail; and the report of the appraisers in writing under oath shall form a part of the proof hereby required, and until such proofs and certificates are produced and examinations and appraisals permitted the loss shall not be payable."

—And there was a reservation of a right to the company to take any of the damaged property at the appraised value, or to repair or replace property damaged or lost, upon giving notice of their intention so to do within 60 days after the receipt of the proof therein required. It was also stipulated in a previous part of the policy that the loss was "to be paid to the assured sixty days after due notice and satisfactory proofs of the same are made by the assured and received at their office in Chicago, in accordance with the terms of this policy hereinafter mentioned."

It is not questioned that the insured property was damaged by the fire, or that the loss was within the terms of the policy. The defense is founded upon the provisions of the policy above set forth. It is alleged that the proofs of loss required by the contract had not been furnished; and it is alleged that the insurance company, not agreeing to the amount of the loss as claimed by the insured in his preliminary proofs, seasonably demanded that the same be determined by the award of appraisers to be chosen by the parties, pursuant to the stipulation in the policy, and that this demand was refused by the insured, who also sold, against the protests of the com-

pany, the damaged stock in small lots, and suffered the same to be scattered, thereby depriving the company of the right to take the property at its appraised value. And it is insisted that in these respects the insured has failed to perform conditions precedent to his right of recovery. To this the plaintiff (in the court below) replies that no such demand for appraisal was made by the company as is contemplated by that provision in the policy.

The case is one of several instituted against various companies who had issued policies on the same stock in force at the time of the fire. Two of these, involving the construction and validity of differing provisions in the policies relative to the right of the parties to demand an appraisal and award, one or both, of disputed demands and other matters, have already been decided and disposed of by the supreme court. *Hamilton v. Liverpool, L. & G. Ins. Co.*, 136 U. S. 242, 10 Sup. Ct. 945; *Hamilton v. Home Ins. Co.*, 137 U. S. 370, 11 Sup. Ct. 133. In the first of these the clause in the policy of that insurance company upon that subject was held to establish a condition precedent, without performance of which, upon the request of the company, the plaintiff could not recover. In the other case, however, it was held that the clause relating to that subject in that company's policy did not require the appraisal and award as a condition to the right of action, but constituted a collateral term in the contract, upon which an independent suit could be brought upon a violation thereof. The present case seems to have been tried upon the assumption by both parties that the provision in the policy brought it within the decision in *Hamilton v. Liverpool*, *London & Globe Insurance Company*, into that class of cases where the stipulation makes the appraisal or award a condition precedent.

On the 26th of April,—10 days after the fire,—*Hamilton*, the insured, transmitted to the Connecticut Fire Insurance Company preliminary proofs of loss, which were not otherwise objected to by the company than is expressed or implied in the correspondence which presently followed between that company and the several other insurance companies acting in concert with it on the one hand, and *Hamilton* on the other, indicating a disagreement with the insured about the amount of loss or damage, and a demand for its determination by appraisers. All other objections to the proofs, if there were any, were waived by the failure to bring them forward. But I think that the letter of the 28th of April, hereinafter quoted, ought to be regarded as tantamount to an objection on the part of the company to the sufficiency of the proofs of loss in respect to the amount of damages claimed. And this brings us to the consideration of the main points in controversy, which are: First, whether the company made such a demand for an appraisal and award as the policy authorized it to make; and, second, if it did not, whether the insured was himself bound to take action for the procuring of an appraisal to supply the deficiency in his proofs of loss as a condition to his right to recover. If this last question is decided in the affirmative, the further inquiry is presented whether he sufficiently discharged his obligation in that behalf, or was he excused therefrom by the conduct of the company?

The reception of the proofs of loss was acknowledged by this insurance company's agent on the 27th April, 1886, with the statement that he would forward them to the proper authorities at once; and on the following day the correspondence above referred to between the insurance companies acting in concert with the insured was begun by the following letter of the company:

"Cincinnati, O., April 28, 1886.

"Robert Hamilton, Esq., Covington, Ky.—Dear Sir: The undersigned, representing the several insurance companies against which you have made claim for loss under their respective policies of insurance upon your stock in your tobacco factory, Nos. 413 and 415 Madison Ave., Covington, Ky., claimed to have been damaged by fire on April 16, 1886, beg leave jointly to take exception to the amount of claim made, and to demand that the question of the value of and the loss upon the stock be submitted to competent and disinterested persons, chosen as provided for in the several policies of insurance under which claim is made; and we hereby announce our readiness to proceed at once with this appraisement, so soon as your agreement to the demand is declared. We further desire jointly to protest against the removal, sale, or other disposition of the property until such an appraisement has been had, and to notify you that the insuring companies will in no way be bound by such *ex parte* action. You may address your reply to the joint demand made above in care of the London and Liverpool and Globe Insurance Company, Third and Main streets, Cincinnati. Waiving none of the rights of the several companies under the terms of their respective policies, we are,

"Very respectfully yours."

[Signed by the agents of 11 insurance companies, of which the plaintiff in error was one.]

To this Mr. Hamilton's attorney replied on the 29th of April, in substance, that he would accede to an arbitration if the person whom the company would select should be acquainted with the manufacture of tobacco, and upon the express understanding that the arbitrators should have full opportunity to examine the stock of tobacco, and that it should then be sold at public auction, in order that the value thus ascertained, with such other evidence as the parties desired, might be presented to the arbitrators. The letter further stated that the interests of Mr. Hamilton required a speedy sale of the tobacco. A lengthy correspondence upon the subject between the companies and the attorney for Mr. Hamilton ensued. It is set forth in detail in the report of the case of the Same Plaintiff v. Liverpool, L. & G. Ins. Co., 136 U. S. 242, 248-252, 10 Sup. Ct. 945, ending with the letter dated May 7, 1886, which terminated the action of the parties in respect to the obtaining an appraisal or arbitration. It is not deemed necessary to repeat this correspondence here. The record of it in the case in the supreme court above referred to was stipulated into the present case upon the trial, and it suffices here to say that it is substantially a prolongation of the controversy as to what should be the rule of proceeding by the arbitrators to be chosen in the reception of proof, and as to the right of the insured to make sale of the property pending the arbitration. The companies insisted that the appraisers, as they called them, should be at liberty to take testimony or not, and so much thereof as they should think proper; the insured contending, on the contrary, for the right to introduce testimony.

The stock was sold by Hamilton at public auction on May 29, 1886.

This case differs in an important fact from that of *Hamilton v. Liverpool, L. & G. Ins. Co.*, 136 U. S. 242, 10 Sup. Ct. 945, in that this insurance company did not, as that company did, after the termination of the negotiation of the companies acting conjointly with Hamilton, demand separately for itself an appraisal.

Referring to the correspondence in this case, it will be seen that it consisted of a joint demand by all the companies for an appraisal as the means of settling the value of the property and the amount of the loss, and a refusal of such demand unless the proceedings of the appraisers should be agreed to be conducted upon certain principles. The companies stood together in making this demand, and, fairly construed, their language indicates that but one body of appraisers was intended, and that the appraisal should be once for all. Each of the companies supported the demand of the others.

The provisions in the clauses relating to the subject were widely different in the several policies. In some, as in the case of the Home Insurance Company, the appraisal, which was to be part of the proofs of loss, was to be a mere report, having no binding force upon either party, and under that provision the demand for an arbitration to fix the amount of value and loss as a condition to the right of recovery was plainly unauthorized. In others, the appraisal was to be had upon the written request of either party, as in the case of the Liverpool, London & Globe Company. In others, it was to be had without such condition, as in the present case. In some, the report or award was a condition precedent to suit, in others not. In some, the number of appraisers was fixed, in others not. In some, two are to be chosen with no umpire. In others, an umpire was provided for, but the mode of appointing him varied even in those. In short, neither the number nor the mode of appointment, nor the functions or mode of proceeding, nor the nature of their report or its legal effect, were the same or alike. This was not a demand for appraisal by this insurance company such as its policy gave it a right to make. It did not acquire its right in any respect from the policies of other companies, and it had no legal concern with their disputes, or the mode to be adopted for their settlement, and had no obligation to champion their cause, or mix its controversy with theirs. The insured was not bound to accept such proposition for determining the value and damage as was demanded of him by the companies, this among them. If he had done so, it would have been an arbitration outside and independent of this policy, standing on the general ground of common-law arbitrations. It is true that Mr. Hamilton did not expressly object to the proposed arbitration on the ground that it was a joint demand. He signified his assent to the demand, provided the arbitration was to be conducted on certain principles. To such a demand he had the right to name his own conditions. He was not put in default in respect to this requirement in the policy by any rightful demand made by the insurance company. The court below

ruled that the demand for appraisal made by the companies in this joint correspondence was not such a demand as this policy authorized, and was ineffectual as a separate request by the Connecticut Insurance Company therefor, and in this I concur.

This seems to have been the question upon which the contest in the court below was principally conducted. But the case involves another question, which, being presented by the record and covered by the exception taken by the plaintiff in error to the direction which was given to the jury to find a verdict for the plaintiffs in that court, we find it necessary to consider.

Referring to this clause in the policy, the question arises whether the insured was not himself bound to take action for the procuring of an appraisal to supply the deficiency in his proofs of loss. The appraisal is not thereby required to be had upon the condition that there shall be a written request by either party, as in *Wallace v. Insurance Co.*, 2 Fed. 658; *Insurance Co. v. Badger*, 53 Wis. 283, 287, 10 N. W. 504,—in which cases it was held that, inasmuch as those words created a privilege which the insured was not bound to exercise, instead of an obligation, the appraisal was not constituted a condition precedent.

It is conclusively settled in the federal courts, in harmony with the doctrine generally prevailing, that when the parties are found, upon a just and reasonable construction of their contract, to have stipulated that a matter preliminary to the obligation and the duty to pay shall be determined and fixed by certificate or arbitration, such stipulation shall be taken as part of the contract, and enforced. It is only necessary to refer to the cases in 136 and 137 U. S., 10 and 11 Sup. Ct., in which *Hamilton* was plaintiff, and the cases there cited in support of this proposition. And though a rather reluctant recognition has in some quarters been heretofore given to the validity and effect of such provisions, the tendency of the courts is to regard them favorably, and not by strained construction defeat their apparent purpose, conceiving it to be beneficial. *Hall v. Insurance Co.*, 57 Conn. 105, 17 Atl. 356; *Delaware & H. Canal Co. v. Pennsylvania Coal Co.*, 50 N. Y. 250.

Applying the general rules for the interpretation of contracts, it would seem not to admit of doubt that the parties here intended that in case of loss the amount thereof, if the parties did not agree upon it, should be ascertained by appraisers before there should be any obligation to pay. It is expressly stipulated that if they do not agree upon the amount of the sound value and damage it shall be determined for them by arbitrators, and their award is declared to be conclusive upon those questions. Although called appraisers, their functions are those of arbitrators in respect to the subjects of value and damage. It is further stipulated that their award shall constitute part of the proofs of loss required by the contract, and that until such proofs of loss are furnished the loss shall not be payable. And the covenant to pay the loss is that it shall be paid 60 days after proofs of the same are made in accordance with the terms of the policy. The case of *Hamilton v. Home Ins. Co.*, 137 U. S. 370, 11 Sup. Ct. 133, differed essentially from this. There were

two distinct references found in the policy. The first was for a mere appraisal and report, not binding on the parties, which was to become part of the proofs of loss; the second was for an arbitration after the proofs of loss were received in due form. The liability to pay arose when the proofs of loss were received and found sufficient. The arbitration was an independent matter, not connected with those proofs. It was upon that ground that it was distinguished from the previous case.

The case of *Hamilton v. Liverpool, L. & G. Ins. Co.*, 136 U. S. 242, 10 Sup. Ct. 945, differed from this in that the policy there provided that no action should lie against the company until the award was had. But that difference cannot be material. That language only emphasized what the former language had, in effect, accomplished. It involves an absurdity to say that an action would lie to recover what there is no duty to pay,—a loss that is not payable. In some of the leading cases, where it was held that the terms of the contract established a condition precedent, there was no express provision that an action should not lie before the award was made; and several of these are cases cited with approval by the court in 136 and 137 U. S., 10 and 11 Sup. Ct., already referred to. *Scott v. Avery*, 5 H. L. Cas. 811; *Collins v. Locke*, 4 App. Cas. 674; *Viney v. Big-nold*, 20 Q. B. Div. 172; *Delaware & H. Canal Co. v. Pennsylvania Coal Co.*, 50 N. Y. 250; *U. S. v. Robeson*, 9 Pet. 319; *Railroad Co. v. March*, 114 U. S. 549, 5 Sup. Ct. 1035. And there are many other such cases. Indeed, this precise point was discussed in the case in 50 N. Y., and the same view expressed as is here entertained. And in the case in 137 U. S., at page 386, 11 Sup. Ct. 133, the court treat a condition necessarily implied from the terms of the contract as equivalent to an express agreement that no action shall be brought until the award is obtained. As has been many times pointed out, it is always a question of construction. Whatever the language may be, if the intention of the parties is sufficiently apparent, effect will be given to it.

The supreme court, in *Hamilton v. Liverpool, L. & G. Ins. Co.*, founds its decision upon the principle adopted and applied in *U. S. v. Robeson*, 9 Pet. 319, and *Railroad Co. v. March*, 114 U. S. 549, 5 Sup. Ct. 1035. In the first of these cases the amount of compensation was made to depend on the certificate of an officer in the military service, and in the second upon the certificate of an engineer designated "to prevent all disputes." And, indeed, it is difficult to find much difference between such cases and the present. There could be no doubt that, notwithstanding the reference in the contract, in those and the like cases it would have been perfectly competent for the parties to have agreed upon the subject, and thus have dispensed with the reference, so that, in legal effect, the stipulation comes to about the same thing as here.

It devolved, therefore, upon the plaintiff (below) when notified that the amount of his loss was disputed, to obtain an appraisal of the value and damage before he could demand payment of the loss, unless the company expressly or by implication excused it. It was held in *Carroll v. Insurance Co.*, 72 Cal. 297, 13 Pac. 863, that a dec-

laration upon a policy containing such a provision, which did not aver that the amount of loss had been agreed upon or an award made, or give some excuse for not having obtained it, did not state a cause of action. This would accord with the view of several of the judges in the cases cited, who treat the stipulation as of the substance of the things to be done to constitute performance and complete the cause of action. That duty would be discharged by a fair effort to obtain the appraisal, even though the insured failed in consequence of the fraud or misconduct of the other party, the impracticability of organizing the board, or the proceedings becoming abortive by reason of some radical error of the appraisers, or by any other obstacle preventing him for which he was not at fault. When the conduct of the insurer is such as to lead the insured to suppose that performance on his part is not required, or when the insured takes such a position in regard to his liability as plainly to indicate to the other party that the insurer would not pay the loss even if the particular requirement of the policy in respect of the proofs of loss were executed by the insured, he is excused from its performance.

In the complaint of the plaintiff in the court below it was alleged that he delivered to the defendant due proofs of loss, and had done and performed all the conditions in the policy. In the first defense presented by the answer this allegation was denied. The plaintiff below nowhere in his pleadings, either in the complaint or in his original or amended reply, alleges that he had any reason for not demanding an appraisal. He does not allege that he was misled by the defendant, and sets forth no facts from which a waiver could be inferred, except that in the third paragraph of the amended reply it is alleged that the defendant was silent, and made no objections, after receiving the proofs of loss, and thereby waived any or different proofs. But this allegation is disproved by the evidence when it is shown that the defendant signified its disagreement with the amount of the plaintiff's claim. Nor is there anything in the bill of exceptions, which reports the evidence in full, tending to show that the insured made any attempt to procure the appraisal provided for in the policy; and the remaining question is whether he was excused from doing so by the conduct of the company. To operate to that result, the course pursued by it must have been such as to have given him good reason to suppose that a request from him for an appraisal would have been refused. In that case he would not be required to do a vain thing. *Findeison v. Insurance Co.*, 57 Vt. 520; *Devens v. Insurance Co.*, 83 N. Y. 168; *Hambleton v. Insurance Co.*, 6 Biss. 91, 95; *Taylor v. Insurance Co.*, 9 How. 390, 403; *Insurance Co. v. Wolff*, 95 U. S. 326, 330; *Insurance Co. v. Pendleton*, 112 U. S. 696, 709, 5 Sup. Ct. 314.

Tried by this test, the action of the company in its participation in the joint correspondence does not show that the insured had any good reason for believing that the company would not have assented to an appraisal in its case if, without insisting on an unwarranted predetermination of the rules by which the appraisers should be governed, the insured had requested it. In fact, the

whole correspondence, taken together, leads fairly to the opposite inference, and the concluding paragraph of the letter of May 7th from the companies to the insured, which closed the correspondence, tends strongly to indicate that such a proposition from him would have been readily assented to by the company. It was stated in the first letter (that of April 28th) that the several companies waived none of their rights under the terms of their respective policies. The insured must be presumed to have known and understood—what he now contends and the court holds—that the arbitration then contemplated was not the one provided for by the policy, and there was still the same opportunity after as before that correspondence to have obtained the appraisal and award. The case is not like one where one party has lulled the other into a sense of security, or prolonged the negotiations until the time has elapsed within which an act might be done according to the agreement. When the negotiations for a joint appraisal and award ended, and nothing had been accomplished, the parties stood where they did before, and the proper course was still open. Instead of pursuing it, Hamilton proceeded to sell and scatter the damaged property on the 28th of May, at which date only about half of the 60 days given to the company by the policy within which it might take the property at its appraised value had expired. He thereby deprived the defendant of another right secured by the contract, and forfeited his own right of recovery thereon.

For these reasons my opinion is that the direction to find a verdict for the plaintiffs upon the case as exhibited by the pleadings and the evidence was erroneous.

SWAN, District Judge. The plaintiff in error is one of 12 companies which had insured Robert Hamilton against loss or damage by fire on his stock of tobacco in his factory at Covington, Ky. The sum insured by plaintiff in error was \$25,000. The terms of the policy material to the questions presented by the record are the following: The loss was—

"To be paid to the assured or his legal representatives 60 days after due notice and satisfactory proofs of the same are made by the assured and received at their office in Chicago, in accordance with the terms of the policy hereinafter mentioned. * * * (7) Of Losses. In case of loss the assured shall give immediate notice thereof, and shall render the company a particular account of said loss under oath, stating the time, origin, and circumstances of the fire; the occupancy of the building insured or containing the property insured; other insurance, if any, and copies of all policies; the whole value and ownership of the property, and the amount of loss or damage; and shall produce the certificate, under seal of a magistrate, notary public, or commissioner of deeds nearest the place of fire, and not concerned in the loss or related to the assured, stating that he has examined the circumstances attending the loss, knows the character and circumstances of the assured, and fully believes that the assured has, without fraud, sustained loss on the property insured to the amount claimed by the said assured. * * * [Here follow provisions that assured shall, if required, furnish books of account and other vouchers for examination, the original or certified duplicate invoices of all insured property, shall submit to one or more examinations by a person appointed by the company, and shall sign the same when reduced to writing, under the penalty, in case of refusal to meet these requirements, of forfeiting all claim under the policy.] Loss or damage to property par-

tially or totally destroyed, unless the amount of said loss or damage is agreed upon between the assured and the company, shall be appraised by disinterested and competent persons, one to be selected by the company and one by the assured; and, where either party demand it, the two so chosen may select an umpire to act with them in case of disagreement; and if the said appraisers fail to agree they shall refer the difference to such umpire, each party to pay their own appraiser and one-half the umpire's fee; and the award of any two in writing shall be binding and conclusive as to the amount of such loss or damage, but no appraisal or agreement for appraisal shall be construed under any circumstances as evidence of the validity of said policy or of the company's liability thereon. When personal property is damaged, the assured shall put it in the best order possible, and make an inventory thereof, naming the quantity and cost of each article, and upon each article the damage shall be separately appraised; or, if a building, by an estimate in detail; and the report of the appraisers in writing under oath shall form a part of the proofs hereby required, and until such proofs and certificates are produced and examinations and appraisals submitted the loss shall not be payable. The company reserves the right to take the whole or any part of the property so damaged at the appraised value. * * * All fraud or attempt at fraud by false swearing or otherwise shall forfeit all claim on this policy."

April 16, 1886, within the life of the policy, a fire occurred on the premises insured, and, as the assured claims, the stock of tobacco was greatly damaged by smoke, though it was not physically destroyed. April 26th—10 days after the fire—the assured served on the agent of the Connecticut Fire Insurance Company sworn proofs of loss, which were acknowledged by the agent the next day, and transmitted to the home office of the company. The insured's letter accompanying them called attention to the proofs of loss, "with invoice attached in compliance with the terms of your policy," and adds: "If there is any defect in the substance or form of the above proof, please advise me at once, that I may perfect the same to your satisfaction; and return the proof to me in such case for that purpose." His letter further stated that the property described and damaged had been invoiced and arranged, and was ready for examination by the company. The "invoice attached" was headed, "Inventory of Property in Nos. 413 and 415 Madison Ave., Covington, Ky., April 16, 1886," and stated the quantity in pounds, quality, and value of the damaged stock. No objection was made by the company to the proofs, although they were not accompanied by "the report of the appraisers in writing under oath."

On the day following the acknowledgement of the receipt by the agent of the company of the proofs of loss, viz. April 28th, the 12 companies united in a joint demand upon Mr. Hamilton, set forth in the opinion of Judge SEVERENS, notifying Hamilton that they "beg leave jointly to take exception to the amount of claim made, and to demand that the question of the value of and the loss upon this stock be submitted to competent and disinterested persons, chosen as provided for in the several policies of insurance," etc., and "jointly" protested against the removal, sale, or other disposition of the property until such appraisement has been had, etc., and instructs the insured to address his "reply" to the "joint" demand made above in care of, etc. To this demand Mr. Hamilton declined to accede, except upon certain conditions, not acceptable to the company; and

a lengthy correspondence ensued between him and the companies collectively, which is set forth in the cases of *Hamilton v. Liverpool, L. & G. Ins. Co.*, 136 U. S. 242, 10 Sup. Ct. 945, and *Hamilton v. Home Ins. Co.*, 137 U. S. 370, 11 Sup. Ct. 133, and by stipulation is made part of this record. No demand upon the assured for an appraisal other than that evidenced by this joint correspondence, so called, was made by the plaintiff in error. This correspondence closed May 7, 1886, without agreement for the appraisal it proposed having been effected. On May 29th Hamilton sold at auction, pursuant to advertisement, the damaged tobacco.

This suit was brought more than 60 days after the receipt by the company of Hamilton's proofs of loss served April 26th.

The circuit court directed a verdict for plaintiff in error's portion of the loss. Error is assigned upon the instruction.

The first contention of the company is that the "joint correspondence" which passed between the insurers collectively and Mr. Hamilton constituted a demand by the plaintiff in error, under its policy, for the appraisal of the insured property. On this point it is well said by Judge SEVERENS:

"This was not a demand for an appraisal by the insurance company, such as its policy gave it a right to make. It [the company] did not acquire its rights in any respect from the policies of other companies, and it had no legal concern with their disputes or the mode to be adopted for their settlement, and had no obligation to champion their cause or mix its controversy with theirs; and the insured was not bound to accept such proposition for determining the value and damage as was demanded by the companies, this among them. If he had done so, it would have been an arbitration aside and independent of the policy, standing on the general ground of common-law arbitration."

With this I entirely agree. The court below correctly ruled that the joint demand made by the insurance companies, some of whom were not entitled to an appraisal under their policy, could not be held to be the several demands of any of the insurers.

2. The second point urged is that, under the terms of the policy in suit, the appraisement is a condition precedent to an action on the policy, because the appraisal and award are, by the express language of the contract, made "part of the proofs of loss," and the loss is not payable until such proofs are made. It will be seen that the only difference in phraseology between the promise of this company to pay the loss and that expressed in the policy of the Home Insurance Company set forth in 137 U. S. 370, 11 Sup. Ct. 133, is the insertion in the former of the word "satisfactory" preceding the word "proofs," and after the words "at their office in Chicago" the policy in suit attaches to the promise the following: "In accordance with the terms of this policy hereinafter mentioned."

It is not necessary to decide whether these differences qualify in any degree the undertaking of the company to the assured in case of loss, for, if they were intended to make its promise conditional on the satisfactory character of the proofs of loss and their accord with the requirements of the policy, there can be no doubt that the company could waive any defect in them; and its failure to notify the insured of their insufficiency in any particular would not be per-

mitted because of it to defeat the claim of the insured when it had rested its defense upon other grounds, and thereby misled him. The plaintiff in error made no objection to the proofs of loss beyond its joinder with the other insurers in taking "exception to the amount of the claim made," and their demand that the question of value be submitted to appraisers, evidenced by the joint letter of April 28th, which we agree was not a demand for the appraisal stipulated for in its policy. Having thus tacitly accepted the proofs of loss as "satisfactory" and "in accordance with the terms of the policy," and, as we hold, having failed to demand of the insured the appraisal authorized by its policy, the company cannot now be heard to object to the insufficiency of the proofs of loss, notwithstanding the provision that "the report of the appraisers in writing under oath shall form a part of the proofs hereby required," unless the contract expressly or by necessary implication make such appraisal a condition precedent to the assured's right of action.

It is claimed by the company that such is the force and effect of the provisions in this policy, and that the clause that, "until such proofs and certificates are produced, and examinations and appraisals permitted, the loss shall not be payable," in connection with the agreement to refer the valuation to appraisers, manifests the intention of the contract to make the assured's right of action dependent upon and secondary to the appraisal. In support of this position it is contended that this case is not distinguishable from *Hamilton v. Liverpool, L. & G. Ins. Co.*, 136 U. S. 242, 10 Sup. Ct. 945. The policy in that case, after providing for an appraisal substantially like that of the policy in suit, and that unless such appraisal was permitted the loss should not be payable, contained this further condition: "It is furthermore expressly provided and mutually agreed that no suit or action against this company for the recovery of any claim by virtue of this policy shall be sustainable in any court of law or chancery until after an award shall have been obtained, fixing the amount of such claim in the manner above provided," (i. e. by appraisal, as here.) The policy in suit has no such condition. The argument of the plaintiff in error therefore necessarily is that the words in the policy, "the loss shall not be payable," are the legal equivalent of the clause expressly inhibiting suit or action on the policy until after the award of the appraisers. This position cannot be maintained consistently with the ruling in the case of *Hamilton v. Home Ins. Co.*, cited *supra*, in which the policy in suit had substantially the same provision as that of the plaintiff in error here, viz. "that until such proofs, declarations, and certificates are produced, and examinations and appraisals submitted, by the claimants, the loss shall not be payable;" and, like this, had no provision whatever postponing the right to sue until after an award. Under that case it is not enough to bar an action that the contract provided that "the loss shall not be payable" until compliance with the conditions of the contract, but it must also expressly or by necessary implication make the right to sue dependent upon the arbitration, or inhibit suit or action until such compliance. The absence of this latter prohibition is the distinguishing feature

between the case of *Hamilton v. Home Ins. Co.*, 137 U. S. 384, 11 Sup. Ct. 133, and that of *Hamilton v. Liverpool, L. & G. Ins. Co.*, 136 U. S. 254, 10 Sup. Ct. 945. There is no language in the policy under consideration which implies that the appraisal is a condition precedent to the right of action, except the provision that until it is permitted "the loss shall not be payable," which, without more, is insufficient.

This conclusion is fortified by the terms of the policy relative to the appraisal and the nature of the claim made by the assured. Under the terms of this policy, loss or damage to property partially or totally destroyed is classified as a subject-matter of appraisal, distinct and apart from that of "personal property damaged," subsequently provided for in the policy. In the ascertainment of the amount of the loss arising from the partial or total destruction of the property, a complete scheme of appraisal is formulated by the policy, which in express terms makes the award of the appraisers, or, if they fail to agree, and an umpire is appointed, then of any two of the tribunal thus constituted, "binding and conclusive as to the amount of such loss or damage," (i. e., unmistakably, the amount of the loss or damage "to property partially or totally destroyed," and none other.) Beyond the valuation of such property the policy confers no authority upon the appraisers. If this appraisal is properly had, and the loss on this class of property thus fixed, the agreement of the parties has left for judicial inquiry only the validity of the policy and the liability of the company thereon. A subsequent and independent provision of the policy deals with the second class of property thus: "When personal property is damaged, the assured shall put it in the best order possible, and make an inventory thereof, naming the quantity and cost of each article, and upon each article the damage shall be separately appraised; or, if a building, by an estimate in detail; and the report of the appraisers in writing under oath shall form a part of the proofs hereby required." It will be seen from this that the parties have not, by their contract, nominated or agreed upon a tribunal for appraisal of this class of property; nor have they said that the appraisal of the damage of each article shall be "binding and conclusive," nor in any manner defined its effect, but the contract merely declares that "upon each article the damage shall be separately appraised," i. e. justly valued, which is the normal meaning of the word "appraised." It is not said that such appraisal shall be by the same persons whose award upon property partially or totally destroyed is made binding or conclusive "as to the amount of such property," and whose action is expressly limited to such property. Nor is it provided that any "award" shall be made of the damage to personal property "not partially or totally destroyed." The provision that "until such appraisals [plural] are permitted the loss shall not be payable" is demonstrative that the valuation of the loss or damage to "property partially or totally destroyed" and that of "personal property damaged" are separate matters. The appraisers of the first must make an "award" in writing, (not under oath,) which is conclusive and binding; while the valuation of the second class is evidenced by a

mere "report in writing," which is not declared to be binding upon the parties in any respect, and is, in truth, but a part of the proofs of loss. *Hamilton v. Home Ins. Co.*, supra. There is nothing in the language of the policy to exclude the right of the assured, or that of the company's agent, from appraising each article, ("of personal property damaged,") as no method of appraisal of that class of property is contracted for in the policy, while the carefully framed provision for the ascertainment of the amount of loss or damage to property partially or totally destroyed commits the conclusive decision of that question to a tribunal designated and agreed upon by the parties. The inference naturally derivable from the omission to provide a like scheme for the valuation of "damaged personal property," and from the fact that its value is to be evidenced only by a "report in writing under oath" instead of an "award in writing of any two" of the appraisers, is that it was not the intention of the contract to make the result of the separate valuation of each article a finality between the parties, but only evidence for the action of the company. Remembering that the claim of Hamilton is not for "property partially or totally destroyed," but is founded on the damage to the tobacco untouched by fire, claimed to have been done by the taint imparted to it by the smoke, it seems clear that the effect of the provision for appraisal of property destroyed is a question which does not necessarily arise here, and that the valuation of the damage to the stock by smoke is not referred to such appraisers, nor made by the contract a condition precedent to suit on the policy.

A further consideration seems to repel a construction of the policy which would postpone the assured's right of action until an appraisal had been made and reported. The phrase, "and until such appraisals are permitted," is not mandatory upon the assured, but permissive to the company. It modifies the apparently absolute requirement that "loss or damage, unless the amount of said loss or damage is agreed upon between the assured and the company, shall be appraised," etc., and makes it provisional merely. It confers on the company the right to the stipulated appraisal if it be seasonably and properly demanded, and requires the assured to consent to it when thus made. It is not said that the loss shall not be payable until such appraisals are had, but until they are "permitted." It was, therefore, the duty of the company to take the initiative in proceeding for an appraisal. This it failed to do, but united with the other insurers in asserting a joint right of appraisal, which the assured lawfully rejected. Hamilton did not refuse to "permit" an appraisal under the policy, and, as such refusal is made by its express terms the substantial condition on which the "loss shall not be payable," his right of action was neither defeated nor deferred because no appraisal had been had.

For the reasons stated, and agreeably to the principles laid down in the cases cited, the assured's right of recovery is not expressly limited to the sum named by the appraisers; neither is it agreed

that his action shall not be brought until there has been an arbitration, or that arbitration shall be a condition precedent to the right of action. These are the only conditions, as I read *Hamilton v. Home Ins. Co.*, cited supra, approving *Dawson v. Fitzgerald*, 1 Exch. Div. 257, which avail to bar an action on a contract.

Plaintiff in error, by receiving the proofs of loss without objection to the want of the appraisers' report, and by its failure to demand an appraisal authorized by the terms of its policy, waived all objections to the proof of loss, and, in my opinion, the jury were rightly instructed to render a verdict for the plaintiffs.

TAFT, Circuit Judge. This case was once argued before my Brothers SEVERENS and SWAN, sitting as the circuit court of appeals. They were unable to agree. A reargument was ordered, and upon the rehearing I sat with them. The differing views of my brethren remained unchanged by the rehearing, and are set forth in the foregoing opinions, which so fully and clearly state the case and the arguments pro and con as to render any statement or full discussion of the case on my part unnecessary.

Both the judges concur with the views of Judge Sage in the court below, that the demand of the 12 companies in what is called the "joint" correspondence was for a single appraisal by one board of appraisers, and that this demand was not within the requirement of the defendant's policy. The companies and Hamilton seem to have been struggling with the inherent difficulties of the situation, growing out of the great inconvenience which would attend the literal compliance with the terms of all the 12 policies. In their efforts at an agreement, however, they were all, insurers and insured, negotiating outside of the policies, and the demands of each side could not be rested on the terms of the policies. Hamilton, in the case now before us, had furnished proofs of loss in which the amount thereof was fixed by himself. If those proofs had been accepted, then he would have complied exactly with the term of the policy on that subject, for in that case he and the defendant company would have agreed upon the amount of the loss, and the provision for an appraisal would have remained inoperative. Instead of agreeing to the amount of the loss, as fixed by him, the defendant company, with all the others, notify him that they do not agree to it. I conceive that such a notification, though made by 12 jointly, works for the benefit of each company separately. I know no reason why it should not. If they all object, each objects, and it was only necessary that the insured should be advised that the contingency had not occurred which rendered the provision for an appraisal inapplicable. It seems clear, therefore, that while the joint demand for an appraisal or arbitration of the character described in the letters sent by the 12 companies was not a demand for an appraisal secured to the defendant company under its policy, the joint notice of an objection to the amount was a sufficient notice under the policy to apprise the plaintiff, Hamilton, that there could be no agreement between him and the defendant company as to the amount of loss.

While the defendant company was demanding a joint appraisal, and until the "joint" correspondence ceased, obligation on the part of Hamilton to proceed under the appraisal enjoined by the policy was clearly suspended. The last letter of Decamp, agent for all the companies, including the defendant company, advised Hamilton that "if the form of 'submission to appraisers' we submitted contains any provision or condition limiting or defining the duties of the appraisers, and not prescribed by the several policies, each company will submit its own form, as we desire and demand a submission free from any conditions by either party."

By this letter the defendant company assumed an obligation to submit a form of appraisal to Hamilton. Whatever duty, under the policy, there might have been upon Hamilton to take the initial step towards an appraisement after receiving notice of a disagreement as to valuation, so as to fulfill the condition precedent to his recovery, this communication was a clear waiver of that duty by the defendant company. It was a clear invitation to Hamilton to do nothing until the company had acted. The company never did act. It cannot now be heard to say that Hamilton lost all his rights under the policy by a delay which the company itself occasioned. The appraisement was, under this policy, a part of the proof of loss. The conduct of the company was as much as to say: "We have your proof of loss. We object to it, and we will hereafter point out to you the method by which it can be remedied." Subsequent failure to point out the method of remedying it, estops the company from asserting that the proof of loss does not comply with the requirements of the policy.

The action of the circuit court was, it seems to me, right, and the judgment should be affirmed.

UNITED STATES v. POLITZER.

(District Court, N. D. California. December 20, 1893.)

No. 2,773.

POST OFFICE—NONMAILABLE MATTER—LOTTERIES.

Government bonds, issued under a scheme in which the time of redemption and certain premiums or prizes to be awarded to some of the holders are fixed by a drawing, are "lotteries," and the mailing of circulars announcing the redemption of certain bonds, and the date of the next drawing, is prohibited by Rev. St. § 3894. *Horner v. U. S.*, 13 Sup. Ct. 409, 147 U. S. 449, followed.

At Law. Indictment of Adolph Politzer for depositing in the mails certain circulars relating to alleged lotteries.

Chas. A. Garter, U. S. Atty.

Edmund Tausky, for defendant.

MORROW, District Judge, (charging jury.) The indictment in this case contains four counts. They charge substantially:

- (1) That defendant did on the 28th day of November, in the v.59f.no.2—18

year 1890, deposit in the mails of the United States, in the city and county of San Francisco, to be conveyed and delivered by the United States mail, a certain circular, which said circular was then and there contained in an envelope, upon which said envelope was a postage stamp of the United States of the denomination of one cent, and addressed in writing to T. H. Stickler, care John G. Wright, 227 Commercial street, Salem, Oregon. This charge has relation to the first envelope and contents introduced in evidence.

(2) The second count contains substantially the same allegation with respect to an envelope and contents addressed to T. M. Roseberg, care John G. Wright, 227 Commercial street, Salem, Oregon.

(3) The third count contains substantially the same allegation with respect to the envelope and contents addressed to Henry S. Simon, Cigar Store, Salem, Oregon.

(4) The fourth count contains substantially the same allegation with respect to an envelope and contents addressed to Fred Larse, care John G. Wright, 227 Commercial street, Salem, Oregon.

The indictment relates to these four envelopes and contents, charged to have been deposited in the United States mail, to be transmitted by the United States mail, and delivered to the parties to whom they were addressed. The indictment is found under section 3894 of the Revised Statutes. That section provides (so far as is material to this case) as follows:

"No * * * circular concerning any lottery, * * * or other similar enterprise offering prizes dependent upon lot or chance * * * shall be carried in the mail or delivered at or through any post-office or branch thereof, or by any letter carrier. * * * Any person who shall knowingly deposit, or cause to be deposited, or who shall knowingly send, or cause to be sent, anything to be conveyed or delivered by mail in violation of this section, or who shall knowingly cause to be delivered by mail anything herein forbidden to be carried by mail, shall be deemed guilty of a misdemeanor," etc.

Now, the question for you to determine is whether or not this defendant deposited or caused to be deposited in the mails a circular concerning any lottery or other similar enterprise offering any prize by lot or chance. The papers contained in these envelopes have been exhibited to you. They are alike, and are headed, "Redemption List of European Government Premium Bonds," and refer to 5 per cent. Austrian government bonds, 1860; Brunswick bonds of 1868-69; Italian red cross bonds of 1885; Bucharest bonds of 1869; Hungarian red cross bonds of 1883. Together with the reference here made to those bonds, there are the following other statements, with reference to the Austrian government bonds: "Drawing of November 1st, 1890. Next drawing, Feb. 1st, 1891." With reference to the Brunswick bonds of 1868 and 1869, it says: "Each bond of the above series must draw a prize in the premium drawing of December 31st, 1890. Capital prize, marks 60,000." With reference to the Italian red cross bonds of 1885, after giving "Drawing of November 1st, 1890," it says, "Next drawing takes place February 1st, 1891." With reference to the Bucharest bonds of 1869, it says: "Drawing on November 1st, 1890. Next drawing, Feb. 1st, 1891. Capital prize, francs 25,000." As to the Hungarian red cross bonds of 1883, it says: "Redemption of No-

vember 1st, 1890. Next redemption takes place March 1st, 1891."

The present statute prohibiting the sending of matter through the mails relating to lotteries and other similar enterprises originally provided an offense for sending circulars, etc., concerning "illegal" lotteries, but in 1876 congress struck out the word "illegal," and left the statute standing with respect to lotteries and similar enterprises, whether legal or illegal. Prior to that time the Louisiana State Lottery had been authorized by the law of that state, and it is probable the word "illegal," in the statute, was struck out in order to provide against the transmission through the mails of any matter relating to any enterprise similar to the Louisiana State Lottery.

Counsel for defendant has urged that the dealing in, purchasing, or selling of the bonds mentioned in these circulars is not prohibited by the statute of this state. That is true; but it is not material in this case. It is also true with respect to the Louisiana State Lottery. That is authorized by a state statute, but yet the transmission of circulars concerning that lottery has been prohibited by the laws of the United States since 1876. It is your duty to determine whether defendant is guilty under the provisions of the statutes of the United States. You have nothing whatever to do with the provisions of the state statutes in this connection. It is the constitutional province of congress to protect the mail against the transmission of letters, postal cards, circulars, or other mail matter concerning enterprises deemed improper. Therefore congress, under undoubted constitutional authority, has prohibited the sending through the mails of the United States any matter concerning lotteries or other similar enterprises involving lot or chance. Whether it is unlawful under the state law is a matter not under consideration. It is our duty to determine what the law of the United States is, and to administer that law.

With respect to this particular matter, the question whether these bonds, or bonds of the character mentioned here, come within the provisions of the state statute prohibiting lotteries, was raised in the state of New York, and brought before the courts there. The state of New York permitted the dealing in this class of securities. *Kohn v. Koehler*, 96 N. Y. 362. The question whether correspondence relating to such bonds was within the United States statutes was carried to the supreme court of the United States in *Horner v. U. S.*, 13 Sup. Ct. 409, upon three questions presented by the United States circuit court of appeals for the second circuit, as follows:

"(1) Do the bonds mentioned and described in the first and second counts of the indictment herein represent a lottery or similar scheme, within the meaning of section 3894 of the Revised Statutes of the United States?

"(2) Is the circular described and set forth in the first and second counts of the indictment herein a circular concerning any lottery, so-called 'gift concern,' or other similar enterprise offering prizes dependent upon lot or chance, within the meaning of section 3894 of the Revised Statutes of the United States?

"(3) Does the circular mentioned and set forth in the first and second counts of the indictment herein constitute a 'list of the drawings at any lottery or similar scheme,' within the meaning of section 3894 of the Revised Statutes of the United States?"

You observe, in that case it was a circular that was set forth in the indictment. It was the kind of circular charged to have been deposited by the defendant in this case. The defendant in that case was arrested, tried, and convicted by the court. Then those questions were certified to the supreme court, and the supreme court say:

"We are of the opinion that the scheme in question falls within the inhibition of section 3894, as amended. The denunciation of that section is no longer against sending by mail a circular concerning an 'illegal' lottery, but is against mailing a 'circular concerning any lottery, so-called "gift concert," or other similar enterprise offering prizes dependent upon lot or chance.'"

For the purpose of explaining the views of the supreme court, it cited with approval certain definitions of the word "lottery," as follows:

"In the Century Dictionary, under the word 'lottery,' is the following definition: 'A scheme for raising money by selling chances to share in a distribution of prizes; more specifically, a scheme for the distribution of prizes by chance among persons purchasing tickets, the correspondingly numbered slips or lots representing prizes or blanks being drawn from a wheel on a day previously announced in connection with the scheme of intended prizes. In law, the term "lottery" embraces all schemes for the distribution of prizes by chance, such as policy-playing, gift exhibition, prize concert, raffles at fairs, etc., and includes various forms of gambling. Most of the governments of the continent of Europe have at different periods raised money for public purposes by means of lotteries; and a small sum was raised in America during the Revolution by a lottery authorized by the continental congress. Both state and private lotteries have been forbidden by law in Great Britain and in nearly all of the United States, Louisiana and Kentucky being the notable exceptions.' Under that definition, the circular in question had reference to a lottery. In Webster's Dictionary, 'lottery' is defined as 'a distribution of prizes by lot or chance.' In Worcester's Dictionary it is defined as 'a distribution of prizes and blanks by chance; a game of hazard, in which small sums are ventured for the chance of obtaining a larger value, either in money or in other articles;' and it is there said that during the eighteenth century the English government constantly availed itself of this means to raise money for various public works. In the Imperial Dictionary the word is defined thus: 'Allotment or distribution of anything by fate or chance; a procedure or scheme for the distribution of prizes by lot; the drawing of lots. In general, lotteries consist of a certain number of tickets drawn at the same time, some of which entitle the holders to prizes, while the rest are blanks. This species of gaming has been resorted to at different periods by most of the European governments as a means of raising money for public purposes.'"

Now, upon these definitions, the supreme court say:

"Although the transaction in question was an attempt by Austria to obtain a loan of money to be put into her treasury, it is quite evident that she undertook to assist her credit by an appeal to the cupidity of those who had money. So she offered to every holder of a one hundred florin bond, if it was redeemed during the first year, 135 florins, if during the second year 140 florins, and so on, with an increase of five florins each year, until the sum should reach two hundred florins, and she also offered to the holder, as part of the bond, a chance of drawing a prize varying in amount from four hundred florins to two hundred and fifty thousand florins. Every holder of a bond has an equal chance with the holder of every other bond of drawing one of such prizes. Whoever purchases one of the bonds purchases a chance in a lottery, or, within the language of the statute, 'an enterprise offering prizes dependent upon lot or chance.' The element of certainty goes hand in hand with the element of lot or chance, and the former does

not destroy the existence or effect of the latter. What is called in the statute a 'so-called gift concert' has in it an element of certainty, and also an element of chance; and the transaction embodied in the bond in question is a 'similar enterprise' to lotteries and gift concerts."

The supreme court reviews the authorities with reference to what has been considered and commented upon by the various courts of the United States as constituting a "lottery," and finally arrives at the conclusion that the three questions certified to the supreme court should be answered in the affirmative, viz.: "Do the bonds mentioned and described in the first and second count of the indictment herein represent a 'lottery or similar scheme,' within the meaning of section 3894 of the Revised Statutes of the United States?" The supreme court say, "It does." To the second question: "Is the circular described and set forth in the first and second counts of the indictment herein a 'circular concerning any lottery, so-called "gift concert," or other similar enterprise offering prizes dependent upon lot or chance,' within the meaning of section 3894 of the Revised Statutes of the United States?"—the supreme court say, "It is." To the third question: "Does the circular mentioned and set forth in the first and second counts of the indictment herein constitute a 'list of drawings at any lottery or similar scheme,' within the meaning of section 3894 of the Revised Statutes of the United States?"—the supreme court say, "It does." Therefore, so far as the character of these bonds is concerned,—the Austrian government bonds,—the supreme court holds it is a lottery scheme or enterprise offering prizes dependent upon lot or chance. Testimony has been offered in the present case as to the character of these bonds, namely, the Austrian bonds, the Brunswick bonds, the Italian red cross bonds, the Bucharest bonds, and the Hungarian red cross bonds. This testimony tends to show that they involve the element of lot or chance.

In order to convict defendant of the offense charged in the indictment, it is incumbent upon the government to prove two facts: (1) That the defendant knowingly deposited or caused to be deposited in the mails, for conveyance or delivery thereby, the circulars set forth in the indictment; and (2) that such circulars concern a lottery.

Every person is presumed to know and intend the legal and necessary consequences of his own acts. Therefore, if he deposited or cause to be deposited matter in the mail, properly prepaid and addressed, he is presumed to know and intend that such matter would be conveyed and delivered to the persons to whom it is addressed; and proof of such mailing is sufficient to authorize you to find that it was intended for delivery through the mails to the persons addressed. Under the decision of the supreme court of the United States, upon the law under which this prosecution has been brought and conducted, the bonds which have been offered in evidence and explained to you involve the elements of a lottery, in this: the redemption at different times, and the prizes or premiums that are awarded to some of them in different amounts at such redemption, depend on chance or lot. Therefore I charge you that if you shall

find that the circulars set forth in the indictment and produced in evidence before you relate to the bonds I have mentioned, then they relate to and concern a lottery such as the statute contemplates, and are by law nonmailable; and if you shall determine that these circulars, or any of them, were deposited in the mail by the defendant, or under his authority or direction, or caused to be mailed or to be deposited in the mail by him, it is then your duty to find the defendant guilty of the misdemeanor charged in the indictment.

To constitute the offense of knowingly depositing or causing to be deposited in the mail a circular concerning a lottery, it is necessary that the offending party should be conscious of the physical act of depositing or causing to be deposited the circular in the mail, and that he should be aware that such circular related to an enterprise where the premiums or prizes or other important pecuniary detail is determined or fixed by lot or chance. The absence or presence of intent or design to evade the law cuts no figure in the case whatever. Whether or not the defendant knew that he was violating the law, or whether or not he knew of the existence of any such law, is not for you to consider. It is a most elementary principle of legal jurisprudence that ignorance of the law excuses no one. Every one is presumed and bound to know the law of the land; and his ignorance of it or of its effects or operation is no valid defense or excuse for an act committed in violation of it. Therefore I further charge you that if you shall determine that the defendant mailed or caused to be mailed the circulars in evidence, knowing that such act constituted the mailing, and being aware of the fact that the circulars thus mailed related to the bonds produced before you, then it is your duty to find that the defendant knowingly mailed or caused to be mailed such circulars, within the meaning of the statute, and he is guilty, therefore, of the offense charged.

The postmark on the envelope is presumptive evidence of the mailing of the envelope thus marked, with its inclosure, at the time and place designated in the postmark. If, therefore, an envelope have a San Francisco postmark of a certain date, it is presumptive evidence that such envelope, with its inclosure, was mailed at such date in San Francisco. You will further take into consideration in determining the question who mailed the circulars in evidence the circumstantial evidence in that connection, which consists of the testimony of Mr. Ford, the superintendent of the mails in the San Francisco post office, that other and similar circulars were mailed in the city, and passed through this post office in the regular transmission of mail matter, at or about the time of the commission of the offense charged in the indictment. You will also consider the other testimony that the defendant was at such time engaged in the business referred to in these circulars at the place designated in such circulars in San Francisco; and you will further consider the probability or improbability that any other person not connected with or acting under the authority of the defendant would have obtained from him such circulars, and, without his consent, deposited the

same in the mail. You will further take into consideration, in determining the question, the circumstance that the envelopes contained on the outside, "337 Pine Street, San Francisco, Cal.," and that they contained the name of the defendant; and also, on the bottom of the circular, it reads: "All premiums cashed at once. Any information cheerfully furnished at our office. European Premium Bond Exchange. Politzer & Co., 337 Pine St., San Francisco, Cal.,"—and that it appears he was conducting an office at this place, No. 337 Pine street, and that his name is signed at the bottom of these circulars; and also whether it would be likely any other person would take those envelopes containing those circulars, and deposit them in the mail.

The defendant has requested some instructions, which I will give you:

The defendant is presumed to be innocent until proven guilty. The burden of proof is upon the government to establish the defendant's guilt beyond a reasonable doubt. It must so establish every fact and every element going to constitute the offense charged. It is not enough that the defendant deposited, or caused to be deposited, a circular concerning a lottery. He must have done so knowingly; that is to say, he must have deposited these letters containing the circulars knowing that they related to these bonds. The defendant has a right to be a witness in his own behalf or not, as he chooses, and his failure to testify on his own behalf must not in any way be construed by you prejudicially to him. His failure to testify must not and does not create any presumption against him. He has a right to rely upon the presumption of innocence, and to require the government to prove beyond a reasonable doubt every element going to constitute the offense charged. But, gentlemen of the jury, the doubt must be a reasonable doubt. It must be a doubt arising out of the evidence, and not be a fanciful conjecture, or a strained inference. It must be such a doubt, arising out of the evidence, as a reasonable man would act upon or decline to act upon in his own important affairs. You are to determine this case from the testimony, and upon the inferences to be drawn from the facts the testimony has established to your satisfaction. You will find the defendant guilty or not guilty as you find the facts to be upon each or all the counts. There are four counts, and you will find defendant guilty or not guilty upon the four counts. They charge separate and distinct offenses. The testimony is, however, directed towards all four of the counts.

Mr. Tausky: The bond referred to by the supreme court decision was the bond of 1863, which is a different bond from the bond of 1860 in this case. The terms of the bond are entirely different.

MORROW, District Judge: The reading of the decision of the supreme court was for the purpose of stating the views of the court with respect to this class of bonds, as to whether or not they come within the provisions of the statute. The testimony is to the effect

that the time of payment of these bonds depends on a drawing, and the amount to be received as premium depends on a drawing. These drawings involve the elements of chance. It is not necessary for you to find that these circulars refer in every instance to bonds held to involve the elements of chance. If the circulars refer to any bonds of that character, that is sufficient.

Mr. Tausky: We except to the refusal of the court to give all the instructions asked for by defendant.

UNITED STATES v. PATTERSON et al

(Circuit Court, D. Massachusetts. June 1, 1893.)

No. 1,215.

1. **INDICTMENT—DEMURRER—SURPLUSAGE.**

Surplusage in an indictment cannot be reached by demurrer of any character; but, if it be assumed that a special demurrer will lie, it must point out the specific language objected to, and not require counsel and the court to search through the indictment for what is claimed as demurrable.

2. **SAME—CONSPIRACY TO MONOPOLIZE INTERSTATE COMMERCE—ACT JULY 2, 1890.**

An indictment for conspiracy to monopolize interstate commerce in cash registers need not negative the ownership of patents by defendants, or aver that the commerce proposed to be carried on is a lawful one.

3. **SAME—AVERMENTS.**

It is unnecessary to set out in detail the operations supposed to constitute interstate commerce, and in this respect it is sufficient to use the language of the statute.

4. **SAME.**

It is unnecessary to allege the existence of a commerce which defendants conspire to monopolize, as the statute does not distinguish between strangling a commerce which has been born, and preventing the birth of a commerce which does not exist.

5. **SAME.**

The indictment need not show that the purpose of the conspiracy was to grasp the commerce into the hands of one of the defendants, or that defendants were interested in behalf of the party for whose benefit they conspired, or what were their relations to such party.

At Law. Indictment of John H. Patterson and others for conspiracy to monopolize interstate commerce in cash registers, in violation of the act of July 2, 1890.

Elihu Root and F. D. Allen, for the United States.

H. W. Chaplin, for defendants.

PUTNAM, Circuit Judge. This case was heard on general demurrer, February 28, 1893, during the October term, 1892. 55 Fed. 605. The demurrer was overruled as to counts 4, 9, 14, and 18, and as to all other counts the demurrer was sustained, and the counts quashed, and the defendants were given leave to file special demurrers to the counts sustained; and, March 7, 1893, a so-called special

demurrer was filed, within the time allowed therefor. This was brought to the attention of the court, and heard during the same term, May 6, 1893.

In the opinion handed down February 28th, the following occurred:

"The allegations of what was done in pursuance of the alleged conspiracy are, under this particular statute, irrelevant."

Again:

"That the means [intending the means by which the market was to be engrossed or monopolized] are alleged with reasonable precision in the remaining counts appears from the practical application of the rules of pleading appropriate to this case made in *U. S. v. Waddell*, 112 U. S. 76, 5 Sup. Ct. 35. Some of the allegations in each count may be insufficient, but these are only surplusage."

Notwithstanding this surplusage, there was sufficient in each of the four counts which the court sustained to render them valid; and the surplusage is largely of such a character that it is entirely disconnected from the essential allegations, and may be disregarded at the trial. The pleadings, however, are very voluminous, and there may be difficulty in sifting out the insufficient allegations, especially those touching the "means" referred to, from those which are sufficient, and in determining what is thus to be regarded as surplusage; and, as to this, there may prove to be at the trial differences of opinion between the counsel for the United States, the counsel for defendants, and the court. As the indictment runs against many parties, scattered through several states, at remote distances from each other and from the place of trial, and as its subject-matter is complex, and involves a great number of transactions, it appeared to the court that the trial, at the best, would be burdensome and expensive, both for the United States and the accused, and that on this account it was important to minimize this by settling in advance, if it could be done, what should be held to be surplusage. The court was well aware that what are ordinarily spoken of as special demurrers find their origin in the statutes 27 Eliz. and 4 & 5 Anne, and have been held to be limited to proceedings in the nature of civil suits; but it had in thought that, independently of these special demurrers by statute, there was at common law a special demurrer lying against surplusage, which reached also indictments and criminal informations. Such the court understands to be the statement of the law in *Chit. Pl. (7th Eng. Ed.)* 253. The court had no intention that the questions which had been fully raised and carefully argued under the general demurrer should again be brought to its attention, and no other intention than that of assisting in simplifying the course of the trial as above explained. The court is, however, now forced to the conclusion that surplusage in indictments cannot be reached by demurrer of any character. Such is positively laid down as the law in *Steph. Pl. (3d Amer. Ed.)* 365; *Heard, Crim. Pl.* 140, 271; and is also stated by Lord Cranworth in *Mulcahy v. Reg.*, *L. R. 3 H. L.* 306, 329. If, however, the law is otherwise, and surplusage and irrelevant matter in indictments may be

made the subject of a special or limited demurrer, what has been filed by the defendants in this case, under leave granted February 28th, would be insufficient, because it is expressed in general terms, and requires the counsel for the United States and the court to search through the indictment for what is claimed to be demurrable, when, by all the rules of pleading, it ought to set out the specific language objected to, and ask the ruling of the court on that alone. The reason touching this proposition stated in Story, Eq. Pl. § 457, applies everywhere. Clearly is this so in this case, because this so-called special demurrer is expressly to the entire 4th, 9th, 14th, and 18th counts.

It seemed to the court that there must be some way by which, as a matter of right, parties brought in on a complex and voluminous indictment may have settled in advance of the trial what portions of it, if any, are surplusage. It has been frequently said—certainly with reference to civil proceedings—that surplusage might be rejected on summary motion, and the pleadings left to stand as though it had been struck out or never inserted. Gould, Pl. (4th Ed.) c. 3, § 170; Chit. Pl. (7th Eng. Ed.) 252; and many other authorities. It also has been understood that in criminal cases it might be disposed of to a certain extent by a *nolle prosequi*, and that this would apply to a separable part of any one count, as well as to the whole of a count, or to an entire indictment. Bish. Crim. Proc. (3d Ed.) § 1391. The general expressions, however, of the opinion in *Ex parte Bain*, 121 U. S. 1, 7 Sup. Ct. 781, are sufficient to cause this court to proceed no further with these suggestions, unless the subject of them is formally brought to its attention and counsel are duly heard.

On the whole, therefore, the court is compelled to conclude that the permission which it gave to defendants to file a special demurrer was perhaps inadvertent, and certainly has proved ineffectual for the purposes which the court had in mind. The counsel for the defendants, however, have availed themselves of this permission to reargue several of the propositions submitted at the hearing on the general demurrer, apparently insisting that they were overlooked by the court, because not noticed in its opinion passed down February 28th; and they also present at least one additional proposition. Many points were raised on demurrer by counsel for the defense, some of them of great importance, and some of a minor character; so that a full exposition of the views of the court touching every question which was presented, would have resulted in an opinion too lengthy to be excusable as coming from a tribunal for whose errors there is ample remedy by appeal. Therefore the court touched in its opinion only the salient features of the case. Under the present circumstances, however, the court feels called on to notice briefly some of the points which have been pressed anew on its consideration.

The claim that the indictment should negative the ownership of patents by the defendants, and also set out that the commerce carried on, or proposed to be carried on, by the National Cash-Register

Company, was a lawful one, and perhaps some other matters of that character, proceeds on the hypothesis that its allegations should be certain to every intent,—a rule which applies only to pleas in abatement. All such are matters of defense, not to be anticipated by the prosecutor.

The claims that these counts left it for the prosecutor, and not for the court, to decide whether they state subject-matters of interstate commerce, and also that it is necessary that they should set out in detail the operations supposed to constitute interstate commerce, are not maintainable, because, so far as this feature of the indictment is concerned, it is clearly sufficient, according to numerous decisions of the supreme court, which need not be cited, to use the language of the statute. The suggestion of the court, in the opinion passed down February 28th, that the statute is not one of a class where it is sufficient to declare in the words of the enactment, related to the particular proposition then under consideration.

As to all the propositions touching the existence of commerce in cash registers, or knowledge, or want of allegation of knowledge, on the part of the accused, it is sufficient to say that those counts which do allege the existence of such commerce also allege positively knowledge on the part of the defendants; and those which do not allege such existence are sufficient, because neither the letter of the statute nor its purpose distinguishes between strangling a commerce which has been born and preventing the birth of a commerce which does not exist. On this point, also, in the opinion of the court, it is sufficient to use the language of the statute.

Much of what is said by the defendants about judicial knowledge touching cash registers and patents has no application to common-law proceedings, especially on the criminal side of the court, and the court will not take time to enlarge upon this.

The suggestion that no count alleges an intent to injure or defraud the public by raising the price, or otherwise, relates to indictments of an entirely different character from this at bar, and to conspiracies which are illegal in their essence, without reference to the means adopted to accomplish their purposes.

As to the proposition that the National Cash-Register Company is not alleged to have been a party to the conspiracy, the court went, in this direction, to the extreme limit which the letter of the law would permit. It sustained only those counts which alleged a combination for the purpose of engrossing, monopolizing, or grasping the trade in question, and rejected all those counts which alleged only an intention to destroy certain competitors named. Beyond that the court purposely left its opinion in an indefinite form, because neither the letter of the statute nor the philosophy of pleading conspiracies require that it should appear that the purpose was to engross, monopolize, or grasp into the hands of one of the persons indicted, or that the defendants were interested in behalf of the party for whose benefit they combined to monopolize, engross, or grasp, or, indeed, what their relations were to that party. Even if the statute should finally be held to be limited to combinations to engross, monopolize, or grasp in behalf of some party to the

combination, yet there remains the well-known rule of law that it is unnecessary to indict all the persons involved in a conspiracy. Of course, the court would have felt less doubt in meeting this objection if it had been alleged that the corporation named was a party to the conspiracy, or if the relations of the accused to it, or some other matter of a kindred character, had been set out. It may be that, when the proofs are developed at the trial, some unforeseen difficulty will arise, which need not now be anticipated; but, on the whole, the court concluded that this objection was not well taken.

In order that the defendants' exceptions may be undoubtedly saved at this term, the general demurrer having been overruled at the last, and that the defendants may be able to show to the appellate court specifically the points taken on demurrer in this court, I conclude to regard the so-called "special demurrer," in connection with the motion filed March 17, 1893, as a petition for a rehearing, and the clerk will enter the following order:

Leave to the defendants to file special demurrer granted February 28, 1893, annulled as inadvertent. Petition of defendants for rehearing on general demurrer granted. Order overruling demurrer as to counts 4, 9, 14, and 18, entered February 28, 1893, annulled. Matters set out in the so-called "special demurrer" are, by leave of court, assigned as additional causes for demurrer under the general demurrer. Counsel for the defendants and for the United States heard anew touching demurrer to counts 4, 9, 14, and 18. Demurrer overruled as to those counts; defendants to answer over, as provided by statute.

NEW HOME SEWING MACH. CO. v. BLOOMINGDALE et al.

(Circuit Court, S. D. New York. December 30, 1893.)

TRADE-MARK—INFRINGEMENT.

The use of the word "Home" in connection with a make of sewing machine for over 25 years entitles the manufacturer to protection against one who puts the words "Home Delight" in a similar way on machines offered for sale by him.

In Equity. Suit by the New Home Sewing Machine Company against Lyman G. Bloomingdale and others to enjoin infringement of a trade-mark. Injunction granted.

John Dane, Jr., for orator.

D. Solis Ritterband, for defendants.

WHEELER, District Judge. The pleadings and proofs show that during about 25 years the predecessors of the orator have, and lately the orator, a corporation of Massachusetts, has, used the word "Home" in making and selling sewing machines; that by this name, which was registered by them as a trade-mark March 15, 1892, their machines acquired a wide and favorable reputation; and that the defendants are putting the words "Home Delight" in

a similar way upon sewing machines offered by them for sale. This use of that word seems to be well calculated to lead ordinary purchasers of such machines to think that these machines come from the orator or its predecessors. The defendants have no right to so pass off their machines as those of the orator. *McLean v. Fleming*, 96 U. S. 245. This proof is sufficient for preventive relief without proof of actual sales by these means of defendants' machines for the orator's.

Decree for orator for an injunction.

WALES v. WATERBURY MANUF'G CO.

(Circuit Court, D. Connecticut. January 1, 1894.)

1. PATENTS—ANTICIPATION.

One who takes old devices, having material defects, and, with a definite idea of remedying the same, retains the desirable features, and adapts them by novel modifications to new and varying conditions, so as to produce an article confessedly superior to all others, is not anticipated by such prior devices.

2. SAME—INVENTION—PRIORITY—LEVER BUCKLES.

The Wales patent, No. 172,527, for an improvement in lever buckles, was not anticipated as to claims 1, 2, and 3 by the House or Wardwell patents, Nos. 147,325 and 152,200; and was prior in time to the Smith patent, No. 167,947; but is void for want of invention as to claims 4, 5, and 6.

In Equity. Suit by Harriot H. Wales against the Waterbury Manufacturing Company for infringement of patent. Decree for complainant.

Geo. R. Blodgett, for complainant.

Geo. E. Terry, for defendant.

TOWNSEND, District Judge. This is a bill in equity, alleging infringement of letters patent No. 172,527, granted January 18, 1876, for an improvement in lever buckles. The defense alleges prior invention by Dwight L. Smith, and anticipation by prior patents. Complainant's device belongs to the class of lever buckles adapted to receive the edge of a fabric of indefinite length, and to hold it in attachment by the use of a lever. It consists of a metal blank, constituting the baseplate, with its two opposite sides so bent as to form side lugs parallel to each other at right angles to said plate. The base plate is slitted at the sides or corners, and extends at its center beyond said lugs, so as to form a tongue. The outer or lower ends of the side lugs are perforated, so as to make the bearings for a lever. This lever consists of another metal blank, having one of its ends so bent at right angles to the main part or body of the blank, and so journaled at the corners made by said angle, as to bring the bent end of said lever against the base plate, and at right angles thereto when the buckle is closed, and to then permit the body of the lever to fit between the upturned sides of said lugs.

The claims of said patent are as follows:

"(1) In a lever buckle, the base plate, A, having slots or openings, F, F, substantially as and for the purpose herein set forth. (2) The combination of the lever, C, with the base plate of lever buckles, having the cuts or openings, F, F, therein, substantially as and for the purpose herein set forth. (3) The combination of the lever, C, with the base plate of lever buckles, having slots or openings, F, F, therein, and the spring tongue, D, substantially as described. (4) The combination of the lever, B, with the body plate of lever buckles, having the cuts or openings, F, F, therein, substantially as and for the purpose herein set forth. (5) The combination of the two levers, B and C, with the body plate of lever buckles, having the cuts or openings, F, F, therein, substantially as and for the purpose hereinbefore set forth. (6) A lever buckle, having at one end the lever, C, slots, F, F, and spring tongue, D, and at the other a suitable fastening device, substantially as described."

In support of the claim of anticipation defendant introduced in evidence certain patents, and certain models showing modifications thereof. Several of said exhibits were introduced for the purpose of showing that there was no novelty in claims 4, 5, and 6, for the combination of double levers, working in opposite directions, at opposite ends of the same plate; or for the combination of one lever with a suitable fastening device at the other end of the buckle. Said claims for said alleged combinations are so manifestly void for lack of invention or patentable novelty, in view of the state of the art, that I shall not consider the evidence thereon.

The main object of the alleged invention was to provide a buckle by the use of the rigid upturned lugs and the slitted sides, into which material of a greater width than the body of the buckle, and of varying thicknesses, might be passed beyond the pivot bearings, and firmly gripped by the lever at a point opposite the bearing point of the lever, and considerably within the edge of the fabric.

It is alleged that patent No. 147,325, granted to Henry A. House, February 10, 1874, and No. 152,200, granted to W. S. Wardwell, June 16, 1874, show a clear embodiment of the device covered by claims 1, 2, and 3 of the patent in suit. The Smith patent will be considered later. The buckle made in accordance with the House patent shows a form of construction whereby a blank is bent in the shape of a U, so that the bent portion is parallel with the body of the blank, and forms its face. The ends of the bent portions are turned up, so that the bearings of a grip lever may be journaled therein. The bend in the blank furnishes the spring action of the buckle. The chief defects in this buckle were the following:

(1) The U shape of the blank prevented its use as a strap buckle; that is, where a fabric, like a suspender, was not to be gripped on its edge, but was to pass through the buckle. (2) The U-shaped blank furnished a weak spring for the buckle, and an inadequate bearing for the lever. (3) The limited space between the point of contact of the lever and the bend of the blank, was insufficient to receive a fabric of any considerable length; while the lengthening of the ends of the bent blank, so as to afford greater receiving distance, would so further weaken the spring as to unfit it to exert a grip on the fabric.

The insufficiency of the spring was recognized, and an attempt made to remedy it in said buckle as manufactured, by having the back of the blank or base plate cut out, so as to admit and hold an extension of the engaging end of the grip lever.

The Wardwell buckle has the sides of the base plate upturned at right angles, said sides being journaled at one point to receive the bearings of the grip lever, and at another point to receive the bearings of an accessory plate interposed between the grip lever and the base plate. A flat spring is riveted to the base plate, so as to hold said accessory plate open when not in engagement. The grip of the fabric is secured in this buckle by extending the base plate and accessory plate so as to form jaws beyond the side lugs of the lever. The chief objections involved in this construction are the following:

(1) In no case can a fabric wider than the body of the buckle be inserted under the actual bearing point of the lever. (2) The strongest compression of the jaws of the two plates against such fabric must necessarily be at its extreme edge. (3) The pressure of the material against said plates beyond the bearing point of the lever would naturally cause the accessory or clamping plate to so bend or flare outwardly as not to grip the material. (4) The riveted spring interferes with the practical use of the buckle to receive materials intended to pass through the buckle. (5) The rear end of the lever is not housed or protected when the buckle is closed. (6) As the bearings of the lever are at the point of its contact with the base plate, the base plate is necessarily rigid at that point. (7) It necessarily results from these features of construction and operation that there is practically no spring action at the point of greatest pressure, and no adaptability to receive and hold fabrics of varying thicknesses.

When Wales set out to devise a lever buckle, the field for invention was very limited. But there was some inherent defect of construction, or difficulty in the way of practical operation, in all of the buckles previously manufactured. None of them was adapted for all the various purposes for which such a buckle is to be employed. Under these circumstances he invented something new in construction and operation, accomplishing the new and useful results of adaptability to all lengths widths and thicknesses of fabrics, of a firm grip, by the new means of a combination of elastic base plate and rigid upturned side lugs, slitted so as to receive the edge of the fabrics beyond the grip of said lever, and of a bearing of the lever upon the fabric at the point where its leverage was greatest, said elastic base plate forming a spring tongue, whose action was independent of the proportion and construction of said lever bearing. By this mode of construction he also secured a protection for the rear end of the lever, so that when the buckle was closed, it would be housed, and kept in position by the upright side lugs. The only question is whether such an invention discloses patentable novelty, or whether it would naturally have occurred to any person skilled in the art. That it did not so occur, either as to

means or result, is evident from the patents heretofore discussed, and from others in evidence in the case.

The following considerations seem to me to be pertinent to this inquiry: The old, simple side-lug buckle was impracticable. House, Wardwell, and Wales had it before them. Each tried to invent an improvement. Each secured, in a different way, a result, and each obtained a patent therefor. That the improvements of House and Wardwell presumably involved invention, and that the improvement of Wales accomplished other and more useful results, suggest that the prior inventors must have striven to accomplish these results, and failed, and that such improvements involved the exercise of invention, and would not have occurred to any person skilled in the art. *Thomson v. Bank*, 3 C. C. A. 518, 53 Fed. 250.

That Wales had these buckles before him seems to support the claim that his buckle involved creative skill, for, instead of following out their ideas, he recognized the defects necessarily inherent in their plans of construction, and abandoned them. It was not, therefore, the "carrying forward of the original thought," but the introduction of new features, producing better results, not analogous to the old results, and of such a character as to require the exercise of the inventive faculty to conceive and produce them. *Manufacturing Co. v. Cary*, 147 U. S. 623, 13 Sup. Ct. 472; *Ansonia Brass & Copper Co. v. Electrical Supply Co.*, 144 U. S. 11, 12 Sup. Ct. 601; *The Barbed-Wire Patent*, 143 U. S. 275, 12 Sup. Ct. 443, 450.

It seems to me that the patentee had a definite object in view, and a distinct idea of means appropriate to effect such object, and that the difficulties obviated and results accomplished show him to have been a meritorious inventor, and, as such, entitled to a patent.

It may be said generally, in regard to the defense of anticipation, that it proceeds upon the theory that anticipation is necessarily proved by merely showing one prior solution of a problem. This theory overlooks the consideration that, even if in this case the House or Wardwell buckle had completely fulfilled all the requirements of a practical buckle, yet, if another person afterwards invented a new way of accomplishing the same result by the application of a new means to produce such result in a different way, he might be entitled to a patent therefor. Wales did not take the U buckle of House, nor the projecting clamp buckle of Wardwell. He did not avail himself of the ideas embodied in either of these inventions, but went back to the old familiar form of side-lug buckle, and, taking it as a basis, retained its desirable features, adapted them by novel modifications to new and varying conditions, and thereby evolved not only a new buckle, operating on a new principle, but one confessedly possessing marked advantages over all of those already invented.

Upon the defense of prior invention it appears that on September 21, 1875, patent No. 167,947 was granted to one Dwight L. Smith for a buckle embodying substantially the same invention as that claimed in the patent in suit. The applications for these patents were in interference, and the question of priority of invention was

decided by default in favor of Wales, the assignor of complainant. But defendant claims that before the alleged invention of Wales said improvement in buckles was known to and used by said Smith. It appears that Wales made his first drawing of the patented article between August or September and December, 1873, and the model thereof about December 12, 1873. Smith testified in his direct examination that as early as November 1, 1873, he made a drawing and model, embodying the invention claimed in his patent. In the interference proceedings he stated that he conceived the invention in the autumn of 1873, made a drawing as early as November 1, 1873, and a model as early as May 1, 1874. On cross-examination, he testified as follows:

"Cross-Int. 20. Did you file a preliminary statement in that case? Ans. I do not now recollect whether I did or not. Cross-Int. 21. If you did file a preliminary statement, and the same differed to any extent from your present testimony, to which would you give the preference in point of accurate recollection,—your present memory or your statements in the preliminary statement? Ans. As the matter at that time was more fresh in my memory, I should say that with regard to the testimony given at that time I should be more likely to be correct than now. Cross-Int. 22. Do you intend by your present testimony to make any claim that you made a model exhibiting the invention described in your patent earlier than the earliest date named by you in your preliminary statement? Ans. I do not."

His explanation, on redirect examination, of the apparent discrepancy between these statements, is as follows:

"R-D. Q. 33. I have before me a certified copy of the proceedings in the interference case between yourself and Mr. Wales, wherein it appears, in your preliminary statement, you used this language: 'The following spring,' (that is, in 1874,) 'as early as May 1st, I made a model substantially like the model accompanying the application for patent.' Does this refer to the model offered in evidence and marked 'Defendant's Ex., Smith Model No. 1,' or to some other model? A. It refers to another model embodying the same principle. R-D. Q. 34. Do you still adhere to your former statement that the buckle marked 'Defendant's Ex., Smith Model No. 1,' was made about the time you conceived the invention contained in the said letters patent, or do you wish to qualify it as having been made at a subsequent time, as would have been implied by the cross-examination? A. If I should tell what I thought, I should say it was made about the time the drawings were made, or soon after, which was in the fall of 1873; but I can't tell positively."

This indefinite statement, taken in connection with the admission upon cross-examination and the interference proceedings, seems to me insufficient to sustain the burden of proof that said Smith was the prior inventor.

The complainant is the wife of the patentee, and acquired title to said patent in 1879. In 1880 she granted an exclusive license to the defendant to make the patented buckles under a royalty, which license was forfeited by defendant, and was canceled June 4, 1881. Since the termination of said license, defendant has continued to manufacture and sell buckles covered by the claims of said patent. It is alleged, and is not denied, that defendant also continued to put such buckles on the market, on cards identical in size, design, and in all other respects, with those designed by the patentee, and used by defendant during the continuance of said license,

except that the patent date stamped on said cards has been changed from that of the patent in suit to that of said House patent.

The defendant practically admits infringement. From one of the exhibits it appears that it has used a bearing plate interposed between the grip lever and the base plate. This is not essential, does not affect the relation or operation of the infringing device, and is either a colorable modification or one which has been adopted for convenience. In view of all these circumstances, I think the evidence of practicability, adaptability, and general utility should resolve any possible doubt in favor of complainant. He has confessedly presented the most useful, and apparently the only practical, solution of the problem presented, and is entitled to the benefit of his patent for the invention as described by him, and claimed in claims 1, 2, and 3 of said patent.

Let there be a decree for an injunction and an accounting as to said claims 1, 2, and 3.

CARL L. JENSEN CO. v. CLAY.

(Circuit Court, D. New Jersey. December 22, 1893.)

PATENTS—INFRINGEMENT—PEPSIN.

The second claim of the Jensen patent, No. 286,138, which claims, as a new article of manufacture, pepsin made according to the process described and claimed in the patent, is not infringed by pepsin produced by dialysis according to the Russell patent, No. 424,357.

In Equity. Suit by the Carl L. Jensen Company against John Bill for infringement of a patent. Bill dismissed.

Joshua Pusey, for complainant.

William P. Chambers and George H. Lothrop, for defendant.

ACHESON, Circuit Judge. The bill charges the defendant with infringement of letters patent No. 286,138, dated October 2, 1883, granted to Carl L. Jensen for improvements in the manufacture of pepsin. The patent has two claims; the first for the described process of manufacture, the second for the product. The process consists in finely cutting up the mucous membranes or the whole stomachs of animals, placing the same in a vessel containing acidulated water, and subjecting the mixture to heat, whereby an artificial digestion takes place akin to the action in the natural stomach, resulting in a sirupy liquid or peptone, which, "after clarifying and purifying by any of the well-known methods," is spread on glass plates to dry, and is then scraped off, and the flakes or scales passed through a fine sieve. The defendant did not manufacture the pepsin complained of, but merely sold it; the manufacturer being Parke, Davis & Co., a corporation of the state of Michigan. For convenience, however, it will hereinafter be designated as defendant's pepsin.

The charge of infringement of the first claim of the patent is not insisted on. The second claim (the one here involved) is in the words following:

"(2) As a new article of manufacture, the within-described pepsin in the form of hard scales or crystals, transparent, odorless, tasteless, capable of being permanently preserved, freely soluble in water without the use of acid, free from inert additions, and having a digestive power of one to seven hundred, substantially as set forth."

The defenses are: (1) That the patented article was put in public use and on sale in this country by the patentee more than two years before his application for a patent; (2) that it was known, made, and used by others in this country prior to his invention; (3) noninfringement. In the view I take of the case, it will only be necessary for me to consider the defense last mentioned. Upon principle and authority it is clear that the second claim of the patent in suit covers only pepsin manufactured by the process described in the patent, or by substantially the same process. *Dittmar v. Rix*, 1 Fed. 342; *Pickhardt v. Packard*, 22 Fed. 530; *Smith v. Vulcanite Co.*, 93 U. S. 486, 493; *Cochrane v. Soda Fabrik*, 111 U. S. 293, 310, 313, 4 Sup. Ct. 455; *Bene v. Jeantet*, 129 U. S. 683, 686, 9 Sup. Ct. 428. The real question, then, is, was the article sold by the defendant made in the mode described by Jensen, or by an equivalent process? The burden of proof to show infringement is, of course, upon the plaintiff. No direct evidence has been given by the plaintiff to show how the defendant's pepsin was manufactured. The plaintiff's case rests exclusively upon the alleged correspondence in physical qualities between the Jensen pepsin and the defendant's. At the most, however, such evidence only makes out a *prima facie* case of infringement. But here the defendant has produced positive and uncontradicted testimony that his pepsin was made in accordance with letters patent No. 424,357, dated March 25, 1890, granted to John B. Russell. In this state of the proofs, the positive evidence should prevail. *Bene v. Jeantet*, *supra*. From the mere grant of the Russell patent there arises a presumption that the process therein described is distinct from that of Jensen. That the two processes are different in principle appears upon a comparison of the patents and a consideration of the proofs. Jensen's process aims to retain all the peptone formed in the digestion of the stomach tissue, and also preserves the other soluble products of digestion. On the other hand, the Russell process reduces the peptone and soluble mineral matter, and to that end the peptic solution is subjected to dialysis.

It is very clear from the evidence that the words "clarifying and purifying by any of the well-known methods," as found in Jensen's patent, were not intended to cover the use of a dialyzer. Upon this point, Prof. Stebbins, the plaintiff's expert, testifies:

"It is, however, my opinion that the process of clarifying and purifying referred to in Jensen's patent meant only the removal of the coarser particles of material, consisting of fat, adipose tissue, and certain mineral matter, by filtration or other means."

This witness also states that the process of dialysis would unquestionably remove a portion of the peptone, and also change the percentages of mineral salts present in the pepsin solution. In this connection, the following extract from the testimony of Prof.

Stebbins, who was the only witness called by the plaintiff to prove infringement, deserves serious consideration:

"67 R. C. Q. In your answers to 47 and 48 R. D. Q.'s, do you intend to draw a distinction between pepsin made by a process which aims at separating a portion of the peptone and the pepsin of the Jensen patent? A. Well, I think a distinction should be made, inasmuch as the two kinds of pepsin would differ considerably in their physical, as well as chemical, characteristics. 68 R. C. Q. Then you would consider a pepsin made by a process which partially separated the peptone as a different pepsin from that described and claimed in the Jensen patent? A. I would."

Now, under the proofs, it is not to be doubted that by the process followed in the manufacture of the defendant's pepsin the peptone is partially eliminated. According to analyses made by Prof. Chittenden, the defendant's expert, the percentage of ash and water together in the Jensen pepsin amounts to 19.22 against only 8.09 in the defendant's pepsin, showing a difference in favor of the latter of over 10 per cent. in these two inactive substances; and, comparing peptone with peptone, the defendant's pepsin contains 5.9 per cent. less peptone than Jensen's, so that the defendant's pepsin has 16.22 per cent. less inactive matter than the Jensen pepsin. But this is not all. Calculated on an ash-free and a water-free basis, which is the true method of comparison, the difference in peptone is 14.26 per cent., this being the reduction of peptone in the defendant's pepsin as the effect of dialysis. In digestive power, which is the test of therapeutic value, the difference in favor of the defendant's pepsin is remarkable, Jensen's pepsin being only a little more than one-third as strong as the defendant's. In view of these facts, Prof. Chittenden's opinion is that the two forms of pepsin are decidedly different. The attention of Prof. Stebbins, upon his cross-examination, was called to the relative strength of the two preparations, and his answers (which follow) are very significant:

"33 C. Q. How, then, do you account for the fact that you found the defendant's pepsin much stronger than the Jensen pepsin? A. I can't account for it, unless it is owing to some special mode of preparation." "29. C. Q., (in rebuttal.) The ferment pepsin in both Jensen's and defendant's preparations of pepsin being the same, is it not certain that there must be some great difference between these preparations to account for their great difference in digestive power? A. Unquestionably there is some great difference, other than the differences already mentioned, namely, the quantities of ash, moisture, and peptone; but what this difference is, I am unable to say."

The inability of this witness to explain to his own satisfaction the striking difference in strength between the two preparations, which undeniably exists, is the less surprising when it is remembered, as he himself states elsewhere in his testimony, that pepsin is a very obscure thing, not fully understood by scientific men, and has never been isolated in an absolute state of chemical purity.

Another quotation from Prof. Stebbins' testimony is here pertinent:

"48 C. Q., (in rebuttal.) Does not the therapeutic value of a preparation of pepsin depend upon its digestive power? A. It does. 49 C. Q. And does not the enormous difference in digestive power between the Jensen pepsin and the defendant's pepsin mark a great advance in this art? A. It certainly marks an advance; yes."

Now, in dealing with the question of infringement here involved, it is to be borne in mind that in the preparation of pepsin as an article of pharmacy Jensen was by no means a pioneer. Its extraction from the stomachs of animals by mincing the mucous membranes and producing artificial digestion thereof under the action of diluted acid and heat, was old and well known, as appears from Foster's Physiology, published in 1877, and as, indeed, may be inferred from the recital in Jensen's own patent. Neither was Jensen the first to prepare the article in the form of scales produced by evaporation to dryness of the peptic solution.

The evidence fully justifies the conclusion that Jensen's patented process will not make the defendant's pepsin. This is shown by Prof. Chittenden's experiments, to which he testifies. I discover nothing in the proofs to discredit his tests. Then, again, the Jensen patent itself fixes the digestive power of the product at 1 to 700 only. Here, too, the testimony of the plaintiff's witness William H. Ball is important. He has been in the plaintiff's service since the middle of the year 1890, and fully understands the process it employs. He says that when he first became connected with the plaintiff company the digestive power of the pepsin then made by it was 1 to 600, but that at the time he testified (February, 1892,) the digestive power of the pepsin the plaintiff was then producing was 1 to 1,800. He was asked to describe the process by which the plaintiff then manufactured its pepsin, but declined to do so. The inference is irresistible that Jensen's patented process will not produce a pepsin having the digestive power of that sold by the defendant, and that the plaintiff is employing other and secret means to secure such result. Taking the proofs as a whole, it is clear to me that they fail to make out the charge of infringement; and therefore, without passing upon the other defenses, the bill of complaint will be dismissed.

Let a decree be drawn dismissing the bill, with costs.

BUNDY MANUF'G CO. v. COLUMBIAN TIME-RECORDER CO.

(Circuit Court, S. D. New York. January 4, 1894.)

PATENTS—INFRINGEMENT—WORKMEN'S TIME RECORDER.

The Bundy patent, No. 482,293, for a workmen's time recorder, in which the impression platen is operated by a check in the hands of the workman, is not infringed by a machine in which the platen is operated by clockwork previously wound up.

In Equity. Suit by the Bundy Manufacturing Company against the Columbian Time-Recorder Company for infringement of a patent. Bill dismissed.

C. W. Smith, for orator.

Alen D. Kenyon, for defendant.

WHEELER, District Judge. This suit is brought for alleged infringement of letters patent No. 482,293, dated September 3, 1892, and granted to the orator, as assignee of William L. Bundy, for a

workman's time recorder. In these machines, time wheels, with dates to hours and minutes in type on their faces, are moved by clockwork so as to present these dates synchronously with the clock to an impression platen moving on a rock shaft set in motion by a check on which the workman's number is placed in type sent down a chute, in which it is stopped near the time wheels; and this number and the time are there printed from the type on a strip of paper passed along under a ribbon by a blow from the platen, and the check is then released, and dropped into a receptacle below. Thus the time of inserting the check for beginning or quitting work by the workman represented by the number on the check is correctly recorded and kept on the strip of paper. Machines for recording the time of workmen by printing from types on the faces of time wheels on the turning of cranks or keys existed before this invention. By the method of the orator's patent, the check, when inserted by force of the workman, moves a lever, which is connected by a rod to a crank arm on the rock shaft, and moves the platen away from the faces of the time wheels against the force of a spring, to where it is held until the check in falling strikes another lever extending into the chute, and releases the platen, which, by force of the spring and its own weight, is brought back, and prints the number of the check and the time on the strip of paper. Five claims are alleged to be infringed, which are for:

"(1) In a workman's time recorder, a check, in combination with a check chute, a lever projecting into it, a rod connected to said lever, a rock shaft, and a crank arm thereon, to which said rod is connected.

"(2) In a workman's time recorder, a check, in combination with a check chute, a lever projecting into it, a rod connected to said lever, a rock shaft, a crank arm thereon, to which said rod is connected, and an impression platen mounted upon an arm secured to said rock shaft."

"(5) The combination, with the impression platen, of a rock shaft, to which it is connected, and means to rotate said crank shaft, actuated by the insertion of a check into the check chute."

"(13) In a workman's time recorder, a clock, time wheels synchronous therewith, a rock shaft, and an impression platen connected thereto and actuated thereby, in combination with a check chute, a rod connected to said rock shaft, a lever connected to said rod and projecting into the check chute, and a check operatively engaging with said lever to rotate said shaft when inserted into said chute.

"(14) In a workman's time recorder, a check, a check chute, and a sliding stop, holding the check upon the printing line, in combination with an impression platen thrown away from the chute by the insertion of the check into the chute, and an arm upon the platen engaging said stop to release said check at the same moment that the impression blow is given by the platen."

In the defendant's machine the impression platen is moved on a rock lever to strike its blow by clockwork separate from the time works, wound up and carried by a spring, and set in motion, at the right moment for printing the number and time, by the weight of the check falling upon a lever extending into the chute, and connected with this clockwork. The first question made for the defendant is whether this is an infringement of any of these claims. These claims do not in themselves refer to the previous description of the parts of the machine mentioned in them, but they must be

taken as, in effect, referring to the whole of the instrument in which they belong. *Westinghouse v. Gardner*, 2 Ban. & A. 55; *Bruce v. Marder*, 10 Fed. 750. In this view, the several elements of these claims are to be considered as parts of mechanism for bringing the impression platen into operation upon the types on the check and time wheels at the proper time. If the invention had been of a time recorder as a new thing containing these parts, the claims might cover all modes of so bringing the impression platen into operation; but, as it was not, they can cover only substantially these means. *Railway Co. v. Sayles*, 97 U. S. 556. In the machine of the patent the impression platen is operated by the check in the hand of the workman; in the defendant's machine it is operated by the clockwork previously wound up. This substantial difference seems to run through the whole, and to take the defendant's machine out of the scope of all of these claims. In this view the several serious questions as to the validity of these claims need not be examined into.

Bill dismissed for want of infringement.

WESTERN ELECTRIC CO. v. SPERRY ELECTRIC CO. et al.

(Circuit Court of Appeals, Seventh Circuit. January 20, 1894.)

No. 104.

PATENTS—SUITS FOR INFRINGEMENT—CONFLICTING PATENTS.

The owner of the junior of two conflicting patents is not obliged to obtain a cancellation of the senior patent by suit, under Rev. St. § 4918, before suing the senior patentee for infringement, since the question of infringement depends on priority of invention, and the remedy given by said section is merely cumulative. *Roll-Paper Co. v. Knopp*, 44 Fed. 609, disapproved.

On rehearing. Denied.

For report of decision on the original hearing of the appeal, see 58 Fed. 186.

Before FULLER, Circuit Justice, and WOODS and JENKINS, Circuit Judges.

WOODS, Circuit Judge. Upon questions already considered, the court is content with its opinion. The petition for a rehearing treats mainly of a proposition which was not presented either to this court or the court below. Indeed, it was not directly in issue, and, being of the nature of matter in abatement, perhaps could have been made an issue only by a special plea. It is claimed now that the question is before us because of the statement made by the court in its opinion, in respect to the question of infringement, that "the first claim of the Sperry patent, and other claims not quoted, are essentially the same as the first and second claims of the patent in suit." By this expression of a fact, which was obvious upon the face of the two patents, it is said this court has decided, and made it to appear for the first time, that "these are conflicting patents;" and, that being so, it is insisted that the holder of the patent last

issued cannot sue the owner of the first patent without first obtaining a cancellation of the earlier patent by a decree under section 4918 of the Federal Revised Statutes. Of the cases cited, only the decision in *Roll-Paper Co. v. Knopp*, 44 Fed. 609, supports the proposition. In effect it is decided in that case that, when two patents for one invention have been issued, the owner of the second, without first having obtained or without seeking by his bill the relief provided by the statute, cannot sue for an accounting and to enjoin infringement by the owner of the first patent. The following extract from the opinion shows the reasoning on which the decision is based:

"In the ordinary case of a bill for infringement filed by the holder of a senior patent against the holder of a junior patent, the claims whereof conflict, it is no defense that the defendant is acting under a patent. The reason of the rule, as I apprehend, is that by the grant of the first letters the government exhausts its power to grant to another person a monopoly of the same invention. Hence, the holder of the prior patent is at liberty to treat the subsequent patent as utterly void, in so far as it conflicts with the earlier grant. Rob. Pat. § 370. But there is an obvious distinction between such a case and one where the defendant proceeded against holds the prior grant, and is operating thereunder in good faith. Ordinarily, a prior grantee of a right, privilege, or estate cannot be proceeded against as a trespasser by a subsequent grantee of the same grantor, even though the prior grant is for some reason voidable, until the proper steps have been taken to have the invalidity of the prior grant judicially ascertained and declared. The principle last referred to seems to be applicable to the case at bar. * * * It has been held that a count for infringement and a count under section 4918 may be joined in the same bill, and I can see no objection to that course of procedure. *Leach v. Chandler*, 18 Fed. 262; *Holliday v. Pickhardt*, 29 Fed. 853; *Swift v. Jenks*, Id. 642."

We are not able to concur in that view. The analogy between letters patent for inventions and grants of ordinary rights, privileges, or estates is not perfect, and fails, we think, at the turning point of the present question. By an ordinary grant there is a transfer of title or estate or ownership from one to another; and the grantor, having parted with what he had, can give nothing by a second deed. The second deed is therefore necessarily ineffective, at law at least, until the first has been set aside; and the holder of the first deed, having the legal if not equitable title, cannot be a trespasser. But, by granting letters patent for an invention, the government makes no transfer to the patentee of a right, privilege, or estate theretofore vested in itself. The essential right is in the inventor before he obtains a patent. By making one grant, therefore, the government does not lose power to make another. The letters constitute, under the law, simply prima facie evidence of the patentee's right to the invention described, as being his own discovery; but whether or not he was in fact the first inventor is left an open question between the patentee and other persons, whether they have patents for the same invention or not. Whether one patentee or the other, when he makes or uses the invention, is an infringer or trespasser depends upon the inquiry whether the one or the other was the first inventor, and not whether he was the first to obtain a patent, and this inquiry may as well be made in the ordinary suit in equity as in the proceeding provided by the statute.

Indeed, in practical effect, a decree in one procedure is not different from the other. The questions of validity and priority, as "between the parties to the suit and those deriving title under them," are settled, whether the decree be in one form or the other.

If it be true, as stated, that "the holder of the prior patent is at liberty to treat the subsequent patent as utterly void, in so far as it conflicts with the earlier grant," and for that reason "cannot be proceeded against as a trespasser" until his patent has been canceled, then the cases in which "it has been held that a count for infringement and a count under section 4918 may be joined in the same bill" must be wrong, because the second count of such a bill would refute the charge of trespass or infringement contained in the first count. It would follow, too, that after an adjudication had been obtained under the statute, establishing the validity of the second patent, the owner of it could have no remedy for prior infringements, committed when the respondent was protected by his own patent and was entitled to treat the complainant's patent as void. The only escape from this would seem to be in the proposition that the adjudication under the statute should be deemed to relate back, but the rule is familiar that things rightly done will not be made wrongful by the doctrine of relation.

The statute, in terms, is applicable alike to all parties concerned. "Whenever there are interfering patents, any person interested in any one of them," it is provided, "may have relief against the interfering patentee, * * * and the court, on notice to adverse parties, and other due proceedings had according to the course of equity, may adjudge and declare either of the patents void in whole or in part," etc. It is conceded that a junior patentee cannot plead his patent as a defense. To the holder of the senior patent, therefore, the remedy of the statute is cumulative, and we are able to see no controlling or good reason for saying that to the other party it is exclusive or restrictive.

Rehearing denied.

THE HATTIE THOMAS.

POND v. THE HATTIE THOMAS.

(District Court, D. Connecticut. January 1, 1894.)

1. MARITIME LIENS—PERSON ACTING AS MASTER—WAGES.

One to whom the navigation, discipline, and control of a vessel is intrusted must be considered as master, although another is registered as such; and if it does not appear that he contracted on the credit of the vessel, he is not entitled to a lien for his wages.

2. SAME—SERVICES IN HOME PORT—LAYING UP VESSEL.

One who brings a vessel into her home port, and lays her up there,—i. e. anchors her out of the channel, pumps her out, dries her sails, sees to her fastenings, and renders other services usually performed by mariners,—is entitled to a lien for his compensation.

In Admiralty. Libel by Nelson Pond against the Hattie Thomas to recover wages. Decree for libellant.

Howard N. Wakeman, for libellant.
Henry G. Newton, for defendant.

TOWNSEND, District Judge. This is a proceeding in rem for seaman's wages and services as keeper of the schooner Hattie Thomas, enrolled at New Haven, Conn. The case was referred to a commissioner, and comes before the court upon exceptions to his report.

The material facts are as follows: On or about November 13, 1891, one Alfred Thomas, master and managing owner of said schooner, was sick, and employed the libellant to take charge of her. The libellant made trips in her from Branford, Conn., to various places, until the latter part of December, 1891. During this period he had the entire control of said vessel, securing freights, receiving and discharging cargoes, securing tows, collecting freight moneys, furnishing supplies for the vessel, hiring, discharging, and paying the seamen, having full authority to go anywhere he pleased, to take any load he could get, to run the vessel as he saw fit, and to do what he thought best with her. Thomas was enrolled as master during all this time, but the libellant, on one or more occasions, signed his name as master. Upon these facts the commissioner finds the sum of \$22.82 due for said services as seaman's wages, provided the court shall find that the libellant during said period was a seaman, and, as such, entitled to a lien against said vessel.

It does not appear from the testimony of the libellant, or from the bill which he sent to Thomas, that his contract was upon the credit of the vessel. It does appear that he had money passing through his hands which he might have retained in payment of his own wages, but that he expended it for other purposes, and looked to the personal responsibility of the owner for his compensation. Under these circumstances it seems to me that the libellant is not entitled to a lien. *The Imogene M. Terry*, 19 Fed. 463; *Peterson v. The Nellie and Annie*, 37 Fed. 217; *The Atlas*, 42 Fed. 793; *The Atlantic*, 53 Fed. 607. As is said in *Peterson v. The Nellie and Annie*, supra:

"Without respect to the registry laws, he would be master to whom the owner actually intrusted the navigation and discipline of the vessel. The inquiry in each case is, what is the fact? As Judge Nixon observes in *The Imogene M. Terry*, 19 Fed. 463: 'Courts of admiralty deal with things, not words.'"

And in said case the libellant was denied a lien for the trip during which he actually served as master.

The only question on this part of the case arises out of the fact that during the time the libellant acted as master he was not enrolled as master. In *The Dubuque*, 2 Abb. (U. S.) 20, it is said that the enrollment is conclusive on the question. Without questioning the correctness of the decision of the learned judge upon the peculiar facts of that case, it may be observed that the rights of the owner were not under consideration therein, and that the statement above referred to was an obiter dictum. Courts of admiralty are not dis-

posed to apply the doctrine of estoppel against the claims of seamen. But in this case the libellant, having made a personal contract with the managing owner, under which he occupied the position and performed all the duties of a master, must be presumed to have contracted upon the credit of the owner, and cannot now claim the lien of a seaman. *Peterson v. The Nellie and Annie*, supra; *The M. Vandercook*, 24 Fed. 472.

After the completion of said trips the libellant entered into a new arrangement with said Thomas, under which, at his request, he brought said schooner into said Branford, and laid her up there, and took care of her for three months. He anchored her on the flats, swung her around to get her out of the channel, pumped her out, dried her sails, saw to her fastenings, and supervised her generally. In this care he was assisted at times by two other men and by his wife. For these services he charged, and the commissioner allowed him, \$30. The claimant claims that these services were not maritime services, and, among other exceptions, excepts to the report of the commissioner allowing said claim as a lien against said vessel in her home port. This exception raises a difficult question, and one concerning which there has been much conflict of authority. The earlier decisions denied a lien for services such as those rendered by watchmen and stevedores upon either a foreign or domestic vessel while in port, because the services were not rendered by mariners, or were, for other reasons, not maritime in their nature, or concerned the cargo, and not the ship. *The Amstel*, Blatchf. & H. 215; *The A. R. Dunlap*, 1 Low. 350. In *The George T. Kemp*, 2 Low. 477; *The Windermere*, 2 Fed. 722; *The Erinagh*, 7 Fed. 231; *The Hattie M. Bain*, 20 Fed. 389; *The Velox*, 21 Fed. 479; *The Scotia*, 35 Fed. 916; *The Gilbert Knapp*, 37 Fed. 209; *The Main*, 2 C. C. A. 569, 51 Fed. 954, and *Steamship Co. v. Washington*, 57 Fed. 224,—it was held that such services were maritime, and created a lien against a foreign vessel. In *The Maggie P.*, 32 Fed. 300, claims for liens for such services were sustained against a domestic vessel. See, also, *The Henry Ames*, (cited in *The Wyoming*, 36 Fed., at page 495.) In *The Senator*, 21 Fed. 191, such a lien was sustained, it not appearing whether the vessel was a foreign or domestic one, the court declaring that there was no difference between such services and those of sailors. In *The Mattie May*, 47 Fed. 69, such lien was sustained, but whether the vessel was at her home port is not stated. In *Wishart v. The Joseph Nixon*, 43 Fed. 926, where a statutory lien was sustained against a domestic vessel, the court considered two of the earlier cases, and distinguished them from the case before it. See, also, *The Wyoming*, 36 Fed. 493. In *The America*, 56 Fed. 1021, Judge Green, citing *The E. A. Barnard*, 2 Fed. 712, and *The Island City*, 1 Low. 375, holds that the services of a ship keeper or watchman on a barge lying in port are not maritime, and cannot be the basis of a maritime lien against a domestic vessel. It will thus be seen that the later decisions give a lien to stevedores, longshoremen, watchmen, and ship's keepers against foreign vessels, while the authorities are in conflict as to whether such lien exists against do-

mestic vessels. In some cases the question seems to have been determined by the maritime or nonmaritime character of the services; in others, by ascertaining whether the services were performed on the credit of the master or of the vessel.

I am unable to find any case where such lien has been denied under circumstances like those in the present case. The services for which the charge of \$30 was made included bringing the schooner into the port of Branford, laying her up, moving her about, pumping her out, and drying her sails, in the expectation, warranted by the statements of the son of the master, that the schooner might shortly again start on her trips. Other services, it is true, were merely those of landmen, but I do not think they should affect the right of the libellant to recover for such maritime services as would naturally be rendered only by a seaman. It seems to me that the principle deducible from the cases establishes that where services are rendered in the home port of the vessel the question whether there is an admiralty lien, irrespective of statute, depends largely upon whether the services are in the nature of repairs or supplies or other necessities for the vessel, such as are furnished by material men, or are such in kind as would be rendered by a mariner. If they are of the latter character, it seems that they are of equal rank with those of other seamen, and constitute a lien against the vessel.

It is further important to inquire whether the services concern the cargo or freight or the vessel itself or her maritime duties, and, if the latter, whether they are connected with her navigation, present or prospective. Assuming these tests to be correct, and applying them to the case at bar, it will be found that the services rendered were such as to entitle the libellant to the lien of a seaman. This conclusion is supported by the learned and exhaustive discussion of the question by Judge Jenkins in *The Gilbert Knapp*, supra, where, in denying the lien of the stevedore, he distinguishes the duties incidental to the contract of carriage and delivery, from those of the seaman as connected with the navigation of the ship. This view of the case renders it unnecessary to consider in detail the other exceptions to the report. A careful examination of the testimony with especial reference to the questions most forcibly pressed upon the hearing has failed to show me any sufficient reason why the report should not be accepted, and it is therefore confirmed.

In view of the foregoing considerations, let a decree be entered for the libellant for \$30 and one-half of the costs.

THE COLORADO.

BIRDSALL et al. v. THE COLORADO.

(Circuit Court of Appeals, Second Circuit. December 5, 1893.)

COLLISION—STEAMER AND SAILING VESSEL.

A schooner in the lower bay of New York, outward bound, on a flood tide, by reason of the wind dying away lost steerageway, and drifted

back across the main ship channel, her master intending to anchor when out of the way of vessels; but she was struck and damaged by a steamer coming down the channel without any alteration of course. *Held* that, as the schooner was unable to direct her course, the steamer was liable.

Appeal from the District Court of the United States for the Eastern District of New York.

In Admiralty. Libel by Amos Birdsall and others, owners of the schooner Emilie E. Birdsall, against the steamship Colorado, for collision. Libel dismissed. Libelants appeal. Reversed.

Edward L. Owen, for appellants.

David Thomson, for claimants, appellees.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

SHIPMAN, Circuit Judge. This is an appeal from the decree of the district court of the United States for the eastern district of New York, which dismissed the libel of the owners of the schooner Emilie E. Birdsall against the steamship Colorado to recover damages to the schooner occasioned by a collision with the steamer, in the lower bay of New York, at half past 9 o'clock in the morning of November 8, 1891. At the time of the collision, the schooner had left the lower quarantine, bound from New York to Philadelphia. The Colorado was coming down the main ship channel, bound to sea. The weather was clear and fine, and the tide was flood.

The theory of the libelants, as stated in the libel, is as follows: The schooner had nearly reached Sandy Hook, when the wind, which had been light from the northeast, died out, and, being without steerageway, she drifted with the tide and sea back up and across the main ship channel, her master intending to anchor when out of the way of vessels. While so drifting without wind, and near the west side of the channel, the Colorado came down upon a course which would cause collision, continued thereon, and struck the schooner, helpless and unmanageable, upon her starboard side, between the main and fore rigging.

The theory of the owners of the Colorado, as stated in their answer, is as follows: The steamer, by reason of her draught and the condition of the tide, was confined to the middle of the channel for safety, and sighted the schooner when there was a good breeze of about 10 miles an hour from a southerly direction. She was under command, and had steerageway, and knew the steamer's necessary course and position, which at the time were such that the two vessels would pass each other in safety, but she suddenly changed her course, and ran across the bows of the steamer, who immediately stopped her engines, reversed at full speed, and took all measures to avoid the collision, but it was inevitable.

The district court justly regarded the question of the velocity of the wind at the time of the collision as the decisive one in the case. If the schooner's theory as to her helpless condition was wrong, she must be regarded as the author of the collision. If she was unable to direct her course, she should have been avoided by the steamship. The district court was of opinion that upon this

question the weight of the evidence was in favor of the steamer, and dismissed the libel. The libelants were permitted to take, and did take, new proofs for use upon the appeal.

Upon the trial before the district court the officers and crew of the schooner testified in conformity with the allegations of the libel that the wind had died away, the schooner was drifting back, and without steerageway, across the channel; and that the steamship, without alteration of her course, ran into the drifting vessel. A disinterested witness, the captain of the schooner Woodhull, which lay at anchor at the head of the Swash channel, from one-half to three-quarters of a mile from the place of the collision, testified that when, on its account, he was summoned on deck, there was no wind,—none to give a vessel steerageway; that the wind, at times, was a little puffy, and died away after the puffs; and that he was outward bound, without enough wind to go to sea. The witnesses on board the steamship were substantially unanimous in their testimony, which supported the averments of the answer. The anemometer record was produced, which showed that the velocity of the wind at Sandy Hook at 9:30 on that morning was 13 miles per hour, and that after 10 o'clock the wind died out almost entirely, the velocity at 11 o'clock being three miles per hour. The weather observer at Sandy Hook thought that the record correctly shows the velocity of the wind at the place of collision, which is about $2\frac{1}{2}$ miles distant from the observatory. Upon the foregoing testimony the district court justly held that the weight of the evidence was in favor of the steamer.

The additional testimony is from three disinterested witnesses, two of whom were captains of steam tugs, who, at the time of the collision, were near the place where it happened. They testify, in differing phraseology, to the fact that there was no wind. One says: "There wasn't hardly a breath of wind; hardly enough wind to fill a sail. We knowed the schooner couldn't get nowhere." Another says, "She seemed to be drifting with the tide." Another says that before the collision happened the wind was nothing at all; not enough to fill a sail, and not enough to give the schooner steerageway. The captain of the Birdsall turned back from his contemplated voyage on account of the lack of wind, and the captain of the Woodhull was lying becalmed, waiting for a wind to go to sea. The oral testimony of the captains of the two tugboats, who were at that time in the lower bay, looking for employment, is in accordance with the conduct of the captains of the two schooners, and re-enforces the testimony which their acts gave that there was no wind at that place at that time. By reason of the new proofs, the weight of the evidence is changed; the decree of the district court is reversed, with costs, and the case is remanded to that court, with directions to enter a decree for the libelants, and take such further proceedings as to justice may appertain. No costs are to be allowed in the district court prior to the new decree in favor of the libelants.

THE GIOVANNI v. CITY OF PHILADELPHIA.

(District Court, E. D. Pennsylvania. January 2, 1894.)

No. 20 of 1893.

1. COLLISION—TUG AND TOW—VESSEL AT ANCHOR.

A tug which, owing to the lack of a proper lookout, takes her tow so near to an anchored vessel as to create a situation of peril, renders her owners liable to the latter for a collision with the tow immediately resulting from the breaking of the towing hawser.

2. MUNICIPAL CORPORATIONS — POWERS — LIABILITY FOR COLLISION WITH ITS TUGS.

A city which, pursuant to its charter powers, engages in the business of towing vessels for profit, is liable for a collision caused by the fault of its tug.

In Admiralty. Libel by Dominico Gavagnin, master of the bark Giovanni, against the city of Philadelphia, to recover for a collision alleged to have been caused by the negligence of the latter's tug. Decree for libellant.

Henry R. Edmunds, for libellant.

Howard A. Davis and Chas. F. Warwick, for respondent.

BUTLER, District Judge. As the Italian bark Giovanni lay at anchor near the breakwater in the Delaware river (out of the usual course of vessels to and from the sea) on February 7th last, she was run into by the ship Standard, and seriously injured. The ship had been taken in charge at Philadelphia by the city ice boat No. 3, and towed near to the Giovanni, when her hawser parted, and the collision followed.

The night was free of fog and distant lights could readily be seen. The wind (a good breeze) was behind the tow and the tide was turning upward. That the Giovanni was properly anchored, with lights burning brightly, and free from blame in all respects, is not disputed.

The respondent seeks to escape liability by charging the ship with fault. In my judgment however the fault was her own. After running dangerously near the Giovanni (in a southerly direction) she suddenly turned squarely eastward (as the peculiar construction of her machinery enabled her to do.) At the same time the ship put her wheel hard a-port, and immediately after hard a-starboard. The hawser being thus drawn across the ship's bow stays, parted. As soon as she discovered this latter fact the ship again changed her wheel to hard a-port in the hope of avoiding the bark, which was slightly eastward, by passing her to the west. She thus probably avoided the infliction of more serious injury. These facts are not seriously controverted. But as respects the question whether the ship was wrong in first putting her wheel to starboard, as the respondent charges, the testimony is in irreconcilable conflict. The witnesses from the ship, several in number, testify that the order to so turn the wheel came from the tug, while the two witnesses who appear from aboard the tug deny that such an order was given. To a landsman it would seem unreasonable that such an order should have been given (unless indeed by mistake, in the haste and excite-

ment of the occasion) as, if persisted in, it would have turned the ship's head opposite the tug's course. But it seems no more unreasonable that it should have been given from aboard the tug than that the ship's officers should have given it of their own motion. The latter explain, however, that the order was proper, to avoid danger of colliding with the tug, which was passing her bows, while the ship's speed before the wind was rapid. It does not appear, however, that the ship's course was affected by the first turn of the wheel. I do not propose to discuss the testimony. I am satisfied the tug was in fault in carelessly approaching too near the bark with her tow, and that the accident resulted directly from this cause. That she was dangerously near seems to be demonstrated by her conduct. In no other way can her sudden turn from southwestward clear round to eastward with all possible speed, be accounted for. I am satisfied she had no proper lookout and that in consequence she ran so near the bark as to create a situation of peril, that the movements of the ship, the parting of her hawser, and the consequent injury to the bark were the natural results.

The respondent further defends on the ground that the city is not responsible for the fault of the tug; that "the towing of vessels is not a part of the functions imposed on the corporation * * * but is a public duty exercised for the benefit of the whole public," and cites section 980 of 2 Dill. Mun. Corp. in support of this position. The doctrine invoked is old and well understood. It has no application, however, to the facts of this case. We need not concern ourselves with the question whether courts of admiralty recognize it; it is sufficient that the tug was not engaged in the discharge of a public duty, such as the doctrine contemplates, but in the prosecution of a private enterprise for the respondent's profit, under its direction and in pursuance of its chartered rights. Under such circumstances, it is well settled that the municipality is entitled to no immunity. Where it enters upon such private business it assumes all the responsibilities that attach to individuals in like circumstances. In *Western Saving Fund Soc. v. Philadelphia*, 31 Pa. St. 175, it is decided that "where a municipal corporation engages in things not municipal in their nature it acts as an individual," and is responsible accordingly. In another suit between the same parties, reported in the same volume at page 185, the court (Strong, J.) says: "Where such a corporation engages in things not public it acts as a private individual;" and that where the grant to such a corporation is to enter upon a business for its private advantage, or emolument, (though the public may derive a common benefit therefrom,) the corporation must be regarded in this respect as a private company; that "it stands on the same footing as any individual, or body of persons upon whom a like franchise has been conferred." To the same effect are *Pittsburgh v. Grier*, 22 Pa. St. 54; *Kibele v. City of Philadelphia*, 105 Pa. St. 41; *Boyd v. Insurance Patrol*, 113 Pa. St. 269, [6 Atl. 536.] The case of *City Council v. Hudson*, 88 Ga. 599, [15 S. E. 678,] presents an admirable illustration of the rule under consideration, and fully covers the case in hand.

The libel must be sustained and a decree entered accordingly.

KINGMAN et al. v. HOLTHAUS et al.

(Circuit Court, E. D. Missouri. December 18, 1893.)

1. FEDERAL COURTS—LOCAL AND FEDERAL QUESTIONS—JUDGMENTS.

The dismissal by the supreme court of an appeal from a state supreme court on the ground that a local question decided was broad enough to dispose of the case, independent of any federal question, is conclusive in a subsequent suit in a federal court involving the same facts and questions, and the alleged federal question will not be considered.

2. SAME—JURISDICTION—FEIGNED CITIZENSHIP.

A suit will be dismissed when it appears that one of the parties, in order to enable him to invoke federal jurisdiction, has merely rented a room in an adjoining state, and sleeps there nights, without changing the place of his business or of taking his meals.

3. DEEDS—RECITALS—EVIDENTIARY EFFECT.

The recital in a deed that it is made in consideration of a certain sum, "and pursuant to the conditions of a certain bond," warrants the conclusion that the bond mentioned was a title bond of the land.

4. ADVERSE POSSESSION.

Occupation of a house and premises actually included in a tract, under color of title to the tract, is, in legal contemplation, possession of the tract, notwithstanding that a subsequent survey may throw the house outside its boundaries.

5. PUBLIC LANDS—EFFECT OF LOCATION—EXECUTION SALE.

An incipient location of land under a New Madrid certificate, though it gave the locator no title as against the government, yet gave him an equitable interest, which he could sell to another by a title bond, good as between themselves, and which could be sold on execution against the obligee; and, on the subsequent issuance of a patent to the original locator, it would inure to the benefit of the person claiming under the sheriff's deed.

At Law. Action of ejectment brought by Mary A. E. Kingman and others against Louis J. Holthaus and others. A jury was waived, and the case submitted to the court. Case dismissed as to one plaintiff, and decree for defendants as to the others.

Statement by PHILIPS, District Judge.

This is an action of ejectment, instituted February 4, 1893, to recover lot No. 60 in Peter Lindell's second addition to the city of St. Louis, Mo., containing about 17 acres of land. Some of the plaintiffs are the descendants of Samuel Hammond, and the remaining plaintiffs claim under deeds of quitclaim from the said descendants, executed in 1874 and subsequently. The parties claim under a common source of title. The history is as follows:

The premises sued for are described as "United States Survey No. 2,500," located under New Madrid certificate No. 161, issued to one Joseph Hunot, or his legal representatives. A Spanish concession was made to said Hunot in 1802 for 800 arpents of land lying in New Madrid county, Mo. In 1810 said Hunot conveyed said land in New Madrid county to one Vandebenden. In 1815 said Vandebenden conveyed said land to one Rufus Easton. This claim was confirmed by act of congress April 29, 1816. This land was injured by earthquakes, and thereafter said Easton applied to exchange it for other land, pursuant to the act of congress of February 17, 1815, for the relief of the earthquake sufferers in said county. A New Madrid certificate was issued (No. 161) August 12, 1816, setting forth that said Hunot, or his legal representatives, were entitled to locate 480 acres on any of the public lands of the territory of Missouri, the sale of which is authorized by law, in lieu of the New Madrid land. On June 16, 1818, Easton, as assignee of Hunot, applied to locate this certificate on the premises

in question. The land was surveyed as survey No. 2,500, and certified to the surveyor general June 23, 1819, and the surveyor general transmitted it to the recorder January 8, 1833; and it was recorded February 2, 1833, and the patent certificate issued to said Hunot, or his legal representatives. The patent from the United States to the said Hunot, or his legal representatives, bore date August 30, 1859. On some objection interposed by the Pacific Railroad Company, the patent was withheld by the secretary of the interior, and delivered November 12, 1860, to Peter Lindell.

By Act Cong. June 30, 1864, the United States conveyed to said Hunot, or his legal representatives, the said land. On September 3, 1818, said Easton executed a title bond to said Samuel Hammond and James J. Wilkinson for the said land, except 234 acres. On July 10, 1819, said Easton conveyed said 234 acres to one William Stokes by deed of warranty. On May 23, 1823, an execution issued from the clerk's office of the supreme court of Missouri, on a judgment theretofore recovered in said court by Richard Rolfe, Beverly Chew, and Mary Clark against said Samuel Hammond for the sum of \$6,877.43½, under which execution the sheriff of St. Louis county, on the 5th day of September, 1823, levied upon and seized all the right, title, interest, and estate of said Hammond in said land, and on the 8th day of October, 1823, the said sheriff sold said property under said execution to said Chew and Rolfe, as the highest bidders, at the sum of \$100. On the 29th day of September, 1823, said Easton conveyed to said Hammond said land by deed of warranty containing the recitals hereinafter mentioned in the opinion of the court. September 9, 1824, the United States recovered judgment against said Hammond in the United States district court of Missouri for \$26,680.35. Execution issued thereon October 9, 1824, returned March 9, 1825, nulla bona and non inventus est; said Hammond having theretofore quit the state, and removed to the state of South Carolina. Upon an execution and capias issued on said judgment, the said Hammond availed himself of the insolvent law, and obtained his discharge in bankruptcy, after conveying by schedule to the United States all of his property, without mentioning the property in question.

There was evidence tending to show that Hammond, from the time of taking the title bond from Easton to this land, in 1818, up to the time of the execution sale, was in possession thereof. In December, 1834, said Hunot conveyed by deed said land to Peter Lindell. March 20, 1840, said Chew and Rolfe conveyed said land to said Peter Lindell. There was evidence tending to show that said Lindell, from 1834, and his heirs, were in possession of this land, under claim of title, up to the time of this litigation. There was evidence offered on behalf of the defendants respecting the reservation of this property as village lots or common field lots of St. Louis, reserved for public school purposes, and an act of the legislature of Missouri, February 13, 1833, incorporating the board of president and directors of the St. Louis public schools, authorizing the said board to sell and dispose of all school lands owned by said board; also, a deed of conveyance, dated August 30, 1845, from said school board, conveying to the said Lindell all the right and title of said board in and to the lots or lands covered by said survey No. 2,500. The defendants also put in evidence certified copies of the survey of certain lots in the Grand Prairie common fields of St. Louis. The heirs of said Hammond, who had previously died, were, during the civil war, citizens of the states of South Carolina, Georgia, Alabama, and Tennessee. Several years after the war, these heirs were found by the promoters of this litigation, and deeds of quitclaim obtained from them for an interest in this land; and said heirs and their grantees instituted this litigation in the state circuit court of St. Louis in June, 1874, to recover possession of this land. In this first litigation the plaintiffs obtained judgments in the local state court, and obtained temporary possession of the land thereunder. Actions of ejectment were then instituted by those claiming through and under said Peter Lindell against said plaintiffs, in which they recovered judgments in the state court, which judgments were affirmed by the supreme court of the state; and thereafter the said plaintiffs instituted actions of ejectment for this land in the United States circuit court of the eastern district of Missouri, at St. Louis. A jury being waived, the case was submitted to

the court for hearing. Other facts will appear in the opinion of the court hereto attached.

Leverett Bell and D. T. Jewett, for plaintiffs.

John B. Henderson and James M. Lewis, for defendants.

PHILIPS, District Judge, (after stating the facts.) This case, in its controlling facts and principles of law, is identical with those of *Hammond v. Johnston*, reported in 93 Mo. 198, 6 S. W. 83; *Block v. Morrison*, reported in 112 Mo. 343, 20 S. W. 340; *Hammond v. Insurance Co.*, (Mo. Sup.) 20 S. W. 344. From these decisions, which were adverse to the plaintiffs, they sued out writs of error to the supreme court of the United States, only one of which has been reached for hearing in the latter court, (*Hammond v. Johnston*, reported in 142 U. S. 73, 12 Sup. Ct. 141,) and it was dismissed on the ground that the record presented no federal question reviewable by that court; and as the decision of the state court was adverse to plaintiffs, upon grounds independent of any federal question, "and broad enough to maintain the judgment," the adjudication by the state court stands affirmed. This latter case was decided in the state supreme court at the October term, 1887. Yielding to the persistent insistence of these plaintiffs, the state supreme court, at the October term, 1892, in the *Block Case*, again considered and reviewed, in a more elaborate opinion, all the questions of law raised by the learned counsel for plaintiffs, and reaffirmed its first decision. This ruling the state supreme court has steadily adhered to in all the cases that have followed.

Such persistent relitigation, in the form of the action of ejectment, of the same title, presenting the same questions, would undoubtedly invite the interposition of a court of equity to grant a restraining order of peace and repose. The mere fact that there are different plaintiffs, and different defendants in possession of parts of the same lot, matters not, as they claim under a common source of title, with a community of interest, and the same right of offense and defense. *Primm v. Raboteau*, 56 Mo. 407. This being so, what is the duty of the federal court, when and where the same action of ejectment is renewed between the same parties or their privies, on the same title and facts substantially presented in the cases so repeatedly adjudicated in the state courts? As in this jurisdiction no equitable defense can be interposed or equitable relief granted on the answer to an action at law, so much of the answer in this case as asks for a restraining order must be disregarded. But the facts pleaded in the answer respecting the prior repeated adjudications in the state court will be regarded, in this jurisdiction, at least, in so far as such rulings of the state court establish a rule of real property in the state, and especially in so far as that ruling involves the construction of the state statutes of local procedure and jurisprudence. For instance, counsel for plaintiffs press upon the consideration of this court the question as to whether *Hammond*, at the time of the execution sale, in 1823, held any such interest in this land as was seizable and vendible under execution. Their contention, in part, is that a

proper regard to and construction of the territorial and state statutes then in force did not warrant such levy and sale. Indisputably, this was purely a question for the state court, as it presented for determination the construction of its statute laws, the character of property interests liable to seizure and sale under execution, and the interest and rights obtained by the purchaser thereunder. It was insisted there, as here, that the fact that whatever interest Hammond had in the lot in question was derived under what is known as the "New Madrid Location Act of Congress of 1815;" therefore, a federal question was presented, involving the proper construction of said congressional act. It was on that ground, and that alone, these plaintiffs carried the Johnston Case to the United States supreme court, and insisted on a reversal of the decision of the state supreme court. But the United States supreme court held that no federal question was involved; that the decision of the state court was broad enough to support the judgment on independent grounds. So palpably does the federal supreme court mean to say that the mere fact that the interest of Hammond, held by the state court to have been transferred by the execution sale of 1823, may have been derived under a New Madrid location, did not affect the conclusive effect of the decision of the state court, that plaintiff's counsel, in argument at this bar, felt compelled to assert that the United States supreme court erred in holding that the case was not reviewable there. That was not an inadvertent nor inconsiderate opinion. I find from the briefs of counsel that that precise question was pressed at length upon the attention of the United States supreme court, and it was passed upon. While it stands, it is conclusive on this court.

It is sought by plaintiffs' counsel to escape from this dilemma by insisting that Chief Justice Black, of the state supreme court, in his opinion, fell into two fatal errors of fact: First, in holding that at the time of the execution sale, in 1823, Hammond held the lot under a title bond from Easton; and, second, that Hammond had ever thereunder entered into possession of the land. Out of deference to this contention, I have examined carefully into this matter. The deed of date September 29, 1823, from Easton to Hammond, conveying this land, contained this recital: That it was made "in consideration of fifteen hundred and eighty-three dollars to him in hand paid by said Samuel Hammond, and pursuant to the conditions of a certain bond executed by the said Rufus Easton to said Samuel Hammond and James I. Wilkerson, dated September 3, 1819." In addition to which, Easton, on July 10, 1819, conveyed the residue of his interest in this lot to one Stokes. This deed, in the descriptive part, calls for "a stone at the southwest corner of the Samuel Hammond survey; thence east 4,766 links to the southeast corner of said Hammond's survey;" and this, as the evidence shows, is the dividing line between the two portions of the survey, thus showing that Easton had disposed of the tract to Hammond prior thereto.

It is insisted that the reference to the bond is too indefinite and uncertain to predicate the conclusion that it was a title bond for

a sale of the land. But the language of this recital must be construed with reference to the subject-matter of the writing in which it is made, and the purpose for which it was made. It being recited in the deed that the indenture was executed "pursuant to the conditions of a certain bond," no other inference is reasonably permissible than that the bond was one, the conditions of which required that the obligor should do precisely what he was doing by the execution of the deed, to wit, to convey to the grantee, by deed, this land, on payment of \$1,583; and, although the deed was made alone to Hammond, the presumption is reasonable that, while Hammond and Wilkerson were named as obligees, its condition was that the deed should be made to Hammond alone, as the recital of the deed is that it was made pursuant to the conditions of the bond. Judge Black says in his opinion there is evidence that Hammond went into possession under his title bond, and remained in possession several years. This fact is stoutly denied by plaintiffs' counsel. Their contention is that the spring called "Hammond's Spring," and the cabin or building used by servants of Hammond, were not in fact on the Hammond land, but were outside of it several hundred feet, on what is known as "Conway's Lot." An examination of the evidence relative to this issue satisfies my mind that Hammond, long prior to 1823, did exercise dominion over this property. There was a cabin occupied by negroes, the servants of Hammond; and this cabin and the spring were then understood to be on the Hammond lot, and within the lines of the survey of Hammond, as then understood. While a later survey may have thrown the spring and cabin onto the Conway lot, it is quite inferable that the occupation and use made by said servants extended to and over the Hammond tract; and as the occupation of a part of the tract was under color of title, and that assertion, as generally understood, extending to the right of dominion over the whole, in contemplation of law, amounted to possession of the whole.

The presumption of law, which prefers to refer the act of a party to a lawful rather than a tortious act, is that Hammond was claiming the right of occupancy by virtue of the title bond, as that was his only color of title or right; and, whatever may now be said respecting the abstract legal limitation of the character of the claim of an incipient locator under a New Madrid claim, it is a part of the history—it may be in part unwritten history, yet founded in the traditions of the territory, back of the existence of the state—that such claimants, from the time of their selection of lands made in lieu of their lost or injured homes in New Madrid county, and their designation on the surface of the earth by survey, regarded the selected spot as their home, and at once entered thereon, with assertion of dominion; built houses and fences, and invested it with all the circumstances of habitation. This fact is rendered especially conspicuous in this case because it appears from the record that, as soon as Easton made his selection, he regarded his interest in the new location so effectual that he conveyed by deed his New Madrid land to the government. It was

of this condition of affairs in the territorial history of the state that Judge Scott, in *Landes v. Perkins*, 12 Mo. 259, observed:

"It is a matter of history, of which this court will take judicial notice, that at the time of the cession of Louisiana to the United States, in that portion of the territory of which this state is composed, nineteen-twentieths of the titles to lands were like that involved in this case, prior to its confirmation. There were very few complete grants. Most of the inhabitants were too poor to defray the expenses attending the completion of their titles, but they had faith in their government, and rested as quietly under their inchoate titles as though they had been perfect. Stoddard's Sketches, 245. As early as October, 1804, we find the legislature speaking of freeholders, and authorizing executions against lands and tenements. See law establishing courts for the trial of small causes, passed October, 1804, (section 10.) There being so few complete titles, the legislature, in subjecting lands and tenements generally to execution, must have contemplated a seizure and sale of those incomplete titles which existed under the Spanish government. At the date of the act above referred to, no titles had been confirmed by the United States. An instance is not recollected in which a question has been made as to the liability of such titles as Clamorgan's under the Spanish government to sale under execution. It is believed that such titles have been made the subject of judicial sales, without question, ever since the change of government."

Easton evidently acted on this usage, for he not only made a title bond to Hammond for a deed to part of his inchoate location in 1818, but in 1819 actually conveyed, by warranty deed, the residue of the lot to William Stokes. And it is not too much to say that, in so far as the government could be said to act by its agents in such a matter, the land-office department itself, although the act of 1815 was silent as to transfers and assignments, recognized the act of earthquake sufferers in transferring their right of location, by admitting such transferees to make the selection. And the equities springing from trades between the incipient locator and other parties have been recognized by the courts of the state, and they have been enforced. *Landes v. Perkins*, supra; *Landes v. Brant*, 10 How. 348. It is not deemed necessary that I should say more of the liability of such an equity as Hammond acquired under his title bond and possession to seizure and sale under execution, than what is said by the supreme court in the *Johnston and Block Cases*, above referred to.

From the inception of this litigation to the last syllable of the argument in this case, the proposition has been earnestly pressed that in respect of New Madrid locations no equitable interest whatever could be acquired by the locator in the selected land until the survey thereof is received and entered at the recorder's office, and as that did not occur, in this case, until 1833, there was no equity whatever in 1823, on which an execution sale could operate for any purpose. *Lessieur v. Price*, 12 How. 59; *Rector v. Ashley*, 6 Wall. 142; *Gibson v. Chouteau*, 13 Wall. 92; *Shepley v. Cowan*, 91 U. S. 330,—are particularly relied upon in support of this contention. It is to be conceded that, looking alone to the language employed in certain portions of these opinions, the conclusion sought to be applied here would find some warrant. But the language of courts must often be restrained to the facts of the particular case, and the objective point in the mind of the judge. Without taking the labor and space to review the facts of these cases, it is sufficient

to say that they involved the question of priority of right between conflicting claimants asserting title to the land under separate sources, each emanating from the government. What the court distinctly sought to emphasize was that, until the final act in the successive stages of acts to be performed on behalf of the locator to complete his right to a patent was performed, the title remained in the government, and, short of the consummative act, the right of the government, in the primary disposal of the public domain, to withdraw the land from the operation of the incipient act of a seeking locator, and divert it to other public use, remained intact, and no act of the claimant, short of a culminative act, could create an equity, as against the government's right to recognize another grantee under it. But, so far as I am able to discover, that court has never held that as between two parties claiming title under the same grantee, after the title has passed from the government, they could not, after the incipient location, as between themselves, make contracts respecting the property enforceable in the courts against each other. On the contrary, the courts, both state and federal, recognize this distinction. In *Bush v. Marshall*, 6 How. 285, there was a sale of a possessory right to two lots in the town of Dubuque. Of this, the court observed:

"At the time of this transaction the United States had not yet offered the land in which the town of Dubuque was situated for sale; but, notwithstanding the occupants of lots were mere tenants at sufferance only, they proceeded to make valuable improvements, under the expectation of the grant of a right of pre-emption from the government, or, at least, that they could complete their title by purchase from it, when the lots should be offered for sale. These possessions and improvements were treated as valid and subsisting titles by the settlers, and were the subject of contract and sale by conveyances in the forms usual for passing a title in fee."

As expressed by another authority:

"The right of the United States to dispose of her own property is undisputed, and to make rules by which lands of the government may be sold or given away is acknowledged; but, subject to these well-known principles, parties in possession of the soil may make valid contracts, even conceding away the title, predicated upon the hypothesis that they might thereafter lawfully acquire the title, except in cases where congress had imposed restrictions on such contracts."

In *Landes v. Brant*, 10 How. 348, one Dodier was the grantee of a Spanish concession, which he conveyed to one Clamorgan in 1807, prior to confirmation. One Sarpy, in 1808, recovered judgment against Clamorgan, on which an execution issued, and Clamorgan's interest was sold by sheriff to one McNair. After which, the commissioners, in 1811, confirmed this claim, and a patent thereon issued in 1845 to Clamorgan, or his legal representatives. The debated question before the court was whether the sheriff's sale and deed conveying the equitable interest constituted the purchaser a legal representative of Clamorgan. The court held that the assignee, by bona fide conveyance, came in before a volunteer, such as an heir or devisee. The court said:

"To what description of assignee, then, did the title inure, according to the act of 1836? Necessarily, to one claiming, not the legal, but the equitable, title existing when the patent issued; and in him the legal title is vested

by the patent. The same rule was applied in the case of *Stoddard v. Chambers*, 2 How. 316."

Further on, the court said:

"In every case when this court has been called on to investigate titles where conveyances of lands had been made during the time that a claim was pending before a board of commissioners, and where the claim was ultimately confirmed in the name of the original claimant, the intermediate assignments have been upheld against the confirmer, and his heirs or devisees, in the same manner as if he had been vested with the legal title at the date of conveyance. We are therefore of opinion that the sheriff's deed made to McNair in 1808 must be supported on this ground, also."

In *Levi v. Thompson*, 4 How. 17, it was held that a register's certificate of purchase of a lot in the town of Dubuque gave such an equitable estate in the lot, before issue of patent, as would subject the lot to sale under execution, under the laws of Iowa. The contention of counsel in that case was that the legislature of the territory could confer no authority on the sheriff to sell the property, "because the title was yet in the United States, and had not passed to Levi and Thompson at the time of the sheriff's sale."

The opinion of Mr. Justice Field in *Shepley v. Cowan*, 91 U. S. 330, is quite explicit. It was delivered at the same term of the decision in the *Hot Springs Cases*, 92 U. S. 698. He referred to the cases of *Frisbie v. Whitney*, 9 Wall. 187, and the *Yosemite Valley Case*, 15 Wall. 77, in which it was held that an inchoate right is not such a vested interest as would deprive congress of the power to otherwise dispose of the property. His language is that the occupation and improvements—

"Did not confer upon the settler any right in the land, as against the United States, or impair in any respect the power of congress to dispose of the land in any way it might deem proper."

Further on, the court say:

"But whilst, according to those decisions, no vested right, as against the United States, is acquired until all the prerequisites for the acquisition of the title have been complied with, parties may, as against each other, acquire a right to be preferred by purchase or other acquisition of the land, when the United States have determined to sell or donate the property. In all such cases, the first in time in the commencement of proceedings for the acquisition of the title, when the same are regularly followed up, are deemed to be the first in right."

After asserting that the bare settlement is the initiatory step in the acquisition of title, the court further says:

"The party who takes this step, if followed up to a patent, is deemed to have acquired the better right, as against others, to the premises. The patent which is afterwards issued relates back to the date of the initiatory act, and cuts off all intervening claimants." See *Landes v. Perkins*, 12 Mo. 254.

I am unable to perceive why the doctrine of relation should not apply to this case. That doctrine, succinctly stated, is as follows:

"Where there are divers acts concurrent to make a conveyance, estate, or other thing, the original act shall be preferred, and to this the other acts shall have relation."

The case of *Stoddard v. Chambers*, 2 How. 316, which definitely settled the title to a considerable portion of the city of St. Louis, quite aptly illustrates the application of this rule. Bell had a

Spanish concession, which he conveyed in 1804, by quitclaim, to Mackey, who conveyed, by quitclaim, in 1805, to Stoddard, whose heirs were the plaintiffs. This claim, in 1836, was confirmed to Bell and his legal representatives. It was held that the legal title related back so as to cover the quitclaim deeds, and inured to Stoddard and his heirs.

What was the initiatory step in this Hunot Case? The supreme court, in the Hot Springs Cases, declares it to be:

"Application to the recorder of land titles, showing parties' claim, and praying for a certificate of location; certificate of location issued by the recorder, setting forth the amount of land to which the applicant is entitled; application to the surveyor, presenting the certificate of location, and designating the lands which the party desires to appropriate; survey and plat made by the surveyor; return of the survey and plat to the recorder to be filed and recorded, with a notice designating the tract located and the name of the claimant; certificate of the recorder, stating the facts, and that the party is entitled to a patent; transmission of this certificate to the general land office; the patent."

The first four of these successive steps were taken as early as 1819. Unquestionably, the title of Hammond relates back to that date, and anterior to the date of the execution sale.

But, say counsel, this principle has no application to the instance of an execution sale, in a case like this; that a sheriff's deed operates only as a quitclaim, and does not reach out to an after-acquired legal title to the fee, even where the execution debtor had an equitable interest. The decisions of the courts are otherwise. In *Porter v. Mariner*, 50 Mo. 364, the court says:

"A sheriff's deed relates back to the sale, as to the defendant in the execution, and his privies, and as to strangers purchasing with notice, and vests the title in the execution purchaser from that time."

So, in *Callahan v. Davis*, 90 Mo. 78, 2 S. W. 216, it is said:

"It will be seen that Thompson conveyed the land to Turpin by quitclaim deed after he had entered it, and before he received the patent, and the contention is that this deed did not convey the after-acquired title, so that Turpin only got an equity, and that the plaintiff cannot maintain this suit at law on that title. Thompson, by his certificate of entry, got an imperfect title,—one upon which, by the laws of this state, he could have maintained an action of ejectment for the land against any person not having a better title. The patent, when issued, made that imperfect title a perfect legal one. The entry and the patent were all several acts necessary to make a complete title, and are to have relation back to the act which created the equitable title."

In *Massey v. Papin*, 24 How. 362, the court says:

"Intermediate conveyances made by one who has taken incipient steps to procure title will be covered by the legal title, when obtained, and will pass such title to the alienee, against the grantee and his heirs, and against his assigns with notice; and this doctrine equally applies whether such intermediate conveyances are made by act of the grantee himself, or by the sheriff under execution." See, also, *Landes v. Brant*, 10 How. 374; *Choteau v. U. S.*, 9 Pet. 147.

It is inconceivable to my mind how the plaintiffs can deny to the defendants the benefit of the doctrine of relation, while they themselves, in this action, are compelled to invoke it to assert title under the patent. It is to be observed that the two conveyances

by the government—first, the headright, or original concession, and the New Madrid location—are referred to Joseph Hunot as the original owner. The confirmation of the grant in New Madrid county was made by Act Cong. April 29, 1816. It was not to Easton, but to Hunot; and it was in lieu of the Spanish grant to Hunot that the government gave its consent to Hunot to make the New Madrid location of the land in question. As the conveyance predicated of the proceedings culminated in the patent of 1859, it devolved upon the plaintiffs to show that those claiming under the patent held lands which were destroyed or injured by the earthquakes in New Madrid county. Hence, in developing their case, they introduced in evidence the concession under the Spanish government to Hunot, and the application in 1811 to the board of commissioners to confirm his concession, and the report of Recorder Bates in 1815, recommending the claim for confirmation. This confirmation dated April 29, 1816, in evidence, was made to Hunot, and not to Easton. They read in evidence the recorder's certificate of August 12, 1816, to Hunot, or his legal representatives, reciting that the certificate was in lieu of the lands injured by the earthquake. Next, they put in evidence the application made by Brown for Easton, June 16, 1818, to the surveyor general, to locate said certificate on the lands in question. Next, the survey returned by the deputy surveyor June 23, 1819, to the surveyor general's office, and the return of this survey to the recorder January 8, 1833. And it was on these proceedings the patent was issued August 30, 1859, to Hunot or his legal representatives, thus showing the legal title in Hunot. And while the patent may be said to inure to the benefit of the owner of the injured land, yet, but for the Spanish concession to the New Madrid land, there could have been no New Madrid location. Easton, owning the New Madrid land when the exchange occurred, became, *pro hac vice*, the owner of the new located land. These were all dependent proceedings on each other, essential to a completed title, and became operative by virtue of the doctrine of relation. The maxim may therefore fitly be applied to the attitude of the plaintiffs, "*Qui approbat non reprobatur.*" He may not both accept and reject the same thing.

This coincidence of situation as to the common source of title illustrates the application of the doctrine of relation to this case, as distinguishable from the principle of the authorities cited by plaintiffs. This presents a case where the parties are claiming title to land after the fee has passed out of the government by patent. They are not claiming the land under conflicting concessions under Spanish grants, nor under conflicting locations under the New Madrid act; but both parties assert title under the same patent, which has its inception in the same location under a New Madrid claim. I am therefore utterly unable to grasp the refinement which would exempt a claim thus situated from the operation of the rule laid down in *Ross v. Barland*, 1 Pet. 655, that in an action of ejectment the courts look beyond the consummative act essential to the appropriation of the land, "from its incipient state, whether by warrant, survey, entry, or certificate, until its final con-

summation by grant," and that the grant, when made, shall relate back to the inceptive act, which, as between plaintiffs and defendants in this case, is the survey and certificate. This being a rule to work out an equity in an action at law in ejectment, it does seem to me it should have place in this case. From the time Hammond's interest in this land was sold under execution, in 1823, he abandoned it to the purchasers, and quit the state. In an insolvent proceeding thereafter, he obtained his discharge, after furnishing a schedule of his property, and conveying all he owned to the United States. He did not include therein this land, thereby solemnly declaring that he made no claim thereto. For nearly 50 years thereafter, until his heirs were hunted up and incited to this litigation, the purchaser at said execution sale, and those claiming under him, through whom plaintiffs claim, remained in the undisputed possession, under open claim of ownership to this land, at least since 1830. In such a case, if there be a single weapon in the whole armory of justice to beat off assaults upon such occupants, it ought to be employed by a court of justice.

I have not considered the plea of the statute of limitation interposed in the answer, as, under the conclusions reached on the other questions of fact and law, the plaintiffs' action must fail. Nor do I pass upon the other important and interesting question raised by the defense, that the lot in question was reserved by the government, and was not subject to location under the New Madrid act of 1815, under claim that it was granted as part of the commons to the village of St. Louis for public school purposes, which title Peter Lindell, under whom defendants deraign by purchase, is alleged to have acquired. As the plaintiffs claim title under Hammond, if that title be in the defendants this action of ejectment is defeated.

There is, however, another question presented by the pleadings and the evidence which the court should dispose of. The jurisdiction of this court in this case depends upon the diverse citizenship of the parties. The plaintiffs claim to be nonresidents of this state. The answer denies this allegation of the petition. The counsel for plaintiffs objected at the hearing to the consideration of this issue of fact, on the ground that the issue was not interposed primarily by plea in abatement. But it is the settled rule of practice, under the state Code, that such a plea may be conjoined with other matters of defense to the action, as the Code contemplates but one answer. *Little v. Harrington*, 71 Mo. 390; *Byler v. Jones*, 79 Mo. 261. And the rules of pleading in actions at law which obtain in the state are followed in this jurisdiction. But if this were not so, since the judiciary act of 1875, it would be the duty of this court, at any stage of the proceedings, whenever the fact appeared—whether in the pleadings or in the evidence—that jurisdiction over the parties does not exist, or is fraudulently sought by the plaintiffs or plaintiff, to summarily dismiss the action, at least as to the party wrongfully in court. *Morris v. Gilmer*, 129 U. S. 315, 9 Sup. Ct. 289; *Anderson v. Watt*, 138 U. S. 694, 11 Sup. Ct. 449; *Railroad Co. v. Swan*, 111 U. S. 379, 4 Sup. Ct. 510. The plaintiff Ed. C. Smith was introduced as a witness in his own behalf, and it ap-

peared from his testimony that prior to January 1, 1893, he was a citizen of the state of Missouri, residing in the city of St. Louis; that he had so resided there 19 or 20 years prior thereto; that after the decisions heretofore mentioned, in the supreme court of this state, and on the 1st day of January, 1893, he claims to have acquired a residence in the state of Illinois. His evidence was that he went over to East St. Louis, which connects with the city of St. Louis by bridge, and rented a room, in which, as a rule, he slept at nights. He did not change his business office in the city of St. Louis, but has ever retained the same, and done business in the city of St. Louis as theretofore. That he took his meals, breakfast, lunch, and dinner in the city of St. Louis. He has no property in Illinois, nor is he engaged in any business there. He was scarcely able to give the number of the room in which he slept. In answer to the direct question, "What was your purpose in going to East St. Louis?" he said he went there so he could use the federal courts, and that he went there for the purpose of bringing this suit in the federal court, and such other suits as he might desire to bring.

This presents a much stronger case against a feigned attempt to acquire a residence than that of *Morris v. Gilmer*, supra, in which the supreme court held that the plaintiff's action should have been summarily dismissed. It is not denied that a person may move out of the state, into another state, for the purpose of acquiring a new residence, to enable him to bring suit in a federal court of the state from which he removes; but the change must be bona fide,—“a real animo manendi, and not merely ostensible.” In other words, the act of removal out of the state must be accompanied with an actual intention of acquiring a permanent residence at the new domicile for an indefinite and uncertain time. The plaintiff's unqualified answer, with the other facts and circumstances in evidence, leave no possible reasonable doubt but that this is a mere pretended and temporary change of residence, if in fact it was a change at all.

The action as to this plaintiff must therefore be dismissed.

On the facts of this case, the law is that plaintiffs cannot recover.

MACK v. WINSLOW.

(Circuit Court of Appeals, Sixth Circuit. December 9, 1893.)

No. 108.

GARNISHMENT—PERSONS SUBJECT TO—COURTS.

The defendants in a suit in which full jurisdiction has been acquired are not amenable to garnishee process by which another court attempts to reach the subject of the action, in a suit against the plaintiff.

In Error to the Circuit Court of the United States for the District of Kentucky.

Bill of interpleader by Elias Block and others against A. W. Darling, Eliza J. Darling, his wife, H. M. Winslow, as trustee for said

Eliza J. Darling and as an individual, and others, among them Leopold J. Mack. The fund in controversy was paid into court, and separate answers, making claims thereto, were filed by defendants Mack and Winslow, and a demurrer to the latter answer was filed by defendant Mack. The demurrer was overruled, and the claim of Mack was disallowed and judgment rendered for Winslow. Defendant Mack brings error. Affirmed.

Statement by RICKS, District Judge:

In 1884, A. W. Darling instituted a suit against Elias Block & Sons in the circuit court of Carroll county, Ky., and on the 1st day of December, 1884, the defendants removed that suit into the circuit court of the United States for the district of Kentucky. On the 22d of December, 1886, the plaintiff recovered a judgment in that suit against the defendants for the sum of \$3,938.40, with interest from March 11, 1882, and costs. This judgment was forthwith assigned to various persons, and, among others, to H. M. Winslow as trustee for his wife, to whom he was largely indebted. Notices of these assignments were duly filed in the clerk's office of this court. This judgment was subsequently affirmed by the supreme court of the United States. 11 Sup. Ct. 832.

On the 11th day of December, 1886, Leopold J. Mack instituted his suit in the superior court of Cincinnati, Ohio, against A. W. Darling, who was a citizen and resident of the state of Kentucky, upon a draft for \$989.56, with interest from November 23, 1881, and a further cause of action upon a promissory note for \$1,010, and interest from November 20, 1883. On the same day the plaintiff filed in said suit his affidavit for an attachment, which recited, among other things, that the defendant A. W. Darling was a nonresident of the state of Ohio, and that Elias Block & Sons, a firm then doing business in the city of Cincinnati, in said state, were indebted to said defendant A. W. Darling in a sum unknown to the plaintiff, and that said Block & Sons had property of the defendant A. W. Darling in their possession, consisting of moneys, credits and choses in action. Upon the filing of this affidavit a writ of attachment was issued from the clerk's office of said court against the defendant, and a notice of garnishment, a copy of which attachment and notice of garnishment was duly served upon the individual members comprising said firm of Elias Block & Sons, and subsequently upon the firm itself. On the 20th of December, 1886, the sheriff of Hamilton county made his return upon said writs, reporting that the defendant A. W. Darling was "not found." On the 10th of February, 1887, an affidavit for service of the defendant A. W. Darling by publication, under the statutes of Ohio, was filed, and an order for publication duly made. On the 3d of May, 1890, the defendant Elias Block & Sons, garnishees, filed their answer, setting forth that on the day they were served with notice of garnishment, to wit, on the 13th day of December, 1886, a suit was then pending against them in the circuit court of the United States for the district of Kentucky, in which A. W. Darling was plaintiff; and that on the 22d of December, 1886, said suit was tried, and a judgment rendered therein against them in the firm name of Elias Block & Sons, for \$3,938.40, with interest from March 11, 1882; and that assignments of said judgment by the plaintiff were made subsequent to the service upon them of notice of garnishment; that no part of said judgment has been paid, and that the indebtedness upon which said judgment was rendered in the said circuit court of the United States existed on said 13th day of December, 1886, and that said judgment still exists in favor of the plaintiff, and was in full force and effect when notice of garnishment was served upon them. On the 8th of July, 1890, the superior court of Cincinnati, Ohio, rendered a judgment in favor of the plaintiff, Leopold J. Mack, against the defendant A. W. Darling in the sum of \$2,913.30, with interest from July 7, 1890, and ordered the garnishees, Elias Block & Sons, to pay the plaintiff the amount thereof within 10 days.

On the 16th day of June, 1891, the judgment debtors, Elias Block & Sons, filed their bill in equity in the nature of a bill of interpleader in the circuit court of the United States for the district of Kentucky against A. W. Dar-

ling, H. M. Winslow, trustee, and various other defendants, setting forth the proceedings in the two suits hereinbefore referred to, and asked for an order permitting them to pay into the court the amount of the judgment rendered against them in the circuit court of the United States in favor of said A. W. Darling; setting forth further the assignments of various parts of said judgment, amounting in the aggregate to \$1,260, and the several parties named in said instruments, and the assignment of the residue of said judgment to H. M. Winslow, as trustee for the wife of said A. W. Darling; and setting forth also the proceedings in the superior court of Cincinnati, and the order of that court made thereunder, and asking that said parties be required to interplead, and that the court should direct to whom the fund should be paid.

Upon this bill an order was made by the circuit court, finding and adjudging "that the suit of A. W. Darling against complainants, for which judgment was recovered against them, was pending in this court when the suit of Leopold J. Mack against A. W. Darling was commenced in the superior court of Cincinnati, wherein the writ of garnishment was served on complainants, and that the judgment so recovered by said A. W. Darling against complainants in this court, the amount of which has been paid into court by said complainants herein, has been duly assigned to said H. M. Winslow, as trustee for Eliza J. Darling, subject to certain claims heretofore paid therefrom by order of this court. It is therefore considered by the court that the claim of Leopold J. Mack to said fund be disallowed, and that the balance thereof now remaining in the registry of this court be paid to H. M. Winslow, trustee."

Follett & Kelley, for plaintiff in error.

Thompson, Richards & Park, for defendant in error.

Before TAFT and LURTON, Circuit Judges, and RICKS, District Judge.

RICKS, District Judge, after stating the facts as above, delivered the opinion of the court.

Upon the foregoing statement of facts, the only question of law presented for our consideration is as to the effect or operation of the proceedings by attachment in the superior court of Cincinnati. Those proceedings were instituted after the commencement of the suit against Block & Sons in the circuit court of the United States for the district of Kentucky. The jurisdiction of the latter court, and the right of the plaintiff to prosecute that suit in that court, having attached, that right could not be arrested or taken away by proceedings in another court.

But it is contended that it was not the purpose of the plaintiff in the attachment suit begun in Ohio to thereby arrest the suit then pending in Kentucky, but only to gain thereby a prior lien and claim by garnishee proceedings upon the fund due from Block & Sons to Darling.

It is further contended, inasmuch as the notice of garnishee from the Ohio court was actually served upon Block & Sons some nine days before the judgment in the circuit court of the United States in Kentucky was rendered, that therefore the lien of the plaintiff in the Ohio proceedings upon the credits and fund in the hands of the garnishee became prior and superior to any and every other lien. But such contention is not well founded. It is the prior pendency of a suit involving the same subject-matter in a court of competent jurisdiction that determines the tribunal to which the

defendant has a right to submit the conflicting claims of pursuing creditors.

The defendant debtor in such cases is equally interested in having the jurisdiction of the court correctly determined. If the exact hour and day upon which interlocutory proceedings took place in rival courts were to determine the priority of liens and claims to the credits in the hands of such defendant debtors, frequent collisions in the jurisdiction of courts would occur, and prove extremely embarrassing. So the courts have wisely determined that the prior pendency of a suit involving the same subject-matter is the test of priority in jurisdiction; and when a defendant is lawfully served with process, or otherwise legally made a defendant in such court, he is rightfully first amenable to the orders and judgments of that court, and protected by submitting himself thereto.

This doctrine is fully and clearly announced by the supreme court of the United States in the case of *Wallace v. McConnell*, 12 Pet. 136, and, though other authorities are cited by counsel, this one is sufficient and controlling. The defendants in the suit in the United States circuit court in the case above cited were not, therefore, amenable to the garnishee process under the attachment proceedings in the Ohio court.

The circuit court, upon the pleadings and evidence, found that the several assignments of partial interests in the judgment made by the plaintiff were valid, and that notice thereof had been duly given and filed in that court. Thereupon the order of distribution of the funds paid in by the judgment debtors was made by the court. Counsel, in their briefs, do not contend that there was any error in the order of the court finding the above assignments regular and valid. We understand the contention to relate solely to the priority of the lien upon the fund which the plaintiff, Mack, is claimed to have acquired by the attachment proceedings in the Ohio court, and this has been fully considered. It is not, therefore, necessary to determine the question whether or not the superior court of Cincinnati acquired jurisdiction of A. W. Darling by virtue of the attachment proceedings under which Block & Sons were garnished as having credits due to Darling, and by the subsequent service by publication.

We hold that the jurisdiction of the United States court in Kentucky over the defendants attached long prior to the institution of the suit in Ohio, and that thereby the defendant was first bound to fully answer the orders and judgments of that court, and, having done so, is protected thereby.

The judgment of the circuit court is affirmed.

DE LOY v. TRAVELER'S INS. CO. OF HARTFORD.

(Circuit Court, W. D. Pennsylvania. November 29, 1893.)

No. 7.

REMOVAL—ALLEGATIONS AS TO CITIZENSHIP—AMENDMENT.

A record not showing whether the defendant, entitled by a company name, is a natural or artificial person, and a petition stating that defend-

ant is a citizen of another state, without averring incorporation in that state, do not affirmatively show a right to removal because of such citizenship, and the defect cannot be supplied by amendment.

At Law. Action by Adele De Loy against the Traveler's Insurance Company of Hartford, Conn., brought in the court of common pleas of Lycoming county, Pa., and removed therefrom by defendant. Heard on motion to remand. Granted.

The motion was made on the following grounds:

First. Because the petition filed in the state court for the removal of the case to the circuit court of the United States appears by the record to have been filed after answer made by the defendant to the plaintiff's declaration and statement.

Second. Because the record fails to show that the defendant is a nonresident of the state of Pennsylvania, and was such nonresident at the time suit was brought.

F. P. Cummings and H. C. & S. T. McCormick, for the motion.

O. E. Sprout and J. A. Beeber, opposed.

BUFFINGTON, District Judge. We are of opinion that neither the petition nor record affirmatively discloses such facts as warranted the removal of this case from, or divested the jurisdiction of, the court of common pleas of Lycoming county. The record does not show whether the defendant is a natural or an artificial person; whether a partnership or an individual doing business under a company name. The praecipe for the summons entitles the parties as "Adele De Loy v. The Traveler's Insurance Co. of Hartford, Conn.," and the petition for removal sets forth "that said defendant, your petitioner, at the time this suit was commenced, was, and still is, a citizen of the state of Connecticut." Do these facts affirmatively show a right of removal? It was alleged on the argument that in point of fact the defendant company was a corporation duly created by the laws of Connecticut, but there is no such averment in the record. If it be a corporation, not only should that fact be averred, but the place of incorporation must be specified, as upon that fact depends its place of citizenship. See *Frisbie v. Railway Co.*, 57 Fed. 1, and cases there cited.

But leave is asked to amend. This we decline to allow. It has been held in *Carson v. Dunham*, 121 U. S. 427, 7 Sup. Ct. 1030, that in a case where a petition for removal on its face showed a right to transfer, an amendment germane to the petition, and which did no more than set forth in proper form what was before imperfectly stated, was permissible. But in the present case we have a petition which on its face shows no right to remove, and the proposed amendment would show what is not now shown, viz. the jurisdictional fact of actual parties of such diverse citizenship as would confer jurisdiction on the court. The case comes within the spirit of *Crehore v. Railway Co.*, 131 U. S. 242, 9 Sup. Ct. 692, and *Jackson v. Allen*, 132 U. S. 32, 10 Sup. Ct. 9, and is not the subject for an amendment such as is proposed in the circuit court, when the case was originally brought in the state court, and from thence removed.

The case is therefore remanded to the court of common pleas of Lycoming county, at the costs of the defendant, and it is so ordered.

STREIGHT v. JUNK et al.

(Circuit Court of Appeals, Sixth Circuit. December 9, 1893.)

No. 112.

1. CREDITORS' BILL.—WHO MAY MAINTAIN—CORPORATIONS.

A creditors' bill cannot be maintained by one who has neither obtained a judgment, nor shown any reason for not doing so.

2. CORPORATIONS—RIGHTS OF STOCKHOLDERS.

A stockholder may sue to enforce a claim of the corporation against its managing officer for diversion of funds, when its assignee in insolvency refuses to do so.

3. SAME—LACHES—PLEADING.

A stockholder who seeks to enforce rights of the corporation against its managing officer for diversion of funds arising from an unauthorized "swapping" of checks, and who, after alleging that, being a director, he protested in writing against such acts on first learning thereof, but that they were nevertheless continued for two years, shows facts convicting himself of laches, if he fails to further aver that he was ignorant of such continuance.

Appeal from the Circuit Court of the United States for the Middle District of Tennessee.

In Equity. Suit by John Streight, as a creditor and stockholder of the Junk Bros. Lumber & Manufacturing Company, to enforce claims of the corporation against S. C. Junk, its managing officer, arising from his unauthorized acts. Demurrers to the bill were sustained below, and it was then dismissed. Complainant appeals. Affirmed.

Statement by RICKS, District Judge:

The bill of complaint in this case was filed by John Streight, a citizen and resident of the state of Ohio, and suing on his own behalf, and all others interested as stockholders and creditors of the Junk Bros. Lumber & Manufacturing Company, against that company, S. C. Junk, and George W. Stainback, assignee under a general assignment for the benefit of creditors made by said company and S. C. Junk. All of said defendants are citizens of the state of Tennessee and district aforesaid.

The material averments in the bill are that the defendant company is a Tennessee corporation carrying on the business of the sale and manufacture of lumber; that during the year 1890 and other years the defendant S. C. Junk was president, and at times also general manager, of said company, and that as such officer he had charge and control especially of its financial affairs, and a general supervision of its business; that said Junk, as such officer of the company, without the knowledge or consent of or notice to any other stockholder or officer, did execute and issue corporate paper in the form of notes and bills of exchange for the purpose of "swapping" the same for similar paper made by the firm of G. W. & W. H. Bliss, when he knew said firm to be insolvent; that the complainant, being advised of said illegal acts for the first time about August, 1890, and being a stockholder and a director, did address the defendant Junk a protest in writing against such unlawful acts on his part and on behalf of the company, but that, notwithstanding such protest, said Junk continued the unlawful exchange of negotiable paper with Bliss & Co. until the fall of 1890, when said firm failed, and upon said failure, as the paper issued by complainant's company to Bliss, and by Bliss to the former company, matured, the said Junk, as president, paid off the same with the money of said corporation, the amount of the illegal paper so paid aggregating some \$18,000; that because of such losses the complainant's company, after a struggle of some 18 months, viz. in May, 1892, finally succumbed, and made a

general assignment under the laws of Tennessee to the defendant Stainback, as assignee of all its property for the benefit of its creditors. The bill further avers that the making and exchanging of the corporation paper by Junk with the Bliss Company paper was ultra vires, that the payment of such paper out of the funds of the corporation was wrongful, and that Junk is liable for such wrongs, for which he sues on behalf of himself and other stockholders. He further alleges that he requested said assignee to institute proceedings for the benefit of said corporation, its stockholders and creditors, against the defendant Junk, but he refused so to do unless a majority of the stockholders requested him to do so. Complainant alleges that this proceeding is not a collusive one to confer upon the court a jurisdiction which it otherwise would not have.

John Ruhm & Son and James Trimble, for appellant.

Steger, Washington & Jackson, Tillman & Tillman, and A. N. Grisham, for appellees.

Before TAFT and LURTON, Circuit Judges, and RICKS, District Judge.

RICKS, District Judge, after stating the facts, delivered the opinion of the court.

The first contention necessary to consider and determine is the first ground of demurrer relied upon by the assignee of the insolvent corporation and the defendant Junk,—that the complainant cannot maintain his suit because he is not a judgment creditor. It is well settled that, when a complainant institutes a suit to subject the assets of an insolvent corporation to the payment of debts due to him and other creditors in whose behalf he sues, he must be a judgment creditor. He must have reduced his claim to a judgment, and have exhausted his remedy at law as a creditor, before he can resort to the equitable remedies of a creditors' bill to reach equitable assets in the debtor's hands. In the case of Tube-Works Co. v. Ballou, 146 U. S. 523, 13 Sup. Ct. 165, Justice Blatchford said:

"Where it is sought by equitable process to reach equitable interests of a debtor, the bill, unless otherwise provided by statute, must set forth a judgment in the jurisdiction where the suit in equity is brought, the issuing of an execution thereon, and its return unsatisfied, or must make allegations showing that it is impossible to obtain such a judgment in any court within such jurisdiction."

The objection to the incapacity of the complainant to maintain this suit because he is not a judgment creditor is therefore well founded. But, according to the averments in the bill, the complainant was a shareholder in the Junk Bros. Lumber & Manufacturing Company at the time of the wrongful acts complained of, and at the time the suit was instituted. As such shareholder, and before the bill was filed, the complainant avers he requested the defendant Stainback, as the assignee of said corporation, to institute a suit in his name against the defendant Junk to make him account for his unlawful acts set forth in the bill. This the assignee refused to do. He was the proper person upon whom such a demand should have been made. By the general assignment the right to bring such a suit passed to the assignee. After the assign-

ment he represented the corporation as well as its creditors, and was authorized to sue upon corporate rights of action. *Wallace v. Bank*, 89 Tenn. 637, 15 S. W. 448; *Williams v. Halliard*, 38 N. J. Eq. 376; *Brinckerhoff v. Bostwick*, 88 N. Y. 52.

Under the ninety-fourth equity rule, the complainant having, in due course of procedure, made a demand on the assignee to institute this suit, and the assignee having refused, the former was entitled to bring this proceeding as he did. For these reasons we think the complainant was authorized to institute this suit as a shareholder in the insolvent corporation seeking relief for the wrongful acts complained of.

The next contention to be considered is the claim of the defendants that complainant is not entitled to any relief in this case because he was guilty of gross laches, as a director and stockholder in the insolvent corporation, in not preventing the wrongful acts set forth in his complaint. He admits in his bill that in August, 1890, he knew that defendant Junk was making and issuing negotiable bills and notes, and "swapping" them for similar paper issued by Bliss & Co. While he avers that he protested in writing against such unauthorized acts on Junk's part in 1890, he does not aver in his bill that after such protest he did not know that such illegal paper was continuously issued and used. The corporation continued in business until May, 1892, as complainant avers, but he does not aver or claim that he was ignorant of the fact that such unauthorized acts continued after his protest. He fails to disclose by proper averments in his bill such vigilance and diligence in protecting his interests as the law rightfully exacts from one in his position in said corporation, after full knowledge in 1890 of the continued unlawful acts of his associate officers and stockholders. In 148 U. S. 370, 13 Sup. Ct. 585, (*Johnston v. Mining Co.*), the supreme court said:

"The law is well settled that, where the question of laches is in issue, the plaintiff is chargeable with such knowledge as he might have obtained upon inquiring, provided the facts already known by him were such as to put upon a man of ordinary intelligence the duty of inquiry."

By his averments of what knowledge he had of these unlawful acts, and by his failure to aver that he was ignorant of a continuation of said acts, we think the complainant has shown such laches as justifies a court of equity in denying him the relief for which he prays. He sues in this case for himself and other creditors or shareholders; but no other creditor or shareholder appears to claim any relief under his bill. He cannot recover in his own behalf, for the reasons already stated. To what extent he could participate in a recovery obtained by others authorized to maintain a suit for the same wrongs need not now be considered. All that we hold is that the appellant is not entitled to maintain this suit upon the averments in the bill disclosing laches on his part. This makes it unnecessary to consider the other assignments of error set forth.

The decree of the court below will be affirmed, for the reasons stated.

PRESS PUB. CO. v. FALK et al.

(Circuit Court, S. D. New York. January 12, 1894.)

1. COPYRIGHT—PHOTOGRAPHS—PUBLIC CHARACTERS.

One who photographs an actress in her public character, free of charge, with the understanding that she is to have as many photographs as she desires, to do with as she may please, is the owner of the photograph and negative, and has the right to secure a copyright for his own exclusive benefit; and her right does not extend to making copies, or permitting others to do so for their own benefit.

2. SAME—AUTHORITY OF EQUITABLE PART OWNER.

Even if the photograph were taken under such circumstances as to give her an equitable interest in the photograph and copyright, she would have no authority to permit another to make copies for his own benefit, without consent in writing, as required by the statute.

In Equity. Suit by the Press Publishing Company to restrain Benjamin J. Falk and another from prosecuting an action at law for infringement of a copyright for a photograph, and other relief. Bill dismissed.

John M. Bowers, for orator.

Benno Lewinson and Edwin T. Taliaferro, for defendants.

WHEELER, District Judge. The orator is the publisher of the New York World; the defendant Falk is a well-known photographer, of the city of New York; and the defendant Johnson, a prominent actress, well known by her theatrical name, "Marie Jansen." He had taken several photographs of her, as a public person, in stage costumes and positions, and took one of her as she appeared in "Nadja," and copyrighted it. The orator published a sketch of her career in its Sunday edition, and illustrated it with cuts made from photographs furnished by her, and, among others, with one from this photograph, copyrighted by the defendant Falk, without including the notice of copyright. The law provides that if any person shall, after the copyrighting of a photograph, without the consent of the proprietor first obtained, in writing signed in the presence of two witnesses, publish the same, he shall forfeit to the publisher every sheet thereof, and further forfeit one dollar for every sheet of the same found in his possession. Rev. St. U. S. § 4965; Lithographic Co. v. Sarony, 111 U. S. 53, 4 Sup. Ct. 279. The defendant Falk has brought suit on the law side of this court against the orator, to recover these penalties, alleging the printing of 260,183 copies, of the value of \$13,009.15, found in the orator's possession, and the forfeiture of \$1 each, amounting to \$260,183. This suit is brought to restrain prosecution of that suit, on the right of the defendant Johnson to publish copies of the photograph, and to authorize the orator to do the same.

Obviously, no question arises here as to the legality of the copyright, or as to any defense which the orator could make at law. That litigation could not be brought from the law side to this side of the court. The sole question is as to whether the orator acted upon some equitable right, which could not be set up as a defense

at law. The bill, as to this, alleges that a photograph of her had been copied into a misrepresentation and caricature of her, of which she spoke to him, whereupon he said he could protect her from being thus misrepresented and caricatured, and protect himself in the sale of the photographs; that she assented to this, and requested him to procure copyrights of such photographs as he might take of her, which he stated were to be taken out by him, and used for their joint benefit and protection, and that she could use, and authorize the use of, the same, as she deemed best and for her interest. The answer sets up, as to this—

"That he obtained a copyright therefor, in due form of law; that said defendant Johnson had and has no right, title, or interest in or to said photograph, nor the copyright thereof, either adverse to this defendant or otherwise; that if said copyright was taken out by this defendant, to be used by him and said defendant Johnson for their joint benefit and protection, then, as this defendant is advised and verily believes, said defendant Johnson had no right or power to impair or destroy this defendant's rights and interests therein by authorizing, directing, or permitting a publication of said photograph in such manner as would constitute an abandonment or destruction of this defendant's rights therein."

As to these points, she testifies:

"Q. 21. Did you assent or object to this proposition? A. I expressed myself as pleased that I should see no more bad printing of myself, and there it dropped." "Q. 23. What was to be Mr. Falk's interest in such photographs? A. We never discussed that. His interest, I suppose, was to be the same as before." "Q. 26. Who was to have the profit of selling them? A. Mr. Falk." "Q. 27. Just state your rights. A. That I was to have all the pictures I desired, to do with as I chose, free of charge." "X-Q. 118. Didn't he have the right of selling your pictures, even without copyrighting them? A. Certainly." "X-Q. 119. Don't you know, Miss Jansen, that there is a custom which controls the dealings of the theatrical profession and the photographic art, where sitters have their pictures taken without charge to them, or at a reduction from the regular rates,—that the photographer has the right to sell the pictures, for his own benefit, to the public? A. Yes, I know of such a courtesy." "X-Q. 120. Don't you know that is the custom? A. Yes." "X-Q. 121. You never paid for having your pictures taken, did you, at Mr. Falk's? A. No, sir."

And he testifies:

"Q. 55. Had Marie Jansen any authority to authorize the publication of the copyrighted pictures? A. No, sir." "Q. 56. Did you give her any authority, of any kind? A. No, sir." "Q. 57. Was there any agreement between you, whereby she had any such authority? A. No, sir." "Q. 70. Miss Jansen testified, in answer to cross-interrogatory 119, that it is the custom, when a photographer takes pictures without charge, that he has the right to sell the pictures for his own benefit to the public. Is that the custom? A. It is."

When a person has a negative taken and photographs made, for pay, in the usual course, the work is done for the person so procuring it to be done, and the negative, so far as it is a picture, or capable of producing pictures, of that person, and all photographs so made from it, belong to that person; and neither the artist nor any one else has any right to make pictures from the negative, or to copy the photographs, if not otherwise published, for any one else. *Pollard v. Photographic Co.*, 40 Ch. Div. 345; *Moore v. Rugg*, 44 Minn. 28, 46 N. W. 141. But when a person submits himself or herself as a public character, to a photographer, for the taking of a

negative, and the making of photographs therefrom for the photographer, the negative, and the right to make photographs from it, belong to him. He is the author and proprietor of the photograph, and may perfect the exclusive right to make copies by copyright. *Lithographic Co. v. Sarony*, 111 U. S. 53, 4 Sup. Ct. 279; *Falk v. Engraving Co.*, 48 Fed. 262, and, on appeal, 4 C. C. A. 648, 54 Fed. 890. Obviously, on these pleadings and proofs, the negative was not made for Miss Johnson; and she was not, and is not claimed to have been, a customer of the former class. That she was the subject of the picture would not, alone, make it hers. The right to it would depend upon for whom the work was done, and the evidence shows that what Mr. Falk did was done for himself. That she was to have as many of the photographs as she wanted, to do with as she pleased, did not affect his exclusive right to make other copies. The owner of a copyrighted book would have the same right to it that she had to these photographs, which would not, in either case, extend to making copies, and, more clearly, not to giving others the right to make them. With such a right outstanding, nothing would be left of the copyright.

If, however, by any understanding which could be implied out of the circumstances, she could be said to have any equitable ownership here, it would be of a copyright, of which she would be, to the extent of her interest, a proprietor. He would be the proprietor of what remained, if anything; and the holder of the legal title to the whole. The statute works these forfeitures for publishing copies without the consent of the proprietor first obtained, in writing signed in the presence of two witnesses. Here is no pretense of any consent in writing from both or either. Had she been the publisher of the *World*, or so procured the publication of the article containing these copies that it would have been hers, such an equitable right would doubtless have protected her, and others employed by her, within the principle of the cases cited for the orator. *Lawrence v. Dana*, 2 Amer. Law T. Rep. (N. S.) 402; *Wallerstein v. Herbert*, 16 Law T. (N. S.) 454; *Nichols v. Marsh*, 61 Mich. 509, 28 N. W. 699; *Id.*, 140 U. S. 344, 11 Sup. Ct. 798. As to her part in procuring the publication, the writer for the *World* testifies:

"Q. 10. What led you to call at Miss Jansen's? A. I was sent to write a story about Miss Jansen by the editor of the *Sunday World*." "R. D. Q. 102. Miss Jansen gave you the pictures, with permission to use them? A. She did. R. D. Q. 103. Did she give you those pictures? A. She did. R. D. Q. 104. Did she give you permission to use them? A. She did. R. D. Q. 105. And did you rely on that permission? A. Yes, I did."

And Miss Johnson testifies:

"Q. 62. And you assented to his publishing what he did publish? A. I did. Q. 63. Was your motive pure information to the *World*, or had you an idea that it would promote your own interests, or was it both? A. Both."

This shows clearly that the publication was made by the orator in the *World* for, itself, on its own procurement, and not for her on hers; and, so far as anything about it derived from her was concerned, they acted and relied upon her consent. A part owner could not effectually give this without writing, as required by the

statute, any more than a sole owner could, nor an equitable owner more than a legal owner. Neither is such a statute, which is essentially like the statute of frauds, any less binding in equity than at law. 2 Story, Eq. § 754; *Randall v. Howard*, 2 Black, 585; *May v. Sloan*, 101 U. S. 231. No right available to the orator as a defense in equity, and not at law, is made to appear, and the orator must therefore be left to make defense at law.

Let a decree be entered, dismissing the bill, but without prejudice to any defense at law.

MANHATTAN TRUST CO. et al. v. CITY OF DAYTON.

(Circuit Court of Appeals, Sixth Circuit. December 9, 1893.)

No. 114.

1. MUNICIPAL CORPORATIONS—CONTRACTS—GAS COMPANIES.

When a municipal council is authorized by statute to contract for a period not exceeding 10 years, its contract for 20 years, or for an indefinite time, cannot be sustained as a contract for 10 years, but is entirely void.

2. SAME—ORDINANCES—CONSTRUCTION.

Under a statute empowering municipal councils to regulate, from time to time, the price of gas, and authorizing them to bind themselves by contract not to reduce the price below an agreed minimum for 10 years, a council contracted for minimum schedule rates by "mixer measurement" for 5 years. Afterwards it passed an ordinance providing in one section that consumers might elect to have gas furnished by meter instead of at the schedule rates, in which case a maximum price was fixed, without any limitation of time. A subsequent section declared that the contract before made should continue in force, "except as herein altered" for the unexpired time thereof. *Held*, that the provision for a maximum price was not a contract for any period, but was an exercise of the power to regulate, and a limitation on the license granted, and continued in force after the expiration of the original contract, and until repealed. 55 Fed. 181, affirmed.

Appeal from the Circuit Court of the United States for the Southern District of Ohio.

In Equity. Petition by the city of Dayton, Ohio, intervening in a suit by the Manhattan Trust Company against the Dayton Natural Gas Company. Heard on demurrer to the answers of complainant and the receiver of the gas company to the intervening petition. The demurrers were sustained, and the receiver was enjoined from charging more for gas than the rates fixed by ordinance. 55 Fed. p. 181. The trust company and the receiver appeal. Affirmed.

The Dayton Natural Gas Company is an Ohio corporation, organized originally under the name of the Southwestern Ohio Natural Gas & Petroleum Oil Company. On the 18th of March, 1887, the city council of Dayton, Ohio, by ordinance, authorized said corporation to occupy streets, alleys, and public grounds of the city, and lay pipes for the purpose of furnishing gas to the public and to private citizens. By the terms of the ordinance it had 18 months within which to introduce gas into the city, under penalty of forfeiture of all the rights under the ordinance. The company accepted the ordinance, and executed the bond as required by it, and began the work of establishing itself within the city. It failed, however, to introduce gas

by January 1, 1889, and in consequence of this failure the city council, by resolution, in pursuance of the reserved power mentioned in the ordinance, declared all the rights granted thereby forfeited. Prior to this forfeiture, and on the 23d of December, 1887, the council had passed an ordinance regulating the price to be charged by the gas company for natural gas to be furnished by it for fuel purposes for and during a period of five years next ensuing from and after the date at which the ordinance should take effect, which was to be at the expiration of 10 days from the date of its first publication. The schedule of prices contained in that ordinance related alone to gas to be furnished for fuel purposes by "mixer measurement." Section 2 of the ordinance was in these words: "The foregoing is fixed as the minimum price at which said city council requires said company to furnish gas to the citizens of said city, and for the public buildings of said city, for said term of five years, and said company is hereby required to assent thereto by written acceptance, filed in the office of the city clerk of said city." This ordinance was duly accepted by the gas company.

On the 28th of March, 1889, the name of the company having been changed to the Dayton Natural Gas Company, an ordinance was passed by the city of Dayton, granting to the company "the right and privilege to lay, maintain and operate pipes in the city for the purpose of supplying natural gas for heating, fuel and power purposes only." This ordinance was in the following words and figures:

"Section 1. Be it ordained by the city council of the city of Dayton, that, subject to the terms, conditions and limitations of this ordinance, there is granted to the Dayton Natural Gas Company, its successors and assigns, the right and privilege, for the term of twenty years, to lay, maintain and operate mains, pipes, branches and conduits through the streets, lanes, alleys, avenues and public grounds of said city for the purpose of supplying said city and its inhabitants with natural gas, or produced gas, for heating, fuel and power purposes only.

"Sec. 2. Before said company shall do any work or lay any pipes, it shall execute a bond to the city of Dayton in the penal sum of \$50,000, to the acceptance of the city council of said city, with not less than five sureties thereon, three of whom shall be residents of said city, conditioned as follows:

"(1) That said company shall proceed within ten days after being notified so to do by the city civil engineer of said city, to repair and place in good condition the streets, avenues, lanes and alleys of said city, where pipes have heretofore been laid or work done by said company, or by the S. W. O. N. G. & P. O. Co., and prosecute said work with diligence.

"(2) That said company will not in any manner molest, damage or interfere with any of the gas or water pipes, or public or private sewers now laid or constructed in or along any of the streets, avenues, lanes, alleys or public grounds of said city.

"(3) That said company will restore any and all streets, avenues, lanes, alleys and public grounds in which it may lay pipes, or which it shall disturb or interfere with in laying pipes, to as good condition as they were before the laying of said pipes.

"(4) That said company will, without delay, remove from the streets, avenues, lanes, alleys and public grounds all dirt or rubbish caused by the laying of said pipes.

"(5) That said company will reimburse said city for all money expended in restoring any street, avenue, lane, alley or public place, or any part thereof, to as good condition as the same was before the same was opened for the purpose of laying pipes therein; and for all money expended for clearing away any dirt or rubbish caused by the laying of pipes, as aforesaid, where said company has failed to so restore the condition of any street, avenue, lane, alley or public place, or to remove such rubbish or dirt within ten days after receiving written notice from the city civil engineer so to do.

"(6) That it shall indemnify and save harmless the said city from and against any and all claims, demands, suits or liabilities of any kind that said city may be subjected to or incurred by reason of or growing out of the opening of said streets, avenues, lanes, alleys and public places, or the laying of pipes therein, or of permitting or of having such gas within

the city, or in the said pipes, or the doing of work incident to this grant, or in consequence of injuries or damages to persons or property by such gas, or by reason of any explosion of such gas, or growing out of the failure of said company to restore the streets, avenues, lanes, alleys and public places as aforesaid, it being the intention that said company shall be primarily liable as between it and the city in all such cases.

"Sec. 3. The city council may, at any time, require the renewal of said bond, when in its judgment it has become insufficient.

"Sec. 4. Whenever said city shall determine to construct any sewer in or along any street, avenue, lane, alley or public place where any pipe of said company is laid, said company shall, at its own expense, lower, elevate, change, or remove any such pipe, so that such sewer may be constructed as desired by the city.

"Sec. 5. All pavements, sidewalks, curbstones, gutters, streets, lanes, alleys, avenues or public grounds disturbed or injured by said company, in any manner or by any means, shall at once be placed in as good condition as it was before so injured or disturbed.

"Sec. 6. All work in laying or repairing pipes shall be prosecuted in such a manner as not to interfere with the use or travel upon the streets, avenues, alleys, lanes or public places of said city, where it can be avoided, and when such use is unavoidably obstructed by said company it shall, with reasonable dispatch, repair and replace such street, avenue, lane, alley, or public place.

"Sec. 7. All pipes, mains, and apparatus of every kind used by said company shall be of the most improved design and quality. All pipes shall be of standard weight, and be so laid as not to interfere with the use of the streets, avenues, alleys, lanes and public places after same are in place.

"Sec. 8. In order to provide against gas that may escape from high and low pressure mains and pipes from passing into cellars, sewers and buildings, it shall be, and is hereby, made the duty of said company to furnish and supply perforated stop-box lids on all stop-boxes. Gauges showing the amount of pressure on all natural gas lines shall be erected in the city civil engineer's office, at the expense of the company, and there shall be as many gauges as are necessary to indicate the pressure upon all low pressure lines in said city.

"Sec. 9. Said company shall at all times maintain pressure for domestic use of not less than four ounces nor more than eight ounces to the square inch, at the point of consumption.

"Sec. 10. Any consumer within said city shall have the right to require gas to be furnished by meter measurement, and not by the schedule rates; in cases where a meter is used, said company shall have the right to charge and receive any sum not exceeding ten cents per thousand cubic feet, if paid within ten days, or twelve and one-half cents per thousand cubic feet, if not so paid, for the gas used. Such meter shall be furnished and set in place upon the application of any consumer, without cost to such consumer, by said company; but said company shall be entitled to charge a rent of three dollars per year in advance therefor.

"Sec. 11. For all manufacturing purposes, natural gas shall be supplied and furnished at the option of the consumer. First, at not to exceed seventy-five per cent of the cost of coal; or, second, by special agreement, and in that event, at the same rate to all, whether large or small consumers, and in no case shall preference be given in price to one consumer over another; or, third, by meter measurements, not exceeding ten cents per one thousand cubic feet, if paid within ten days, as heretofore provided, the meter to be furnished and set by the company without cost to the consumer, but at the same rent and terms as heretofore named.

"Sec. 12. Said company may cut off the gas from any consumer in case of ten days' default after bills are due in the payment. But when payment is made, gas shall again be furnished to such consumer, on his request.

"Sec. 13. Said company shall be compelled to furnish gas to all applicants, whenever applied for. Said company shall, within ninety days after being ordered so to do by the council, lay pipes in any streets, lanes, avenues, alleys or public places, contiguous to streets, etc., where their pipes are

then laid, provided that, in the opinion of said city council, the amount of gas consumed by such parties will justify the laying of said pipes and making said connections, and provided one-fifth in number of the owners of property upon the line of such extension agree to subscribe for gas.

"Sec. 14. Said company shall supply natural gas to consumers and to said city so long as said gas shall last. Said company shall supply gas to the city building, without cost to the city, sufficient to heat said building. The council of said city shall appoint a proper person to superintend the laying of pipe and repairing of streets, etc., while said line is in process of construction, and said company shall pay the salary of said person, said salary not exceeding twelve hundred dollars per year, to be fixed by council.

"Sec. 15. Mixers numbered as follows shall have openings of the following diameter through them:

No. 3, 3-32 of an inch.

No. 5, 4-32 of an inch.

No. 7, 5-32 of an inch.

No. 9, 6-32 of an inch.

"Mixers designated by letters shall have openings of the following diameter through them:

Mixer A, 6-32 of an inch.

Mixer B, 7-32 of an inch.

Mixer C, 8-32 of an inch.

Mixer D, 9-32 of an inch.

Mixer E, 10-32 of an inch.

Mixer F, 11-32 of an inch.

"The thickness of metal through which the outlet for gas is made in the mixer, should not exceed three-sixteenths of an inch. Any of the above mixers shall be used when required by persons wishing quantity of gas they will supply. Inch measurements above refer to regulation sizes. The contract heretofore made between the city and this company, as to schedule of prices, shall be in full force except as herein altered, and for the unexpired time of said original contract, and all property rights heretofore acquired by this company shall be preserved to it, except as modified herein.

"Sec. 16. Said company shall, at its own expense, furnish and lay all service pipe to the curb line of streets.

"Sec. 17. In prosecuting the work of laying pipes, said company shall be subject to all general ordinances of the city of Dayton, not inconsistent with this ordinance.

"Sec. 18. Whenever the said council of said city shall determine to pave any of the streets of said city, said company shall, if required to do so by resolution of said city council, lay down its mains and service pipes in and along such streets to be improved at such times as the city council may direct.

"Sec. 19. If said company shall willfully violate any of the provisions of this ordinance, directing anything to be done, or enjoining the doing of anything, it shall be liable to the city in the sum of two hundred dollars, as liquidated damages, to be recovered in a civil action.

"Sec. 20. That this ordinance shall take effect at the date when said company shall file its written acceptance of the provisions hereof with the city clerk of said city."

Under the bill filed in the circuit court of the United States for the southern district of Ohio, western division, by the complainant, the Manhattan Trust Company, the property of the defendant gas company was placed in the control of a receiver appointed by that court, who at once qualified and took possession. The receiver, claiming that after the expiration of the term of five years mentioned in the ordinance of December 23, 1887, fixing the schedule of prices for gas furnished through mixers, there was no rate fixed by ordinance or agreement from and after the 10th of January, 1893, proceeded to carry into effect a resolution of the defendant company, passed in December, 1892, in anticipation of the termination of the contract created by the ordinance of December, 1887, advanced the rate of gas to 20 cents per 1,000 cubic feet to all consumers, and sent out his bills accordingly. The city of Dayton filed its intervening petition in the cause, alleging

that the action of the receiver in charging a rate in excess of 10 cents per 1,000 cubic feet was in violation of the ordinance of the city passed March 27, 1889. This petition was answered by the Manhattan Trust Company, and by the receiver, setting up the various ordinances and agreements heretofore mentioned, and insisting that 10 cents per 1,000 cubic feet was an absolutely inadequate price, and ruinous to the interest committed to the control and custody of the receiver; and that, after the expiration of five years after the passage of the ordinance of December 23, 1887, there was no agreement between the city of Dayton and the gas company, and that there was no ordinance in force affecting the price to be charged for gas by the gas company. These answers were demurred to, and stricken from the files, and the receiver restrained by order of the court from accepting more than 10 cents per 1,000 cubic feet, which was to be credited upon the bills sent out, subject to and until further order of the court. From this order of the court enjoining the receiver from collecting more than 10 cents per 1,000 cubic feet, the Manhattan Trust Company and the receiver have appealed.

Wm. B. Richie, John A. McMahon, and Lawrence Maxwell, Jr.,
for appellants.

Craighead & Conover, for appellees.

Before TAFT and LURTON, Circuit Judges, and SEVERENS,
District Judge.

LURTON, Circuit Judge, after stating the facts, delivered the opinion of the court.

The controversy involved on this appeal is as to the price to be charged the citizens of Dayton, Ohio, by the receiver of the natural gas company, and arises upon the intervening petition of the city of Dayton, the answers of the Manhattan Trust Company, and of the receiver.

The contention of the receiver is that there is no agreement between the gas company and the city as to the price, and no ordinance in force regulating the price; that the price of 10 cents per 1,000 cubic feet is an absolutely inadequate price, and ruinous to the interests of the property committed to his management as receiver; and that the charge of 20 cents per 1,000 cubic feet, demanded by him, is reasonable and just. The city, on the other hand, insists that section 10 of the ordinance of March 28, 1889, is in force, and operates as a maximum upon the price of gas furnished consumers by meter measurement. The question turns upon the construction of the ordinances of the city of Dayton passed December 23, 1887, and March 28, 1889, viewed in the light of sections 2478 and 2479 of the Revised Statutes of Ohio. These sections read as follows:

"Sec. 2478. The council of any city or village in which electric lighting companies, natural or artificial gas companies, or gas light or coke companies may be established, or into which their wires, mains or pipes may be conducted, are hereby empowered to regulate, from time to time, the prices which said electric lighting, natural or artificial gas, or gas and coke companies, may charge for electric light, or for gas for lighting or fuel purposes, furnished by such companies to the citizens, public grounds and buildings, streets, lanes, alleys, avenues, wharves and landing places; and such electric lighting, natural or artificial gas, or gas light and coke companies, shall in no event charge more for any electric light, or natural or artificial gas, furnished to such corporation or individuals than the price specified by

ordinance of such council; and such council shall also have power to regulate and fix the price which such companies shall charge for rent of their meters.

"Sec. 2479. In case the council fixes the minimum price at which it requires any company to furnish gas to the citizens, or public buildings, or for the purpose of lighting the streets, alleys, avenues, wharves, landing places and public grounds, for a period not exceeding ten years, and the company assents thereto by written acceptance, filed in the office of the clerk of the corporation, it shall not be lawful for the council to require such company to furnish gas at a less price during the period of time agreed on, not exceeding ten years, as aforesaid."

Under the latter section it was clearly within the power of the council to fix a minimum price at which it would require gas to be furnished for a period "not exceeding ten years." Upon the assent of the company, "by written acceptance filed in the office of the clerk of the corporation," the act makes it unlawful for the council to require gas to be furnished at a less price during the period of time agreed on, not exceeding 10 years.

The price ordinance of December 23, 1887, was a clear exercise of this limited power of contract. The ordinance was, in terms, limited to a period of 5 years from and after 10 days after the date of its first publication, and therefore expired by its own limitation on the 10th of January, 1893. It follows, therefore, that if that is the only price ordinance bearing upon this gas company, it has expired by its own terms, and there is now no agreement or ordinance regulating the charge to consumers.

But the petitioner insists that by section 10 of the ordinance of March 28, 1889, a maximum rate is fixed for gas furnished by meter measurement, and an option given consumers to require meter measurement. That section reads as follows:

"Any consumer within said city shall have the right to require gas to be furnished by meter measurement, and not by the schedule rates; in cases where a meter is used, said company shall have the right to charge and receive any sum not exceeding ten cents per thousand cubic feet, if paid within ten days, or twelve and one-half cents per thousand cubic feet, if not so paid, for the gas used. Such meter shall be furnished and set in place upon the application of any consumer, without cost to such consumer, by said company; but said company shall be entitled to charge a rent of three dollars per year in advance therefor."

If this section is to be construed as a regulation of the price for gas furnished consumers under and by virtue of the power conferred by section 2478, above cited, and is still in force as general legislation, then the controversy is closed, and the receiver must comply with an ordinance clearly within the power of the council to enact. So, if it is to be regarded as a limitation imposed upon the license authorizing the gas company to enter upon the public streets of Dayton, and establish itself there as a gas company, it would be a valid legislative limitation upon the gas company so long as it remained unaltered or unrepealed.

With regard to this section, the insistence of the learned counsel for appellants is, as set down in the brief:

"First. It is not a limitation upon the power of the company for the period of twenty years.

"Second. It is not a contract for that period, it being manifestly beyond the power of council to enter into such contract; nor is it a contract by construction for ten years, a period within its power.

"Third. But it was a contract for the unexpired term of five years from January 10, 1888, (when the price ordinance of December 23, 1887, took effect), being, in effect, an amendment of that ordinance."

We quite agree with counsel as to the second of these propositions. The ordinance of which section 10 is a part does not by any fair and reasonable construction purport to be an agreement under section 2479, Rev. St. Ohio, for a period of 20 years. An agreement for such a term would be *ultra vires*, and it is not to be lightly assumed that the legislative body of the city deliberately undertook to do a vain thing, expressly prohibited by the plain terms of the act giving it the right to make an agreement for a term not exceeding 10 years. Neither can it, by construction, be regarded as an agreement for the term of 10 years. Such a construction could only be reached by the insertion of a term of limitation where none was inserted, or by substituting one term for another. That would be to make a contract for the parties. The section is not so worded as to enable the court to separate the lawful from the unlawful. The contract must stand or fall dependent upon the validity or invalidity of the ordinance as it was enacted. *Trist v. Child*, 21 Wall. 441.

In *U. S. v. Reese*, 92 U. S. 214, a like question arose. Congress had passed a statute punishing election officers who should refuse to allow any person lawfully entitled to do so the right to cast his vote in an election. The supreme court held that congress could only punish such denial when it was on account of race, color, or previous condition of servitude.

"It was agreed," says Mr. Justice Miller, in the *Trade-Mark Case*, 100 U. S. 98, "that the general description of the offense included the more limited one, and that the section was valid where such was in fact the cause of denial. But the court said, through the chief justice: 'We are not able to reject a part which is unconstitutional, and retain the remainder, because it is not possible to separate that which is constitutional, if there be any such, from that which is not. The proposed effect is not to be attained by striking out or disregarding words that are in the section, but by inserting those that are not there now. Each of the sections must stand as a whole, or fall altogether. The language is plain. There is no room for construction, unless it be as to the effect of the constitution. The question, then, to be determined, is whether we can introduce words of limitation into a penal statute so as to make it specific, when, as expressed, it is general only. * * * To limit this statute in the manner now asked for would be to make a new law, not to enforce an old one. This is no part of our duty.' If we should, in the case before us, undertake to make, by judicial construction, a law which congress did not make, it is quite probable we should do what, if the matter were now before that body, it would be unwilling to do, namely, make a trade-mark law which is only partial in its operation, and which would complicate the rights which parties would hold, in some instances under the act of congress, and in others under state law."

Cooley, Const. Lim. 178, 179; *Com. v. Hitchings*, 5 Gray, 482.

We cannot venture to say that an agreement for an indefinite time, or for 20 years,—a time beyond the power of the council,—is to be construed in either case as by construction an agreement for 10

years, because it was within the power of the council to have made an agreement for that time, or for any time short of that time.

This brings us to the question of real difficulty,—that covered by the third contention of appellants, viz. that section 10 is to be construed as an agreement for the unexpired term of the contract as to price contained in the ordinance of December, 1887. This contention is entirely based upon the meaning and legal effect of the provision of section 15 of the ordinance of March 28, 1889, in these words:

"Mixers numbered as follows shall have openings of the following diameter through them:

- No. 3, 3-32 of an inch.
- No. 5, 4-32 of an inch.
- No. 7, 5-32 of an inch.
- No. 9, 6-32 of an inch.

"Mixers designated by letters shall have openings of the following diameter through them:

- Mixer A, 6-32 of an inch.
- Mixer B, 7-32 of an inch.
- Mixer C, 8-32 of an inch.
- Mixer D, 9-32 of an inch.
- Mixer E, 10-32 of an inch.
- Mixer F, 11-32 of an inch.

"The thickness of metal through which the outlet for gas is made in the mixer, should not exceed three-sixteenths of an inch. Any of the above mixers shall be used when required by persons wishing quantity of gas they will supply. Inch measurements above refer to regulation sizes. The contract heretofore made between the city and this company, as to schedule of prices, shall be in full force except as herein altered, and for the unexpired time of said original contract, and all property rights heretofore acquired by this company shall be preserved to it, except as modified herein."

This clearly has reference to the schedule of prices for gas supplied through mixers found in the ordinance of December, 1887. The contractual character of that ordinance, it having been accepted by the gas company, is recognized, and that agreement is proposed to be revised, "except as herein altered, and for the unexpired term of said ordinance." The words, "as herein altered," refer, as we think, to the alteration contained in this section. The old agreement contained no regulation as to the size of the openings in the mixers. This is remedied in this section by a definite provision as to the size of the openings in each mixer referred to by number or letter in the old ordinance.

This section 15 contains the only definite indication that anything in this ordinance was intended as a contractual proposition. This proposition for an agreement is limited to the matter covered by the old agreement. This leaves section 10 to stand as a regulating provision of legislative character, and not intended as a proposition under section 2479. The expression of a purpose to make an agreement, so far as there had been an agreement, and for the unexpired term of that agreement, is an indication of the limits of the agreement intended by the new ordinance. It is as much as to say that, "so far as there was an agreement, it shall be revived, subject to the provision herein as to the size of the openings in the mixers; but as to matters not within the old agreement there shall be no agree-

ment which is to stay our free hand as a legislative body." This is borne out by the fact that there is no limitation as to time contained in section 10, which provided a price when delivered through meters, or section 11, which refers to the use of gas by manufacturers. Why such particularity in limiting the agreement as to the delivery through mixers to the unexpired time of the old agreement, while neither of these sections contain any reference as to time? The only answer would be that the council intended to give to the new company all the privileges of the old, whose rights had been forfeited, and to make it an agreement just as broad as that it had had with the old company, but no broader.

To constitute a valid proposition for an agreement, the council should have made a schedule for a distinct period of time, not exceeding 10 years. Such a proposition, when accepted, would constitute an agreement. But if it be for an indefinite time, or for a period beyond the time allowed by section 2479, it will be void as an agreement. *Coke Co. v. Avondale*, 43 Ohio St. 257, 1 N. E. 527; *State v. Gas Co.*, 37 Ohio St. 45.

The conclusion we reach is this: That section 10 is a legislative regulation of the price of gas delivered by meters, and a limitation upon the license granted this company, which must stand as a lawful regulation of price, under section 2478, Rev. St. Ohio, until altered, amended, or repealed by subsequent legislation. The receiver is as much bound by this public law as the company would be.

The decree is therefore affirmed.

MICHIGAN CENT. R. CO. v. HUEHN et al.

(Circuit Court, D. Indiana. January 22, 1894.)

MUNICIPAL CORPORATIONS—PUBLIC IMPROVEMENTS — NECESSITY FOR—PRELIMINARY RESOLUTION—INJUNCTION.

The Indiana statute providing that whenever it shall be deemed necessary to construct any public improvement the council shall declare by resolution the necessity therefor, and state the kind, size, location, and terminal points, and publish notice thereof for a specified time, must be complied with before the council can order the improvement made. The mere passage of an ordinance ordering the improvement, without the publication of such preliminary resolution, is not the equivalent thereof, and the making of the improvement will be enjoined.

In Equity. Bill by the Michigan Central Railroad Company against Henry Huehn, Thomas W. Kinser, and William J. Kinser. Heard on motion for preliminary injunction. Granted.

Winston & Meagher and J. B. Collins, for complainant.

R. Gregory and Lamb & Beasley, for defendants.

BAKER, District Judge, (orally.) It is thoroughly well settled in every tribunal administering justice according to the rules of the common law that the proceedings of a municipal corporation clothed with power to act, if it has proceeded within the scope of

its statutory powers, cannot be collaterally assailed for mere errors or irregularities; so that in this case the precise question raised by the application for a temporary restraining order is whether or not the ordinance adopted by the common council of Hammond, and the proceedings had thereunder, are coram non judice and void, by reason of the failure of the common council to take those preliminary steps essential to give it jurisdiction to act. The statute provides that:

"Whenever cities or incorporated towns subject to the provisions of this act shall deem it necessary to construct any sewer or make any alley or street improvements in this act mentioned, the council or board of trustees shall declare by resolution the necessity therefor, and shall state the kind, size, location, and designate the terminal points thereof, and notice for ten days of the passage of such resolution shall be given for two weeks in some newspaper of general circulation published in such city or incorporated town, if any there be, and if there be not such a paper, then in some such paper printed and published in the county in which such city or incorporated town is located."

It is, in effect, insisted by counsel for the respondents that the provisions of section 7 requiring notice to be given after the work has been done, and an estimate and an assessment upon the various property owners have been made, authorizing the parties so assessed to appear before a committee of the common council, and show either that the work has not been done in compliance with the contract, or that the assessments have not been fairly and equitably distributed, is a sufficient notice, under the constitution and laws of this state, to give validity to the proceedings in question; so that, if the property owner has that notice, it is immaterial that he has not had the notice provided for in section 2, and that the declaratory resolution provided for therein has never been adopted. I entertain no doubt of the meaning and purpose of section 2. That section, I think, was incorporated into the statute in view of the well-known historic fact that these municipal bodies are prone to engage in systems of public improvement without any great regard to the best interests of the city, or of the well-being of the people, and that the legislature meant to impose a barrier on such officers by making them state on the record upon the sanction of their oaths that a necessity existed for such improvements before they could be lawfully undertaken. And then the lawmaking power meant that they should publish for ten days, two weeks before the time fixed for hearing, the substance, at least, of the resolution declaring the necessity for such public improvement, fixing the time and place when and where the property owner would be given an opportunity to appear and remonstrate, and show that the alleged necessity did not exist. I think that provision of the statute is a material and important one. It is important for the protection of the interests of the property owners to be affected by the proposed improvement. The law manifestly contemplated that the people who were to bear the burden should have an opportunity, before the improvement had been entered upon, to bring to the attention of the common council every consideration which they could suggest for the purpose of satisfying the

common council that their declaratory resolution was not well founded, and that the improvement was not necessary. If I entertained any doubt—and I do not—about the wisdom of this section of the statute, I could not entertain any doubt of the duty of the court to enforce it fairly, and in accordance with its terms. I think that it is necessary, before any ordinance is enacted involving the city in any scheme of public improvement of the character of that in question, that a declaratory resolution should have been adopted, and that the notice, substantially as required by that section, should have been given, in order that the citizens or public to be affected may have an opportunity to be heard as to the necessity of the proposed public work.

This statute says that these things which have been omitted shall be done. The statute, in its language, is mandatory; and according to the familiar rule of legal construction, as the statute is enacted for the protection of private rights against inconsiderate municipal action, it must receive the construction that will give it a mandatory force. Now, then, the question is whether or not the evidence in this case shows a substantial compliance with this statutory provision. It is conceded that no declaratory resolution was ever adopted. It is not claimed that there is anything in the ordinance that in terms declares that there is a necessity for this improvement. But it is said that the court, by argument or intendment, will incorporate that into the ordinance, because, unless the common council had believed that there was a necessity for the improvement, they would not have ordered the improvement made. I think the argument is a non sequitur. The distinction between a necessary improvement and one that is a mere matter of taste or mere matter of convenience, or one that is merely the result of the expression of public vanity or caprice, is a distinction that ought to be sharply drawn. I agree that it is for the council to declare the necessity, and if they have done so, and adhered to that declaration, the courts cannot revise such declaration. The legislature of the state, however, has laid its command on the common council, and has said, "you shall not enter upon any public improvement of this sort until, under the obligation of your oath, you have declared, of record, that the improvement proposed is necessary, and have given public notice, fixing a time and place when and where the owners of property may have an opportunity to be heard." This statute is salutary, and in these times courts ought to do nothing to weaken the barriers erected for the protection of private rights against municipal extravagance. I do not think that the ordinance is either a substantial, or even an attempted, compliance with this statutory requirement. I think the ordinance is simply an expression of the will of the common council. I think the common council has utterly disregarded the section in question, and has adopted this ordinance either in ignorance of that provision of the statute, or in disregard of it.

It is said that the requirement of the statute that notice for ten days of the passage of such resolution shall be given for two weeks

in some newspaper of general circulation, which notice shall state the time and place when and where the property owners along the line of the proposed improvement may make objections to the necessity of the improvement,—I say it is argued that that provision of the statute is substantially complied with by the naked publication of the ordinance itself. The ingenuity of counsel in urging such a claim is to be commended, but the argument is one that carried little force with the court. To say that the naked publication of an ordinance, with nothing more, is a substantial compliance, or even an attempt to comply, with the statute, is, in my judgment, entirely unfounded. The notice that is required to be given should show, or attempt to show, that a resolution has been adopted by the common council declaring the necessity for a public improvement, and that a time and place are fixed where those who are to be affected by the proposed improvement may appear, and show why the improvement is not necessary. Can it be said, with any show of reason, that the publication of the ordinance is any notice to the citizen that is to be affected by it, of the time and place when or where he may appear, and argue, and introduce evidence, and be heard on the question of the necessity of the improvement? My own judgment is that the common council, in this case, just simply started out on this scheme of public improvement either in ignorance of the provisions of section 2, or else with the deliberate purpose wholly to disregard them.

Entertaining these views, it follows that the preliminary injunction will be awarded, to remain in force until the final hearing of the cause.

NEVADA BANK OF SAN FRANCISCO v. PORTLAND NAT. BANK et al.

(Circuit Court, D. Oregon. December 23, 1893.)

No. 1,996.

1. NATIONAL BANKS—LIABILITY FOR FRAUDULENT REPRESENTATIONS.

A national bank is liable for fraudulent representations made by it through its cashier to another bank as to the financial responsibility of a customer.

2. SAME—FRAUDULENT REPRESENTATIONS—STATEMENTS OF FACT AND OPINION.

Representations by one bank to another that a certain business corporation "is prosperous," "well organized," "doing a large business," and are "valued customers of ours;" that an investigation of its business and responsibility had been made by the vice president and cashier of the bank, coupled with the transmission of an annual statement, which (as alleged) is known to be false,—are representations of fact, and not of opinion, and are actionable if fraudulently made.

3. SAME.

Fraudulent representations as to the financial responsibility of another for the purpose of procuring him credit are actionable, though containing no statement as to the amount of credit it is safe to extend. *Hopkins v. Cooper*, 28 Ga. 392, and *Glover v. Townsend*, 30 Ga. 92, disapproved.

4. SAME—RECKLESS STATEMENTS.

False representations concerning the financial responsibility of another, made, for the purpose of procuring him credit, negligently and carelessly, without investigation, when investigation would disclose their falsity, imply a fraudulent intent, and are actionable.

5. SAME—STATUTE OF FRAUDS—SIGNATURE BY BANK CASHIER.

The signature of a bank cashier, with his official title appended, to a letter bearing the bank's name at its head, is the signature of the bank, within the meaning of a statute providing against liability for representations as to the credit, skill, or character of another, unless there is a memorandum thereof in writing, signed by the "party to be charged." 1 Hill's Code Or. § 786.

At Law. Action by the Nevada Bank of San Francisco against the Portland National Bank and George W. Hazen to recover damages for false representations. On demurrers to the complaint. Overruled.

Williams & Wood, for plaintiff.

R. & E. B. Williams & Carey and U. S. G. Marquam, for defendant bank.

J. V. Beach, R. G. Morrow, and B. B. Beekman, for defendant Hazen.

GILBERT, Circuit Judge. The plaintiff brings an action for damages against the defendants. It is alleged in the complaint that the Portland National Bank had for one of its customers the Ainslie Lumber Company, and that the company was indebted to the bank in the sum of \$90,000, and was insolvent. That the defendant Hazen, who was the cashier and acting manager of the bank, knew of the financial condition of said company, as likewise did the bank. That, with intent to defraud the plaintiff, and to induce it to advance money to said company, thereby reducing the said indebtedness to itself, the Portland National Bank, by its said cashier, wrote to the plaintiff as follows:

"Portland National Bank.

"Portland, Or., 6-9-1892.

"Mr. I. W. Hellman, Pres. Nevada Bank, San Francisco—Dear Sir: We take pleasure in mentioning very favorably to you the Ainslie Lumber Company. They are valued customers of ours, and are doing a large business in this section. The company is especially well organized in all its departments, and it is among the prosperous concerns on the coast. We have handled quite a share of their business, and found all their obligations met promptly. The gentlemen in the management of the Ainslie Lumber Company are energetic, pushing people.

"Yours, truly,

Geo. W. Hazen, Cashier.

"Your people will remember me as Ass't Cashier of the United States National Bank of Portland."

—That on the 10th day of June, 1892, in answer to a letter from the plaintiff to the Portland National Bank, addressed to its cashier, George W. Hazen, requesting information as to the standing and responsibility of said Ainslie Lumber Company, the said Portland National Bank, by its said cashier, addressed the following letter to the plaintiff's vice president:

"Portland National Bank.

"Portland, Or., 6-10-1892.

"J. F. Bigelow, Vice Pres. Nevada Bank, San Francisco, Cal.—Dear Sir: Your favor of the 8th inst. is before me. At the request of Mr. Wall, the secretary and treasurer of the Ainslie Lumber Company, I took the liberty

of addressing a brief letter to your president in reference to the Ainslie Lumber Company, and I presume Mr. Hellman will show you the said letter. The vice president of our bank, together with myself, made a thorough investigation of the business and responsibility of this lumber firm, and, upon our report to our board of directors, they extended a line of credit, which, in our estimation, the firm would have to be solid to obtain. Last December, Mr. Wall gave me a copy of their annual statement, which I herewith inclose. Would be glad to have you return it to me. I do not know what this lumber company asks of your bank, but feel safe in saying that I thoroughly believe they can and will do whatever they might promise you.

"Respectfully, yours, [Signed] Geo. W. Hazen, Cashier."

—That the annual statement referred to in said letter showed assets amounting to \$268,881.22 over and above all liabilities and debts of the said corporation. That at the time of sending said letter neither the vice president of the Portland National Bank nor the defendant Hazen had made any investigation as to the business or responsibility of said Ainslie Lumber Company, and said letter was written and sent to the plaintiff with intent to cheat and defraud the plaintiff; and that said annual statement was false and fraudulent, and was so known to be by the defendants; and that both of said letters were written and sent for the purpose of inducing the plaintiff to extend to said Ainslie Lumber Company a credit. That the plaintiff, relying upon said representations and upon that account, extended to said Ainslie Lumber Company a credit amounting to \$21,905.82, all of which is lost to the plaintiff, and for which sum plaintiff demands judgment.

For a second cause of action, the plaintiff sets up the same facts that are contained in the first cause of action, but, instead of alleging the fraudulent knowledge and purpose of the defendants in writing said letters, it is alleged that the defendants made no investigation as to said Ainslie Lumber Company, and that the representations in said letters contained were carelessly and negligently made.

Each count of the complaint is demurred to upon the grounds: First, that neither the defendant bank nor its cashier had power to make such representations concerning the standing or credit of the Ainslie Lumber Company; second, the representations contain no definite statement of facts touching the credit of the Ainslie Lumber Company upon which an action could be brought; third, that no action can be brought upon said representations under the statute of frauds. The defendants contend that the defendant bank, which is a national bank, had not the power to assume a liability for its own error or mistake in certifying to the financial standing of a customer seeking credit at another bank. It must be conceded that it had not the power to assume such liability *ex contractu*, but in the case of a tort committed by the bank or its officers a different principle is applied. In such a case it is the rule that the corporation is liable for the negligence or other tort of its agents and servants, even when performing acts that are *ultra vires*. In the case of *Merchants' Bank v. State Bank*, 10 Wall. 604, the court said:

"Corporations are liable for every wrong of which they are guilty, and in such case the doctrine of *ultra vires* has no application. Corporations are

liable for the acts of their servants while engaged in the business of their employment in the same manner and to the same extent that individuals are liable under like circumstances."

In *Bank v. Graham*, 100 U. S. 699, 702, the court said:

"An action may be maintained against a corporation for its malicious or negligent torts, however foreign they may be to the object of its creation, or beyond its granted powers. It may be sued for assault and battery, for fraud and deceit, for false imprisonment, for malicious prosecution, for nuisance, and for libel."

The same doctrine is applied in the cases of *Railroad Co. v. Derby*, 14 How. 468; *Railroad Co. v. Quigley*, 21 How. 202; *Etting v. Bank*, 11 Wheat. 59; *Bissell v. Railroad Co.*, 22 N. Y. 258.

It is argued that the defendant bank cannot be held liable to an action for the unauthorized or fraudulent representations of its agents; and that the cashier of that bank is not, from his mere position as such officer, authorized to make statements of the bank; and that, although the employment and official position of such officer may have given him the opportunity to make such statement, he may nevertheless have made the same as well when absent as when present at the bank. Authorities are cited which sustain this view. The language of the complaint, however, excludes this question from the discussion. It is alleged in the complaint (and for the purpose of this demurrer the complaint must be taken to be true) that the defendant bank itself made the representations, by its cashier, and that the letters were written and sent by the defendant bank. It is alleged that it was the purpose of the bank by the representations to secure an advantage to itself, and that one of the letters was written in direct response to a letter directed to the defendant bank. There is nothing in the language of the letters themselves which would tend to contradict these allegations. On the other hand, there may be found in the letters numerous expressions corroborative of the theory that they were written and sent by and on behalf of the bank, and as the act of the bank.

It is further objected that the language of the letters contains no statement of fact upon which an action can be brought, and that there is no definite information conveyed as to the property or means of the Ainslie Lumber Company, and no amount is stated for which its credit is said to be good. The general rule in regard to such representations is that they must be statements of fact, and not of opinion, and that the representations must be definite and certain in order to charge the defendant with liability. These letters contain the information that the Ainslie Lumber Company "is prosperous," "well organized," "doing a large business," that "they are valued customers of ours." The second letter contains as part of the representation the fact that the writer and the vice president of the defendant bank had made a thorough investigation of the business and responsibility of the company, and there is inclosed a copy of the company's annual statement, which shows assets of \$308,057.75, and liabilities of less than \$40,000. It is alleged in the complaint that this annual statement was known to be false when so furnished by the defendants. These representations so expressed

and so declared upon fully comply with the rule of law concerning such cases.

The cases of *Hopkins v. Cooper*, 28 Ga. 392, and *Glover v. Townsend*, 30 Ga. 92, are cited in support of the proposition that the representations are not actionable unless they indicate to a reasonable certainty the amount for which it will be safe to extend credit. As applied to the facts declared upon, the conclusion reached by the court in the first of those cases is undoubtedly correct, but the principle announced in both cases is not in harmony with the current of authority. In *Boyd's Ex'rs v. Browne*, 6 Pa. St. 310, the representation was that the party seeking credit was "a sober, industrious man, worthy of credit, and able to pay," and was held sufficient to sustain the action. In *Addington v. Allen*, 11 Wend. 374, the defendant was held liable upon a letter which stated in general terms that the person who sought credit was a merchant of some years' standing, and that any assistance given him in the way of buying goods would be thankfully acknowledged by the writer. In *Tatton v. Wade*, 86 E. C. L. 370, the representation was made concerning one who wished to rent apartments, and its purport was that the plaintiff "need be under no apprehension of his honesty," and that he "held a very responsible situation." In *Kimball v. Comstock*, 14 Gray, 508, the defendant was charged with having falsely and fraudulently represented of another that "he was possessed of a large amount of property and entitled to credit."

It is contended that action upon these representations is barred by the statute of frauds. Section 786, p. 594, 1 Hill's Code, provides as follows:

"No evidence is admissible to charge a person upon representation as to the credit, skill or character of a third party unless such representation or a memorandum thereof be in writing and either subscribed by or in the handwriting of the party to be charged."

This provision of the statute is, in substance, a reproduction of Lord Tenterden's act, (9 Geo. IV. c. 14, § 6.) The same or a similar statute has been adopted in several of the states, but it is believed that the provision therein expressed that the representation must be subscribed by the "party to be charged" is found only in the law of Virginia, West Virginia, Kentucky, Alabama, and Oregon. In England, Lord Tenterden's act has been construed to mean that the representation must be signed by the party himself, and may not be signed by an agent. *Hyde v. Johnson*, 3 Scott, 289; *Clark v. Alexander*, 8 Scott, N. R. 147; *Williams v. Mason*, 28 Law T. (N. S.) 232. The same construction is doubtless applicable to the Oregon statute.

It is argued that the signature of the cashier of the defendant bank, attached to the letters, is not the signature of the bank. The English case of *Swift v. Jewsbury*, L. R. 9 Q. B. 301, decided in 1874, is relied upon as giving that interpretation to the statute. In that case a letter had been written to the manager of a bank, requesting his opinion of the standing of one who was seeking credit. The answer was signed, "J. B. Goddard, Manager." The banking company had no knowledge that such letter had been written, and gave the manager no express authority to write the same. The company

was not a corporation. It was a copartnership, with certain privileges conferred by statute. It could sue and be sued only in the name of one of its public officers, and its members could not be made liable in respect to transactions with the company until a judgment had first been obtained against the company through one of its public officers. The decision of the court of queen's bench was that the signature of Goddard, the manager, was in fact and law the signature of the banking company; but, upon appeal to the court of exchequer, Lord Coleridge was of the opinion that the signature to the document upon which the bank was sought to be held liable was not signed by the party to be charged, and did not come within the terms of the statute. Instead of basing the decision upon that view of the law, however, he held that the decision of the queen's bench should be reversed upon the ground that, upon the language of the correspondence, there was no intention to consult the bank, but rather the manager thereof; and that the representation was made by Goddard himself of matters as to which he was pledging his personal knowledge only. Upon this ground the decision was concurred in by the remainder of the court. No American case is found which covers the point in question, but the tendency of the decisions in the states in which Lord Tenterden's act has been adopted has been to modify the protection which the statute affords to fraud by enforcing a strict construction of its provisions. *Bush v. Sprague*, 51 Mich. 41, 16 N. W. 222; *Hodgin v. Bryant*, 114 Ind. 401, 16 N. E. 815. I do not consider the opinion of Lord Coleridge in *Swift v. Jewsbury* in harmony with this tendency of the American courts, or with the theory of the American law, in regard to corporations, and the general course of the transactions of banking business. A corporation can sign instruments in writing only by an officer or officers empowered so to do. In the usual course of the corporation's business the act of signing is not the act of an agent, but the act of the corporation itself. While formal documents are usually signed by the president and secretary, and further authenticated by the corporate seal, the corporation may nevertheless empower any officer to execute deeds or other instruments in writing. In banking corporations, most instruments in writing issued or indorsed by the bank are signed by the cashier. The letters of the bank, in its usual correspondence about business, are often, if not generally, signed by him. In *Morse on Banks and Banking* (section 162) it is said that it is the special duty of the cashier to conduct the correspondence of the bank. The name of the defendant bank stands at the head of both letters referred to in the complaint, and both are signed by the cashier, and his official title is appended. The question is not free from doubt, but I am inclined to the view that in a document of this kind, written under the circumstances detailed in the complaint, the signature of the cashier is the signature of the bank. It may be conceded that the bank would have the power to sign the letters in a different way. It can only append its signature, however, by some officer or agent, and the usual agent or officer to sign a written instrument is the cashier. The cashier, in this instance, not only had the usual powers incident to his office,

but it is alleged in the complaint that the issuance of and the signature to these letters were expressly authorized by the bank, and intended to express its own deliberate action.

In the second count of the complaint there is no allegation of fraud or fraudulent intent upon the part of the defendants in making the representations concerning the credit of the Ainslie Lumber Company, and the question arises whether the averment that the representations were made negligently and carelessly sufficiently states a cause of action. It is held in Kentucky that the statute of that state, which is substantially the same as the law of Oregon above quoted, embraces every case of false representation concerning the credit of another, except cases where a fraudulent intent exists; but that, in case the representations are fraudulent, the statute has no application, and an action may be brought, irrespective of its provisions. *Warren v. Barker*, 2 Duv. 156; *Dent v. McGrath*, 3 Bush, 176. The same doctrine is held in Alabama. *Clark v. Lumber Co.*, 86 Ala. 220, 5 South. 560. I am unable to agree with the reasoning upon which those decisions are based. The decision in *Pasley v. Freeman*, 3 Term R. 51, is generally understood to have prompted the enactment of Lord Tenterden's act. It was held in that case that a false affirmation made by the defendant concerning the credit of another with the intent to deceive and defraud the plaintiff is the ground of an action on the case in the nature of deceit, and that it is not necessary that the defendant's purpose should have been to benefit himself. This was supposed by some to be an evasion of the statute of frauds, in that it permitted actions upon verbal representations while prohibiting actions upon verbal promises to pay another's debt. By Lord Tenterden's act it was declared that representations concerning the credit of another should not be actionable unless in writing, and signed by the party making the same. What was the nature of the representations that were placed under the protection of the statute? They were obviously such as, prior to the statute, were actionable. There is no warrant for holding that the statute was intended to create a new cause of action, or to render representations actionable which before were not. The essence of the action after as well as before the statute was the fraudulent intent. In *Allen v. Addington*, 7 Wend. 10, reviewed on appeal to the court of error in 11 Wend. 374, it was held, after a careful review of all the authorities, that in an action to recover damages for false representations as to the credit of another the declaration must contain the allegations that the representations were made with an intention to deceive and defraud. In *Russell v. Clark's Ex'rs*, 7 Cranch, 69, Chief Justice Marshall said:

"That a fraudulent recommendation (and a recommendation known at the time to be untrue would be fraudulent) would subject the person giving it to damages sustained by the person trusting to it seems now to be generally admitted."

In *Ewins v. Calhoun*, 7 Vt. 79, and *Weeks v. Burton*, Id. 67, it is held that, where one acts upon false representations of another's solvency, and is damaged thereby, he has a cause of action against

the person making the same, if the latter knew them to be false. The same doctrine has been held in some of the states where Lord Tenterden's act has been adopted. *Kimball v. Comstock*, 14 Gray, 508; *Mann v. Blanchard*, 2 Allen, 386; *McKinney v. Whiting*, 8 Allen, 207; *Whitten v. Wright*, 34 Mich. 92. These decisions, and others in general harmony with them, while all declaring that there must have been a fraudulent intent, are not uniform in their definition of that intent. In *Allen v. Addington* it is held that the fraudulent intent may consist either in an interested design on defendant's part to benefit himself, or a malicious design to injure the plaintiff. In other cases it is held that any representation known at the time to be untrue is deemed fraudulent. In *Lord v. Goddard*, 13 How. 211, it is said fraud means "an intention to deceive. If there was no intention; if the party honestly stated his own opinion, believing at the same time that he stated the truth,—he is not liable in this form of action, although the representation turned out entirely untrue." But by the weight of modern authority it is held that the law imputes an intention to deceive in every case where one recklessly asserts that to be true which is untrue, and concerning which he pretends to have a knowledge which he has not. 1 Cooley, Torts, 501; *Brooks v. Hamilton*, 15 Minn. 31, (Gil. 10;); *Lynch v. Trust Co.*, 18 Fed. 486; *Caldwell v. Henry*, 76 Mo. 254; *Cooper v. Schlesinger*, 111 U. S. 148, 4 Sup. Ct. 360. Of this class is the cause of action contained in the second count of the complaint. It is there alleged that the representations were false; that they were made for the purpose of gaining credit for the Ainslie Lumber Company; that they were negligently and carelessly made, without examination or investigation; that, if investigation had been made, the untruth of the facts represented would have been made apparent.

These allegations sufficiently state a cause of action, and both the demurrers are overruled.

MURRAY v. AMERICAN SURETY CO. OF NEW YORK.

(Circuit Court, S. D. California. January 2, 1894.)

No. 557.

1. BANKS—RECEIVERS—AUTHORITY TO APPOINT—STATE STATUTES.

The California statute authorizing the attorney general, on the recommendation of the bank commissioners, to institute suit to enjoin any bank guilty of violating the banking laws from doing further business, and, if it is found insolvent, to cause its business to be wound up under the direction of such commissioners, (Stat. 1877-78, p. 740, as amended by Stat. 1887, p. 90,) does not authorize the court to appoint a receiver for the bank; and a receiver thus appointed without authority cannot maintain a suit to collect claims of the bank.

2. SAME.

A statute providing that upon the "dissolution of any corporation" a receiver may be appointed on the application of creditors or stockholders, (Code Civil Proc. Cal. § 565,) does not apply to the case of an insolvent bank which the state is proceeding against for violating its charter.

At Law. Action by Eli H. Murray, as receiver of the California Savings Bank of San Diego, a corporation, against the American

Surety Company of New York, to recover damages. On demurrer to the complaint. Demurrer sustained.

Luce & McDonald, for plaintiff.

Allen & Flint, for defendant.

ROSS, District Judge. This action was commenced in the superior court of San Diego county, and, on motion of the defendant, was transferred to this court. The action is for damages for the alleged breach of the conditions of two certain bonds, executed by the defendant to the California Savings Bank of San Diego, a corporation, to indemnify that institution against any pecuniary loss by it sustained by the fraud or dishonesty of one J. W. Collins, its vice president, and one Frederick T. Hill, its cashier.

The demurrer filed by the defendant raises, among other questions, the right of the plaintiff to bring the suit. That right is thus alleged in the complaint:

"That on the 12th day of November, 1891, the said California Savings Bank became and was insolvent and suspended business, and thereafter, to wit, on the 4th day of March, 1892, an action was commenced in the superior court of the county of San Diego, state of California, in the name of the people of the state of California, against said California Savings Bank, in which, among other relief demanded by the plaintiff, it was prayed that a temporary receiver be appointed to take possession of all the assets of said savings bank, and to make collection of all claims held by it; and that, upon the final trial of said action, said savings bank be adjudged insolvent, and a permanent receiver appointed to take charge of and collect, preserve, and distribute its assets, and that said corporation be closed and liquidated in the manner provided by section 11 of an act [of the state of California] entitled 'An act creating a board of bank commissioners, and prescribing their duties and powers,' approved March 30, 1878, and as amended by an act approved March 10, 1887; and that such proceedings were thereafter duly had in said action that, by an order of said superior court on that behalf duly made and entered of record, this plaintiff was, on the — day of March, 1892, appointed temporary receiver of said savings bank, and authorized and directed to take possession of all its assets of every kind and character, and to collect and preserve the same pending said action. That on the 2d day of August, 1892, said action came regularly on for trial, and judgment was duly recovered by the plaintiff therein, and entered, 'that the defendant corporation, the said California Savings Bank of San Diego, and all its managers, officers, counselors, attorneys, agents, and others acting in aid or assistance of it or them, be, each and every one of them, and are, each and every one of them, enjoined and prohibited from the transaction of any further business as said corporation.' And it was further in and by said judgment and decree 'ordered and adjudged that Eli H. Murray, of the city of San Diego, is hereby appointed receiver of all the assets and properties of the said defendant corporation, and that he is hereby empowered to sue for and prosecute to determination all indebtedness due said defendant, and to collect, adjust, and settle all claims in favor of said defendant, and that he shall have the right to defend all suits instituted against said corporation, and that he shall allow and adjust, under the control of this court, all the claims against said bank, and, when determined, shall pay to the creditors of said bank such dividends as may from time to time be declared by this court, and to do and perform such further acts as may be provided by law or the further order of this court; and that thereupon this plaintiff duly qualified as such receiver, and entered upon the discharge of his duties as such; and that said judgment has never been set aside or modified, but still remains in full force and effect; and this plaintiff ever since has been, and now is, the duly-qualified and acting receiver of said savings bank."

It is clear that the proceeding in the name of the people of the state of California, of which the superior court, at the instance of the attorney general of the state, took jurisdiction, was by virtue of section 11 of the act of the state creating the board of bank commissioners, and prescribing their duties and powers, of March 30, 1878, (Stat. 1877-78, p. 740,) as amended by an act approved March 10, 1887, (Stat. 1887, p. 90.) As so amended, the section reads:

"Sec. 11. If such commissioners, on examination of the affairs of any corporation mentioned in this act, shall find that any such corporation has been guilty of violating its charter or law, or the provisions of this act, or is conducting business in an unsafe manner, they shall, by an order addressed to the corporation so offending, direct discontinuance of such illegal and unsafe practices, and a conformity with the requirements of its charter and of law under this act; and, if such corporation shall refuse or neglect to comply with such order, or whenever it shall appear to said commissioners that it is unsafe for any such corporation as in this act mentioned to continue to transact business, they shall notify the attorney general of such fact, who, after examination, in his discretion, may commence suit in the proper court against such corporation, to enjoin and prohibit the transaction of any further business by such corporation; and upon the hearing of the case, if the judge of the court where the case is tried shall be of the opinion that it is unsafe for the parties interested, or for such corporation, to continue to transact business, and that such corporation or institution is insolvent, he shall issue the injunction applied for by said commissioners and attorney general, who shall cause said injunction to be served according to law; and said judge shall further direct said commissioners to take such proceedings against such corporation as may be decided upon by its creditors. If any corporation mentioned in this act, which is now insolvent, or which may hereafter become insolvent, or be thrown into liquidation by process of law, or by the order or consent of its stockholders, directors, managing officers, managers, or creditors, the affairs of such corporation shall be closed, and the business thereof settled within four years from the time it shall be declared to be insolvent, or be thrown into liquidation, as the case may be, unless at the expiration of such time it shall obtain the consent, in writing, from a majority of the board of bank commissioners, to continue in liquidation for a longer period. The bank commissioners shall, however, have no power to grant a continuance for such purpose for a longer period than one year at each time. Any corporation mentioned herein, now in liquidation, or that may be hereafter thrown into liquidation, shall make semi-annual reports of the condition of its affairs to the bank commissioners, in the same manner as the solvent banks mentioned in this act, and in addition thereto shall state the amount of dividends paid, debts collected, and the amount realized on property sold, if any, since the previous report. The bank commissioners shall have the power and it is hereby made their duty, to examine the condition of every such corporation in liquidation, in the same manner as in the case of solvent banks; and shall have a general supervisory control of any such corporation. They shall have the power to designate the number of officers and employees necessary to close up the business of any such corporation, and to fix the salaries of the same; and shall do all in their power to make such liquidation economical and as expeditious as the interests of the depositors and stockholders will admit. The bank commissioners are hereby empowered to examine into the affairs of all banks in process of liquidation, at the time of the passage of this act. When any such bank shall have been for two years next preceding the passage of this act, in process of liquidation, or when any such bank shall have been in liquidation for two years from the time it was declared insolvent, or thrown into liquidation, the bank commissioners shall have the power to direct that the business of the bank shall be closed, and may designate a time when such closing shall be effected, and may limit the number of officers and employees, fix their salaries, and make such other orders as are necessary for the economical and expeditious administration of the

affairs of the bank. If any officer or employe of any insolvent corporation, mentioned in this act, shall refuse to comply with the provisions of this section, or disregard or refuse to obey the directions of said bank commissioners, given in accordance with the provisions of this act, such officer or employe shall be punished by a fine of not less than five hundred dollars, or by imprisonment in the county jail for not less than one year, or by both such fine and imprisonment, as a court of competent jurisdiction may determine."

The remedy pursued by the attorney general in the name of the people of the state in the case of the savings bank in question being statutory only, the court that took jurisdiction for its enforcement was limited in its powers by the statute under which it acted. *East Tennessee, V. & G. R. Co. v. Southern Tel. Co.*, 112 U. S. 306, 5 Sup. Ct. 168; *Windsor v. McVeigh*, 93 U. S. 274. It will be seen that the suit the attorney general is by the statute authorized to commence is one "to enjoin and prohibit the transaction of any further business by such corporation." And the statute proceeds to declare that if, upon the hearing of the case, "the judge of the court where the case is tried shall be of the opinion that it is unsafe for the parties interested or for such corporation to transact business, and that such corporation or institution is insolvent, he shall issue the injunction applied for by said commissioners and attorney general, who shall cause said injunction to be served according to law; and said judge shall further direct said commissioners to take such proceedings against such corporation as may be decided upon by its creditors."

That is the extent of the judgment authorized by the statute to be entered in the suit authorized by the attorney general; that is to say, the enjoining of any further transaction of business by the insolvent corporation, and an order that the commissioners take such proceedings against such corporation as may be decided upon by its creditors. The appointment of a receiver in such a judgment was beyond the power of the court, because beyond the scope of the statute under and by virtue of which alone the court was acting. A receiver is an officer of the court, and, when appointed, and his powers put in motion, the property of which he is appointed receiver passes into the custody of the court; the purpose of such proceeding being to preserve the property pending the litigation, so that the relief awarded by the judgment, if any, may be effective. No such purpose is manifested by the provisions of the bank commissioners' act, under which the attorney general proceeded in the case in question. This is further shown by the very next clause of the statute, which reads:

"If any corporation mentioned in this act, which is now insolvent, or which may hereafter become insolvent, or be thrown into liquidation by process of law, or by the order or consent of its stockholders, directors, managing officers, managers; or creditors, the affairs of such corporation shall be closed and the business thereof settled within four years from the time it shall be declared to be insolvent, or be thrown into liquidation, as the case may be, unless, at the expiration of such time, it shall obtain the consent, in writing, from a majority of the board of bank commissioners to continue in liquidation for a longer period. The bank commissioners shall, however, have no power to grant a continuance for such purpose for a longer period than one year at each time."

It is said for the plaintiff that the superior court had jurisdiction "under either section 11 of said act of 1878, or section 565 of the Code of Civil Procedure, [of California,] to make the appointment, provided that the creditors of the corporation came in and requested or consented to such appointment; and also upon the application of the stockholders or directors, and that, as the complaint does not show that there was no such application in that action, this court must presume that there was, if such presumption is necessary to uphold the appointment of the receiver." In the first place, no inference can be indulged in favor of the plaintiff that the judgment or order relied on to sustain the suit was based upon a complaint in intervention by the creditors, stockholders, or directors of the corporation. The general rule is that a pleading is taken most strongly against the pleader; and surely, where, as in this case, the complaint alleges that a certain judgment was entered in an action brought by the attorney general in the name of the people of the state against a corporation created by it, it cannot be presumed that such judgment was in fact based upon a complaint in intervention, filed in the action by some third party or parties. In the second place, neither creditors, stockholders, nor directors of a corporation could become parties, by intervention or otherwise, to a proceeding the object of which was to enjoin a corporation from carrying on its business in accordance with its charter. That power belongs alone to the state that grants the franchise. Section 565 of the Code of Civil Procedure of California provides that, upon the dissolution of any corporation, the superior court of the county in which the corporation carried on business or has its principal place of business, on application of any creditor of the corporation or of any stockholder or member thereof, may appoint one or more persons to be receivers or trustees of the corporation, etc. That section is manifestly inapplicable to the facts of the present case.

The demurrer must be sustained, upon the ground that the complaint does not show a right in the plaintiff to bring the suit. So ordered.

MORTON v. UNITED STATES.

(District Court, D. Indiana. January 15, 1894.)

No. 4,808.

CLERKS OF CIRCUIT COURT OF APPEALS—FEES AND SALARY.

Under the judiciary act of March 3, 1891, §§ 2, 9, a clerk of the circuit court of appeals is entitled to retain from the fees and emoluments of his office, after payment of all other expenses, a sum not exceeding \$500, in addition to his salary of \$3,000.

At Law. Action by Oliver T. Morton against the United States to recover fees as clerk of the circuit court of appeals for the seventh circuit. Heard on demurrer to the petition. Overruled.

A. C. Harris, for petitioner.

Frank B. Burke, for the United States.

BAKER, District Judge. This petition is brought under the act of March 3, 1887, which constitutes the district court a court of claims in certain cases. The petitioner is clerk of the circuit court of appeals for the seventh judicial circuit, and sues to recover \$371.20 of the fees and emoluments of his office, which he has covered into the treasury of the United States, under protest, upon demand of the comptroller of the treasury. He claims that the amount in controversy belongs to him under the act of congress creating the circuit court of appeals. 26 Stat. 826 et seq. The suit involves an adjudication in regard to the compensation to which the clerk is entitled under said act. The money sued for is the whole amount of the fees and emoluments of his office for the year ending December 31, 1892, less the amount paid out for office expenses, including clerk hire, which he was allowed to retain.

Do these fees belong to the clerk? This depends upon the construction to be given to sections 2 and 9 of said act. So much of section 2 as has any application to the question is as follows:

"And the salary of the clerk of the court shall be three thousand dollars a year to be paid in equal proportions quarterly. The costs and fees in the supreme court now provided for by law shall be costs and fees in the circuit court of appeals; and the same shall be expended, accounted for and paid for, and paid over to the treasury department of the United States in the same manner as is provided in respect of the costs and fees in the supreme court."

Section 9 is as follows:

"That the marshals of the several districts in which said circuit court of appeals may be held shall, under the direction of the attorney general of the United States, and with his approval, provide such rooms in the public buildings of the United States as may be necessary, and pay all incidental expenses of said court, including criers, bailiffs and messengers: Provided, however, that in case proper rooms cannot be provided in such buildings, then the said marshals, with the approval of the attorney general of the United States, may, from time to time, lease such rooms as may be necessary for such courts. That the marshals, criers, clerks, bailiffs and messengers shall be allowed the same compensation for their respective services as are [is?] allowed for similar services in the existing circuit courts."

Counsel for the petitioner contends with great earnestness that the clerk is entitled to the salary provided for in section 2, and, in addition thereto, to retain out of the fees and emoluments of his office the same amount which clerks of existing circuit courts are allowed to retain. The district attorney, on the other hand, insists that he is only entitled to his salary of \$3,000 a year; and that the last paragraph of section 9 only relates to such incidental expenses of the court and its officers as the marshal is authorized to pay, and has no relation to the compensation of the clerk for his services. Sections 2 and 9 ought to be so construed as to give full effect to the language of each. They ought not, however, to be construed, unless incapable of other construction, in such a manner as to give the clerk of the circuit court of appeals the salary provided for in section 2, and also the right to retain, in addition thereto, the same amount out of the fees and emoluments of his office as is allowed in the case of the clerks of the circuit courts. Such a construction would result in double compensation. It

would make his compensation larger than that received by the clerk of the supreme court of the United States, and nearly twice as large as that received by the clerks of the circuit courts. It cannot well be doubted that no such result was contemplated by the framers of the statute. Still, if the language employed necessarily forbids any other construction than one leading to such a result, it would be the duty of the court to adopt and enforce that construction.

I think the apparent conflict may be reconciled by regarding section 9 as fixing the full measure of compensation which such clerk is entitled to receive. This section enacts that the clerk of the circuit court of appeals shall be allowed the same compensation for his services as is allowed for similar services in the existing circuit courts. It may be suggested that this provision was intended to fix the fees which may be lawfully taxed and collected as between the clerks and the litigants, and not as providing for the disposition of the fees when collected. This construction would make the compensation of the clerk the amount of his salary, and no more. I am not, however, disposed to adopt this construction, because the statute declares that he shall be allowed the same compensation for his services as is allowed for similar services in the existing circuit courts. This, in my opinion, was intended to fix the limit of his compensation. He is to be allowed for his services the same compensation as is allowed to the clerks of existing circuit courts for similar services. The clerks of existing circuit courts are entitled to receive, for all services rendered by them, \$3,500 a year. If the clerks of the circuit courts of appeals are to receive the same compensation as clerks of existing circuit courts for similar services, then they cannot receive a larger sum for all services rendered by them than \$3,500 a year. The clerks of the circuit courts receive their compensation out of the fees and emoluments of their offices, which they are allowed to retain without covering the same into the treasury. The method in which their compensation is paid is not material. The fees are collected under authority of law, and they belong to the United States as much as though they had been covered into the treasury. In my opinion, the clerk of the circuit court of appeals is entitled to the same compensation as the clerks of the existing circuit courts,—that is to say, \$3,500 a year, and no more.

This construction is in harmony with that which has been uniformly applied in reference to the compensation of district attorneys of the United States. These officers, except in California and the southern district of New York, are each allowed a salary of \$200 a year. Rev. St. § 770. Their compensation is fixed by another section as follows:

"No district attorney shall be allowed by the attorney general to retain of the fees and emoluments of his office, * * * for his personal compensation, * * * a sum exceeding six thousand dollars a year." Id. § 835.

With some exceptions, each United States marshal is allowed a salary of \$200 a year. His compensation to be retained out of the

fees and emoluments of his office is not to exceed \$6,000 a year. The practical construction given to the law relating to the compensation of district attorneys and marshals has been to regard the salary as a part of the \$6,000 of compensation to which each of these officers is entitled. This construction by the treasury department was well known and understood by the congress, and it is fair to presume that it was the legislative intent that the like construction should be given to the sections of the statute under consideration. The plaintiff is therefore entitled to retain, in addition to his salary, for his personal compensation out of the fees and emoluments of his office, the sum of \$500 a year, if so much remains after the other expenses required to be paid therefrom are satisfied.

The complaint shows that the sum of \$371.20 of the fees and emoluments of his office remained at the end of the first year, after the payment of all other expenses. In my opinion, the clerk is entitled to retain for his personal compensation, out of such remaining fees and emoluments, a sum not exceeding \$500 in addition to his salary. It follows that he was entitled to retain the entire amount of the fees and emoluments remaining in his hands at the end of the year, in addition to his salary. The action of the treasury department in compelling him to cover the same into the treasury was wrongful. The payment having been made by the plaintiff under compulsion and over his protest, he is entitled to maintain an action to recover the same. *U. S. v. Lawson*, 101 U. S. 164.

The demurrer to the petition will therefore be overruled, and it is so ordered; to which ruling the defendant excepts.

UNITED STATES v. EISNER & MENDELSON CO.

(Circuit Court of Appeals, Second Circuit. January 12, 1894.)

No. 57.

CUSTOMS DUTIES—CLASSIFICATION—MALT EXTRACT.

A fluid compound labeled, advertised, and sold in bottles as "malt extract" is dutiable as such, though it contains but 12 per cent. of malt extract, under paragraph 338 of the tariff act of 1890, and not as a proprietary medicine, under paragraph 75. 54 Fed. 671, reversed. *Ferguson v. Arthur*, 6 Sup. Ct. 861, 117 U. S. 482, distinguished.

This is an appeal from a decision of the circuit court for the southern district of New York, (54 Fed. 671,) reversing a decision of the board of general appraisers which affirmed the collector's classification for duty of certain fluid malt extract. The merchandise is Johann Hoff's Malt Extract, imported in bottles. Reversed.

During the year 1891 the Eisner & Mendelsohn Company imported from a foreign country into the United States at the port of New York certain merchandise, consisting of a fluid, in colored, molded glass bottles, holding each not more than one pint, and not less than one quarter of a pint, and labeled "Johann Hoff's Malt Extract." This merchandise was classified for duty at the rate of 40 cents per gallon, as "malt extract, fluid, in bottles," under the provision for such

malt extract contained in paragraph 338, Schedule H, of the tariff act of October 1, 1890, (26 Stat. 590,) and duty at the rate of 40 cents per gallon was exacted of the importer on the contents of the bottles by the collector of customs at that port; and on the bottles duty was also exacted by the collector of the importer at the rate of 1½ cents per pound, under the provisions of paragraph 103, Schedule B, of the same tariff act, (26 Stat. 571.) Against the aforesaid classification of this merchandise, and against the exaction on the contents of the bottles of a duty at the rate of 40 cents per gallon, and against the exaction of duty on the bottles at the rate of 1½ cents per pound, the importer protested, claiming that his merchandise was dutiable at the rate of 25 per centum ad valorem, in accordance with the rulings of the treasury department contained in section 2867, June 19, 1876, and section 4834, April 19, 1881, and the provision for "medicinal proprietary preparations" contained in paragraph 75, Schedule A, of the same tariff act, (26 Stat. 570.)

The board of United States general appraisers, to whom the collector, in pursuance of section 14 of the customs administrative act of June 10, 1890, (26 Stat. 137,) transmitted the importer's protests and all other things required by that section, affirmed the action of the collector. As to so much of the decision of the board of appraisers as affirmed the action of the collector as to the contents of the bottles, the importer, pursuant to section 15 of the said customs administrative act, applied to the circuit court of the United States for the southern district of New York for a review of the questions of law and fact involved therein. Upon the return made by the said board of appraisers, and upon evidence subsequently taken in the said circuit court, and establishing other facts below referred to, the said circuit court reversed the decision of the said board of appraisers, and held that the contents of the bottles were dutiable at the rate of 25 per centum ad valorem, as a medicinal proprietary preparation, as claimed by the importer in his protest. 54 Fed. 671. From the judgment of the said circuit court the United States appeals to the United States circuit court of appeals for the second circuit.

Edward Mitchell, U. S. Atty., and Thomas Greenwood, Asst. U. S. Atty.

Charles A. Ray, for Eisner & Mendelsohn Co. appellee.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

LACOMBE, Circuit Judge. The tariff act of October 1, 1890, contains the following:

Paragraph 75: "All medicinal preparations, including medicinal proprietary preparations, of which alcohol is not a component part, and not specially provided for in this act, 25 ¢ ad valorem."

Paragraph 338: "Malt extract, fluid, in casks, twenty cents per gallon; in bottles, or jugs, forty cents per gallon; solid or condensed, forty per centum ad valorem."

There are other provisions covering bottles, generally, imported full, which need not be considered, as the importer's protest did not

set forth the paragraph under which they now claim the bottles should be classed. The collector assessed duty under paragraph 338; the importer claims that the merchandise should be classified under paragraph 75.

Johann Hoff's Malt Extract is a compound of several ingredients, prepared according to a secret formula. It is a medicinal proprietary preparation. It contains a little alcohol, which, however, has not been added as a component, but is generated in the mixture itself. The malt extract in the compound bears to the other ingredients the proportion of 12 to 88; but it is advertised, labeled, and described by the makers and their agents as a malt extract, is imported as such, and has been at all times bought and sold as a malt extract in the trade and commerce of this country. Other proprietary preparations containing malt extract are similarly advertised, labeled, described, bought, and sold, each with the name of the particular proprietor prefixed to the words "malt extract." The trade nomenclature of these articles has an important bearing upon the interpretation to be given to the 338th paragraph above cited. "In fixing the classification of goods for the payment of duties, the name or designation of the goods is to be understood in its known commercial sense. * * * Their denomination in the market will control their classification, without regard to their scientific designation, the material of which they may be made, or the use to which they may be applied." *Twine Co. v. Worthington*, 141 U. S. 471, 12 Sup. Ct. 55. Besides the malt extracts which are thus prepared according to secret formula, there are others which are made according to the public and well-known formula of Baron Liebig, given in the United States and German pharmacopoeias. These vary in consistency from a dry powder to a semi-fluid, being imported and bought variously in barrels, bottles, jugs, by the pound or by the gallon. This is sometimes designated in the trade "Malt Extract," sometimes "Liebig's Malt Extract," and sometimes "Malt Extract," with the maker's name prefixed; as, "Loeblund's Malt Extract," "Lehn & Fink's Extract of Malt." (The terms "malt extract" and "extract of malt" are interchangeable in the trade.) Proprietary as well as nonproprietary malt extracts are made in this country,—Trommer's Extract of Malt at Fremont, Ohio, and others elsewhere.

Prior to 1890, none of these malt extracts were described *eo nomine* in the tariff acts. As far back as 1875, (Synopsis Treasury Decisions No. 2,388,) malt extract was classified for duty as "beer." In 1876, (Id. 2,867,) Johann Hoff's Malt Extract, imported in bottles, was held by the treasury department not to be covered by the ruling of 1875, but to be dutiable as a proprietary medicine. In 1881, (Id. 4,834,) the same article was classified as a proprietary medicine, even when imported in casks. In 1885, (Id. 6,917,) Loeblund's Malt Extract was similarly classified; and in August, 1890, (Id. 10,157,) another extract of malt, whose name does not appear, was classified as a food product, and held dutiable as a nonenumerated manufactured article. In view of the fact that there were known to trade so many different varieties of malt extract, bought and sold as

such, some with the maker's or proprietor's name, and some without, some dry, some condensed, some semi-fluid or semi-solid, (thicker than ordinary molasses, as one of the witnesses describes it,) and some fluid, and of the further facts that different rates of duty had been from time to time assessed upon it under treasury rulings, and that both proprietary and nonproprietary malt extracts are manufactured in this country, it seems reasonable to infer that when congress imposed a duty upon malt extract, if fluid and in casks, at 20 cents a gallon; if fluid and in bottles or jugs, at 40 cents a gallon; and, if solid or condensed, at 40 per cent ad valorem,—it intended to cover all the known kinds of malt extract in all the known conditions in which it is imported. Certainly the language used in the tariff act, construed according to the ordinary rules of interpretation, supports such conclusion. The duty laid on medicinal proprietary preparations is exclusive of such as are elsewhere in the act specially provided for; and, although Johann Hoff's Malt Extract be a medicinal proprietary preparation, it is specially provided for by the term "malt extract," since it is as a malt extract that it is described, labeled, advertised, bought, and sold.

In our opinion, this case is not controlled by the decision of the supreme court in *Ferguson v. Arthur*, 117 U. S. 482, 6 Sup. Ct. 861. In that case the general provision as to calcined magnesia was, as the court held, by its terms applicable only to the single kind of magnesia that was sold in bulk by the pound, whereas the provisions of paragraph 338 of the act now under consideration are manifestly enlarged so as to cover malt extract in all conditions of consistency, and whether in bulk or in such smaller packages as are frequently characteristic of proprietary preparations. Moreover, in the *Ferguson* Case the paragraph touching proprietary preparations did not, in terms, exclude such preparations as were elsewhere specifically provided for.

The decision of the circuit court is reversed, and the classification of the board of general appraisers affirmed.

UNITED STATES v. WARNER.

(District Court, D. Washington, N. D. January 16, 1894.)

No. 690.

POST OFFICE—OBSCENE SEALED LETTERS.

The mailing of an obscene private sealed letter is not within the prohibition of Rev. St. § 3893, even as amended September 26, 1888, by inserting the word "letter;" for all the enumerating words are limited by the concluding words "or other publication." *U. S. v. Wilson*, 58 Fed. 768, followed.

At Law. Indictment of J. M. Warner for mailing an indecent letter in a sealed envelope, in violation of section 3893, Rev. St., as amended by Act Sept. 26, 1888, (1 Supp. Rev. St. [2d Ed.] 621.) Demurrer sustained.

Wm. H. Brinker, U. S. Atty.
A. R. Jones and C. W. Turner, for defendant.

HANFORD, District Judge. The question raised by the demurrer to the indictment in this case is whether the sending by mail in a sealed envelope of a personal written communication from one individual to another is a crime, cognizable in this court. The indictment is founded upon section 3893, Rev. St., which, as amended by Act Sept. 26, 1888, (1 Supp. Rev. St. [2d Ed.] 621,) reads as follows:

"Every obscene, lewd or lascivious book, pamphlet, picture, paper, letter, writing, print, or other publication of an indecent character, * * * whether sealed as first-class matter or not, are hereby declared to be non-mailable matter. * * * And every person who shall knowingly deposit, or cause to be deposited for mailing or delivery, anything declared by this section to be non-mailable, * * * shall, for each and every offense, be fined. * * *

The supreme court of the United States in the case of *U. S. v. Chase*, 135 U. S. 255, 10 Sup. Ct. 756, gave an authoritative interpretation to this law, as it stood previous to the amendatory act of 1888, as follows:

"In the statute under consideration, the word 'writing' is used as one of a group or class of words,—book, pamphlet, picture, paper, writing, print,—each of which is ordinarily and prima facie understood to be a publication; and the enumeration concludes with the general phrase 'or other publication,' which applies to all the articles enumerated, and marks each with the common quality indicated. It must therefore, according to a well-defined rule of construction, be a published writing which is contemplated by the statute, and not a private letter, on the outside of which there is nothing but the name and address of the person to whom it is written."

It is impossible to follow the rule of construction which the supreme court has applied to this statute, and yet hold that the word "letter," interpolated into it by the amendment, is not qualified by the general phrase "or other publication." It is also hard to give the amendment any effect, and yet hold that mere private letters of an indecent character are not within the inhibition of the statute. The question is therefore perplexing. I am unable to agree with Judge Ross, who, in passing upon the same question, in the case of *U. S. v. Andrews*, 58 Fed. 861, is reported as saying that:

"It is difficult to see how the intent of congress to exclude all letters of the character denounced could have been made plainer."

The opinion of Judge Morrow in the case of *U. S. v. Wilson*, 58 Fed. 768, contains a careful review of the history of legislation and of the authorities upon this subject, and, for reasons which to me appear to be sufficient, he sustained a demurrer to a similar indictment. After deliberation I am in doubt. I cannot say that the facts stated bring the case clearly within the intent and letter of the statute. The courts of the United States have no power to punish an act which is merely wrongful, nor, by construction, to include within the penal statutes offenses which are not plainly specified. Being conscious of having an actual doubt in this case,

which I consider that a reasonable mind may justly entertain, I am constrained to follow the decision of Judge Morrow in *U. S. v. Wilson*.

The demurrer is therefore sustained, and the indictment will be quashed.

UNITED STATES v. JARVIS.

(District Court, N. D. Washington. January 16, 1894.)

No. 708.

1. POST OFFICE—OBSCENE SEALED LETTERS.

The mailing of an obscene private sealed letter is not within the prohibition of Rev. St. § 3893, as amended September 26, 1888. *U. S. v. Warner*, 59 Fed. 355, followed.

2. SAME—EPITHETS ON ENVELOPE.

The word "notorious," when written on the outside of a letter, after the name of the person addressed, as follows, "Room 32, Pease House, Front St., City, The Notorious," is not "obviously intended to reflect injuriously on the character or conduct of another," and the mailing of such letter is therefore not within the prohibition of the statute.

At Law. Indictment of George Jarvis for mailing letters of an indecent character in sealed envelopes, upon the outside of which scurrilous epithets were written, in violation of the act of September 26, 1888, (1 Supp. Rev. St. [2d. Ed.] 621.) Demurrer sustained.

Wm. H. Brinker, U. S. Atty.

D. O. Finch, for defendant.

HANFORD, District Judge. The indictment contains several counts, each charging the defendant with having sent, by mail, a private sealed letter of an indecent character, in violation of the act of September 26, 1888, (1 Supp. Rev. St. [2d Ed.] 621.) In this case, as in the case of *United States v. Warner*, I hold that the offense is not indictable by reason of the indecent matter contained in the letter. The United States attorney claims, however, that by an allegation to the effect that upon the envelope of each letter there was written an epithet, to wit, the words "The Notorious," calculated and obviously intended to reflect injuriously upon the character of the person addressed, the case is brought within the first section of said statute, which reads as follows:

"That all matter otherwise mailable by law, upon the envelope or outside cover or wrapper of which, or any postal card upon which, any delineations, epithets, terms, or language of an indecent, lewd, lascivious, obscene, libelous, scurrilous, defamatory or threatening character, or calculated by the terms or manner or style of display and obviously intended to reflect injuriously upon the character or conduct of another may be written or printed, or otherwise impressed or apparent, are hereby declared non-mailable matter; * * * and any person who shall knowingly deposit, or cause to be deposited, for mailing or delivery, anything declared by this section to be non-mailable matter, * * * shall, for each and every offense, upon conviction thereof, be fined not more than five thousand dollars, or imprisoned at hard labor not more than five years or both, at the discretion of the court."

The superscription upon the envelope, as set forth in the indictment, after the name of the person, is as follows: "Room 32, Pease

House, Front St., City, The Notorious." The epithet, although presumably offensive to the person addressed, is not per se indecent, scurrilous, or defamatory, nor of a threatening character, and the use of it, therefore, is not prohibited by the law, unless it is both calculated to reflect injuriously upon the character or conduct of a person, and obviously intended to have such injurious effect. The present inquiry may be limited to the simple question whether or not the intention to reflect injuriously upon the character or conduct of any person is obvious. From the style of the superscription it is not obvious that the words "The Notorious" were intended to characterize the person addressed, or any person. On the contrary, the Pease House would appear to have been intended to be designated as "The Notorious." But, assuming that the epithet applies to the person addressed, the words themselves do not necessarily reflect injuriously. Applied to a person without notoriety, they are meaningless. A man may be a notorious wit. Those who possess and exercise superior powers as orators, singers, or actors gain celebrity, and the holders of exalted positions are referred to as noted persons. Applied to persons of such character, the epithet would be considered by those acquainted with their reputations as being in bad taste, but not as implying any bad imputation.

The demurrer will be sustained, and the indictment quashed.

EDISON ELECTRIC LIGHT CO. et al. v. WARING ELECTRIC CO. et al.

(Circuit Court, D. Connecticut. January 6, 1894.)

1. PATENTS—INFRINGEMENT—ELECTRIC LAMPS.

The Edison incandescent electric lamp patent (No. 223,898) is infringed, as to claim 2, by the Waring lamp, (No. 497,038,) which only differs from it in that the Edison vacuum was to a large extent employed, but rendered somewhat less perfect by the introduction of a small quantity of bromine gas.

2. SAME—LIMITATION BY FOREIGN PATENT.

In determining whether an invention has been "previously patented" in a foreign country, so as to cause the American patent to expire with the foreign one, under Rev. St. § 4887, the date of the actual sealing and issuance of the foreign patent is to be taken, although it is antedated, as in the case of English patents. Telephone Co. v. Cushman, 57 Fed. 842, followed.

In Equity. Suit by the Edison Electric Light Company and the Edison General Electric Company against the Waring Electric Company and others for infringement of a patent. On motion for a preliminary injunction. Granted.

C. A. Seward, F. P. Fish, and R. N. Dyer, for complainants.
Charles E. Perkins and W. E. Simonds, for defendants.

SHIPMAN, Circuit Judge. This is a motion for a preliminary injunction against the alleged infringement of the second claim of letters patent commonly called the "incandescent lamp" or the "filament" patent, (No. 223,898,) dated January 27, 1880, to Thomas A. Edison. The patent has been, directly and indirectly, the subject

of exhaustive investigation before the courts of this country, and was carefully examined by the United States circuit court of appeals for this circuit in the case of Edison Electric Light Co. v. United States Electric Lighting Co., 3 C. C. A. 83, 52 Fed. 300. In the opinion of the court in that case, Judge Lacombe clearly states the history and the nature of the invention, which consisted, in general, in substituting carbon "reduced in size to the filamentary form, and placed in a nearly perfect vacuum," for illuminants, which had previously been the subjects of experiment; a change of material "which involved a reorganization of the lamp," and "presented the complete combination of elements, which, for the first time in the art, produced a practical electric light." The second claim is thus paraphrased by Judge Lacombe:

"The combination of carbon, filamentary or thread-like in size, and properly carbonized, used as an illuminant in an incandescent electric lamp, with a receiver made entirely of glass, and conductors passing through the glass, and from which receivers the air is exhausted to such an extent that disintegration of the carbon, due to the air-washing action of surrounding gases, or to any other cause, is so far reduced as to leave the carbon practically stable."

The defendants' lamp, called the "Waring Lamp," is the Edison lamp, with the alleged exception that in the receiver a nearly perfect vacuum has not been created by exhaustion of the air, but that into the partially exhausted receiver a portion of bromine gas has been introduced. This introduction of bromine, and consequent lessening of the vacuum, it is claimed, produce a marked improvement in the stability of the carbon, and in the diminution of the blackening of the glass of the lamp. This improved construction is protected by letters patent to John Waring, No. 497,038, dated May 9, 1893. The specification says that the atmospheric air may be partially withdrawn by means of an air pump, and the gas is then admitted.

"This gas admitted to the globes, and diluted by the air remaining in them, is then partially withdrawn, and more gas allowed to enter; this process being repeated until the extent to which the desired gas is diluted with foreign gases has become practically infinitesimal. If preferred, the atmospheric air may be at first exhausted, as nearly as possible, and the desired gas then admitted around the carbon. The amount of gas to be admitted will, in practice, vary with the size of the inclosing chamber, with the nature of the gas, and probably, also, with the nature of the other elements of the lamp."

This vague description of the ultimate character of the vacuum, and of the amount of "desired" gas which was to be admitted, furnishes inadequate data by which to ascertain with precision the extent of the departure from the Edison lamp. The question naturally arises, how much desired gas is admitted after the atmospheric air has been exhausted "as nearly as possible?" The defendants' affidavits state the successive steps which are taken in practice, and the resultant vacuum is given in a number of the affidavits with adequate accuracy.

Prof. Appleton gives the essential features of the process, as he saw it in the ordinary manufacture of the lamps, as follows: At-

atmospheric air was pumped from the bulb by a mechanical pump,—not by a mercury pump. Bromine vapor was allowed to fill the bulb, so that the orange-red color of bromine was visible therein. Then followed pumping by a mechanical pump, by which “bromine vapor and air are, to a large degree, removed.” An ample amount of bromine vapor is again allowed to fill the bulb. A third mechanical pumping follows, by which “residual air and bromine vapor are largely removed, but some bromine vapor remains.” The lamp is sealed by fusing the glass opening. The general conclusions, taken by themselves, of Prof. Appleton, and also of Prof. Carmichael, both competent analytical chemists, whose affidavits are introduced by the defendants, would far from satisfy the mind that a material departure from the exhaustion, which was the result of the Edison method of manufacture, had been sought in the Waring lamp. For example, Prof. Appleton says:

“My conclusions, therefore, are that the Waring Electric Company is undoubtedly introducing bromine in its lamps, in the process of manufacture; that the bromine remains in them after their entry in the market. In a given bulb, the quantity is small, but it is perfectly recognizable by the chemist; and it cannot, in an electric lamp, be fairly called unworthy of consideration.”

Prof. Carmichael says:

“The vacuum, as deduced from the experiments cited, is considerably less perfect than that of the Edison lamp. By the ordinary factory test, of observing the duration of the vibration of the carbonized filament, the Novak (Waring) lamps, as supplied to me, appeared to be less perfectly exhausted than the Edison lamps, as I have ordinarily observed them in use.”

Other experts upon each side of this controversy are, however, able to state with more mathematical accuracy the exact nature of the vacuum, and they do not essentially differ in their conclusions. The affidavit of Mr. Howell, in behalf of the complainants, after saying that all lamps exhausted to a high vacuum have residual gases remaining in them, which are “not common air, but are probably a mixture of gases, in which hydrogen predominates,” states as follows:

“The vacuum produced, in practice, in the Edison lamps, is about 1-30000 of an atmosphere; i. e. 29,999 out of 30,000 units of atmosphere are removed from the globe. Or, in other words, if we assume the height of a mercury column at atmospheric pressure to be 30 inches, such a column, connected to one of these lamp globes, will be depressed 1-1000 of an inch, due to the pressure of the residual gas within the globe. A very much lower vacuum or higher pressure than this, however, can be used, in practice, without destroying the commercial character of the lamp, even when no special gas is introduced into the globe. A pressure which will lower the mercury column 1-100 of an inch, i. e. a vacuum of 1-3000 of an atmosphere, would, I believe, be sufficient for commercial purposes, without the use of any of the supposedly inert gases, although a higher vacuum is more desirable.”

The results of Mr. Howell's tests are as follows:

“The Waring lamps contain a gas pressure which may be as high as 1-20 of an inch in the case of the 16 C. P. and 25 C. P. lamps, and which runs from that pressure down to 1-100 of an inch in the case of the 32 C. P. and 50 C. P. lamps. * * * In considering the effect of even so high a pressure as 1-20 of an inch, it should be borne in mind that this means a vacuum

of 1-600 of an atmosphere, involving the removal of 599 out of 600 parts of the air or other gases within the globe."

Mr. Thomas B. Stillman, for the complainants, found that each one of the 16 candle power Waring lamps which he tested contained a pressure of 1-666 of an atmosphere, or a vacuum in which 665 out of 666 units of gas are removed.

Turning now to the affidavits of the disinterested witnesses for the defendants, Profs. Wright and Anthony devote themselves, substantially, to a statement of their opinions in regard to the improved character of the Waring lamp over that of its Edison predecessor, by reason of the introduction of bromine gas, which they think preserves the transparency of the walls of the lamp and the stability of the carbon. While the question of the extent of an alleged improvement upon an existing patented combination may become incidentally important, in ascertaining the character of the departure from the peculiarities of the invention which were described in and protected by the patent, it is obvious that the first and vital question is, were all the elements of the patented combination used in the second and improved invention in the manner, and to produce the result, described in the antecedent patent? Without, therefore, attempting to ascertain the correctness of Prof. Anthony's conclusion that the introduction of bromine into the chamber of an incandescent lamp is a new step in the art, whose results "are of the utmost importance," I shall confine myself to a consideration of the question whether, before he took this step, he made use of the Edison entire combination, and whether the alleged improvement is an addition to, and not a substitute for, one of Edison's described elements.

The defendants' affidavits which are of importance in this connection are those of Profs. Carmichael and Robb, and Mr. Charles A. Stone. Prof. Carmichael says that the Waring lamp contains residual gases which occupy about 1-2000 of the whole volume of the lamp, and the bromine vapor about 11-10000, and together 1-625. Mr. Stone places the exhaustion of the Waring lamps between 1-500 and 1-1000 of an atmosphere. The conclusion of Prof. Robb—who, it is proper to say, has given more attention to this subject than has either of the other experts for the defendants—is that the bromine gas in the Waring 16 or 25 candle power lamp is under a pressure, when the lamp is heated, of about the 1-500 of an atmosphere. There is, therefore, no important disagreement between the experts on either side in regard to the vacuum in the lamps of those respective powers. The estimates vary from 1-500 to 1-666 of an atmosphere. It must be observed that Mr. Howell's tests of 50 candle power Waring lamps (not including those called "Lot No. 1," which turned out to be vacuum lamps manufactured by the Perkins Company) showed a high vacuum. He thinks that the vacuum in the 50 and in the 32 candle power Waring lamps exceeded that in those of lower power. The experiments of the defendants' experts had been limited to lamps of 16 and 25 candle power, and therefore I shall confine myself to the results which

flowed from those experiments, and which, of course, I assume to be true.

The defendants' legal position is authoritatively stated in *Seymour v. Osborne*, 11 Wall. 516, as follows:

"Inventors of a combination * * * cannot suppress subsequent improvements, which are substantially different, whether the new improvements consist in a new combination of the same ingredients, or of a substitution of some newly-discovered ingredient, or of some old one, performing some new function, not known at the date of the letters patent, as a proper substitute for the ingredient withdrawn from the combination constituting their invention."

Their theory is that the introduction of bromine gas into a globe only partially exhausted is the substitution of a newly-discovered ingredient for the air exhaustion of the Edison patent. What Waring puts into the receiver is not of prime importance, but the question to be solved is whether he exhausts the contents of the globe, whether air, residual gases, or newly-introduced bromine gas, to such an extent that when the globe is sealed he has used that part of Edison's combination to such an extent that thereby the carbon is rendered practically stable. The mere introduction of gases into the receiver is not important, but if, before they have been introduced, Waring takes away the atmospheric air and the residual gases, and after the new addition has been introduced he takes away the contents of the globe, by exhaustion, so that a practical vacuum finally remains,—not as high as Edison thought necessary for the spongy and porous cotton thread which he carbonized, but a vacuum which renders practically stable a carbon filamentary in size, and of whatever hard and dense material it may be composed,—then Waring has taken the combination of Edison, however much he may have improved it by the residuum of bromine gas, which Prof. Carmichael estimates to occupy 11-10000 of the volume of the lamp.

To ascertain the effect of the exhaustion by the Waring method upon the stability of the carbon, it is necessary to look at the result of Prof. Robb's instructive experiments, which were as follows:

Four Perkins 25 candle power lamps and four Edison 16 candle power lamps were taken to the Waring factory. Two Perkins lamps (Nos. 1 and 2) and two Edison lamps (Nos. 1 and 2) were left unaltered. The remaining lamps (Perkins Nos. 3 and 4, and Edison Nos. 3 and 4) were opened, and partially exhausted, and treated with bromine, as if they were Waring lamps, in the ordinary course of manufacture. The voltage required to raise the lamps to their normal candle power was measured:

Perkins lamp	No. 1 (original lamp)	gave	25 C. P. at 47.7 volts.
"	" " 2 (" ")	"	25 C. P. " 48.0 "
"	" " 3 (bromine ")	"	25 C. P. " 50.9 "
"	" " 4 (" ")	"	25 C. P. " 49.5 "
Edison	" " 1 (original ")	"	16 C. P. " 56.3 "
"	" " 2 (" ")	"	16 C. P. " 54.0 "
"	" " 3 (bromine ")	"	16 C. P. " 59.0 "
"	" " 4 (" ")	"	16 C. P. " 59.5 "

The four Perkins lamps were then run at 65 volts for ten hours, and at 75 volts for four hours. The Edison lamps were run eight

hours at an average of 78 volts. The candle power of the lamps was then remeasured, at the same voltages as those at which the preceding measurements had been made, and it was found that:

Perkins lamp No. 1 (original lamp)	gave	13.6 C. P.
" " " 2 (" ")	"	13.8 C. P.
" " " 3 (bromine ")	"	23.0 C. P.
" " " 4 (" ")	candle power could not be measured, as filament broke a few minutes before run ended.	
Edison " " " 1 (original ")	gave	6.1 C. P.
" " " 2 (" ")	"	4.4 C. P.
" " " 3 (bromine ")	"	9.9 C. P.
" " " 4 (" ")	"	11.0 C. P.

The second test was as follows:

"I took four lamps in the course of construction at the Waring Electric Company's factory, and had them exhausted on the pump at the same time. Two of these lamps (Waring lamps Nos. 1 and 2) were filled with bromine, and two (Waring lamps Nos. 3 and 4) with air, the degree of exhaustion being identical in all four lamps. The filaments in these lamps were intended for sixteen candle power lamps, and the voltage at which the lamps would yield sixteen candle power was measured at the physical laboratory of Trinity College, and it was found that:

Waring lamp No. 1 (bromine lamp)	gave	16 C. P. at 118.0 volts.
" " " 2 (" ")	"	16 C. P. " 115.9 "
" " " 3 (air ")	"	16 C. P. " 123.9 "
" " " 4 (" ")	"	16 C. P. " 126.9 "

"The lamps were then run at 115 volts for twenty hours. The candle power of the lamps was then remeasured at the same voltages as those at which the preceding measurements had been made, and it was found that:

Waring lamp No. 1 (bromine lamp)	gave	16.0 C. P.
" " " 2 (" ")	"	16.0 C. P.
" " " 3 (air ")	"	9.4 C. P.
" " " 4 (" ")	"	11.0 C. P.

These and kindred tests satisfy Prof. Robb that the vacuum in the bromine lamps is so poor that if the vapor in the lamps had been air, instead of bromine, they would have been considered worthless.

In view of the present condition of incandescent lighting in this country, I have no doubt that an Edison lamp, with the exhaustion which was given in the experiments, would be considered by the users of electric light as so far inferior to the ordinary standard of an Edison lamp as to be worthless, and would be discarded by those who were accustomed to the usual stability of an incandescent lamp. But these experiments show, to my mind, when read in connection with the other affidavits of the defendants, that Waring intentionally used the principle of exhaustion to a generous degree, and that the vacuum ingredient of Edison was to a large extent employed, and its benefits were partially enjoyed. Waring took the lamp which Edison gave in 1880, and which was the first practical incandescent electric light, and used all the ideas which were finally embodied in the Edison lamp, but used the idea of exhaustion to a more limited extent than the original inventor thought was necessary. Nevertheless, without the large exhaustion of the atmospheric air and the gases which Waring accomplished, his lamp

would be a failure. It will not be claimed that the inventor of an improvement upon a previously patented combination can use one of the patented elements in a dwarfed and incomplete way, but by its use receive the old resultant benefit, and escape the charge of infringement by reason of the low percentage of such use. The defendants' theory is that its use is so far unlike that of Edison that it can properly be said to be radically different. That theory is not supported in the Waring specification, and it does not seem to me to be supported by the facts. The statement in the specification that the atmospheric air may be at first exhausted as nearly as possible, and the desired gas then admitted, is significant. The amount of gas admitted Profs. Appleton and Carmichael's affidavits show to have been small.

The defendants claim that the Edison patent, which was dated January 27, 1880, has expired, by reason of the expiration of the British patent No. 4,576, for the same invention, antedated to November 10, 1879, but not sealed, and the specification of which was not enrolled until after the United States patent in suit had been issued. This question was recently examined by Judge Jenkins in *Telephone Co. v. Cushman*, 57 Fed. 842. He refers to the various decisions upon the question, and concludes that the invention is not patented abroad before the actual sealing and issuance of the patent, and that the term "patented," as used in section 4887 of the Revised Statutes, "does not mean the preliminary proceedings, but the actual issuance of the patent under the seal of the government, speaking the exercise of sovereign will, investing the patentee with the grant of a monopoly." In this conclusion I entirely concur.

The motion is granted. The terms of the order are to be settled upon notice.

KRICK v. JANSEN.

(Circuit Court, S. D. New York. January 4, 1894.)

PATENTS—INVENTION—FLORAL DESIGNS.

The Krick patent, No. 408,416, for a floral design, consisting of a foundation having holes in it, combined with picks for holding the flowers in position, shows patentable invention.

In Equity. Suit by William C. Krick against Edward Jansen for infringement of a patent. A demurrer to the bill was heretofore overruled. 52 Fed. 823. Decree for plaintiff.

Isaac S. McGiehan, for plaintiff.

Louis C. Raegener, for defendant.

WHEELER, District Judge. If the plaintiff's patent, No. 408,416, dated August 6, 1889, for a floral letter or design, was for the letter merely, consisting of the foundation, covered with flowers, as described, it would be anticipated, and void. But it is for such letters in combination with the holes and picks for holding them in position on large floral pieces. This combination seems to be new, and quite useful. It did not involve great invention; but great-

ness is not required for patentability. It seems to be sufficient for that.

The defendant's letters have not holes through the foundation for attaching the picks to them, but have the picks at the edges of, and over, the foundation, attaching them to it in a manner equivalent to that. This does not appear to be a successful evasion of the patent. He seems to have taken the substance of the plaintiff's invention.

Let a decree be entered for the plaintiff.

WESTERN UNION TEL. CO. v. INMAN & I. STEAMSHIP CO.

INMAN & I. STEAMSHIP CO. v. WESTERN UNION TEL. CO.

(Circuit Court of Appeals, Second Circuit. January 12, 1894.)

Nos. 32, 33.

NAVIGABLE WATERS—OBSTRUCTION BY SUBMARINE CABLE.

A vessel which, though touching bottom, forces her way by her own screw through the soft mud, is "navigating;" and if, while so doing, her screw is fouled by, and breaks, a submarine cable, the burden is on the cable company to show that the cable was so constructed and maintained as "not to obstruct navigation," as required by Rev. St. § 5263; and this burden is not sustained when there is nothing to show the actual condition of the cable at the time, and it appears that it was originally laid near the end of an existing pier used by large ocean steamers, and over a mud bank, which they must necessarily plow through at certain states of the tide. 43 Fed. 85, affirmed.

Appeal from the Circuit Court of the United States for the Southern District of New York.

In Admiralty. These were cross libels to recover damages caused by the breaking of a submarine cable by the screw of the steamship City of Richmond, and for fouling of the screw thereby. In the district court the libel of the telegraph company was dismissed, and that of the steamship company sustained. 43 Fed. 85. This decree was affirmed pro forma by the circuit court, and the telegraph company appeals. Affirmed.

Statement by LACOMBE, Circuit Judge:

These are appeals by the Western Union Telegraph Company from pro forma decrees of the circuit court affirming decrees of the district court, southern district of New York. Cross libels were brought by the parties, each claiming its damages sustained on August 16, 1887, by a fouling of the screw of the S. S. City of Richmond with submarine cables owned by the telegraph company, and extending under the North river from at or near Courtland street, on the New York side, to and under the Netherland Steamship Company's pier, on the Jersey City side. The Netherland pier was there, and in use by ocean steamers, before the cables in question were laid under it; and ocean steamers have been in the habit of docking at Jersey City for 40 years. The cables of the libellant were first laid there in 1867, under authority of the act of congress of July 24, 1866. The district judge found the telegraph company solely in fault, dismissed its libel, and sustained the cross libel of the steamship company.

David D. Duncan, for appellant.

Henry G. Ward, for appellee.

Before WALLACE and LACOMBE, Circuit Judges.

LACOMBE, Circuit Judge, (after stating the facts.) Briefly stated, the movements of the steamship on the day in question were as follows: She arrived in the vicinity of the Inman pier at about 9 A. M., on a flood tide. That pier is immediately below the Netherland pier, and immediately above the Red Star pier. Her own berth, on the north side of the Inman pier, was occupied by another steamer of that line, and the slip south of that pier was full of barges. The flood tide made it necessary for her to proceed some distance above, and then round to, so as to make the end of her pier (the only place available for landing passengers) against the tide,—a maneuver equally necessary when she makes the slip on a flood tide. She lay, while discharging her cabin passengers and baggage over a forward gang plank, at the southern end of her pier, with her stern angling out in the river, and projecting up stream. By the time these were landed, the tide had fallen so much that she was in part touching the bottom, and, had she remained there till fully aground, the unevenness of the bottom would have caused damage by straining. She could not move forward without running into the Red Star pier, nor could she proceed directly astern, as she lay, without risk of hitting a broad barge which lay at the end of the Netherland pier. With the aid of two powerful tugs hauling with hawsers on her port quarter, her stern was breasted out till the hawsers broke; the stern then resting in the mud at the bottom of the river some little distance southeast of the Netherland pier. Her propeller was then put in motion; the tugs still hauling at right angles to her course, so as to keep her stern down to southward until she struck the ebb tide. Steadily, and without any apparent obstruction or stoppage of her motion, the steamer, under her reversed screw, moved onward through the mud, passing on her way through a mud bank about 300 feet off the Netherland pier, until she reached the middle of the river, where she anchored. None of her officers, who were at their respective posts, and attentive to their duties, were conscious of her touching, striking, or fouling anything. The second officer, who was stationed at the stern, noticed a water-logged pile in motion near the sternpost, which he surmised had been started up from the bottom by the action of the propeller. Reporting this circumstance, the next day, to the first officer, a diver was sent down, and found fragments of seven or eight submarine cables entangled in the screw.

The act of congress above referred to gives libellant the right to lay its cables "under the navigable streams of waters in the United States," with the limitation or condition that such lines "shall be so constructed and maintained as not to obstruct the navigation of such streams and waters."

The district judge has elaborately set forth the facts in evidence, and, in affirming his decision, we do not deem it necessary to re-

state them all. The appellant has criticised some of his statements as to the character of the bottom at the locality in question, on the ground that they are not in all respects sustained by proof; but it is abundantly established by uncontradicted evidence that the cables intersected the line of a bank of mud which lay off the Netherland pier, and that the mud composing that bank was of such a character that the City of Richmond, under a reversed screw, navigated herself through it stern first by her own power. That a vessel is navigating when she is able to thus proceed by the use of her own power is a self-evident proposition, which needs no citation to support it, though reference may be made to Gould, Waters, § 87; Mayor, etc., of Colchester v. Brooke, 7 Q. B. 339; Ferguson v. Steamship Co., 10 Vict. Law R. 279.

It being clear that the steamer was navigating, it is for the owner of the cables to show that they were not so maintained as to obstruct navigation. Here, in the nature of things, the evidence is unsatisfactory. No one knows the condition of affairs at the bottom of the river on the morning in question. Whether, by reason of some kink, a part of one of the cables was protruded upward into the water, or whether one of them rested on the water-logged pile in such manner that when the latter was disturbed by the screw it momentarily raised the cable above its ordinary location, or at what depth in the soft navigable mud the cables rested that morning, is all a matter of conjecture. Aside from occasional fouling of the cables by anchors, there is no evidence to show that they had theretofore interfered in any way with the movement of vessels, except that, a short time before, the propeller of the steamer Westernland had come in contact with them. When it is considered that the locality in question had been occupied for years by ocean steamers as large as the City of Richmond, which necessarily must, upon occasions, have plowed their way through this mud bank, the fact that the cables were never thus caught before is suggestive that there had been some recent change in their position. But, whatever the cause of the accident in question, the owner of the cables laid across this navigable stream has failed to show that it did not happen because of any failure to maintain them in such a way as not to obstruct navigation; and, as the owners of the steamship have shown that she was navigating when she encountered them, the person who undertook to maintain the cables so as not to obstruct navigation has failed to sustain the burden of proof which the accident cast upon him.

Counsel for the appellant has argued at great length, and with abundant citation of authority, upon the question, what is the proper construction to be given to the words of limitation in the act, "not to obstruct the navigation?" The conclusion for which he contends is thus stated in his brief:

"The test must be, does it unreasonably, unnecessarily obstruct, in view of the objects to be accomplished? Does it obstruct or interfere with the navigation more than is necessary? Some interference, under some possible conditions and circumstances, is necessary; but is it reduced to the minimum in a given case?"

In answer to this, two suggestions will suffice. Each case should be disposed of upon its own facts; and it may be taken as a safe rule that the degree of obstruction will vary with the character and extent of the navigation. In the case now before the court, the locality for the crossing was selected, for all that appears, voluntarily by the libellant. There is nothing to show that it was constrained by any necessity to lay its cables where it did, and not elsewhere. The obligation to maintain the cable so as not to obstruct navigation is fully operative when the question of a place to lay it is being decided. This locality had been occupied for years before by ocean steamers. The Jersey end of the cable was carried ashore under a dock built for and used by such steamers. The telegraph company knew, or could easily have ascertained, that, in certain conditions of the tide, there was not water enough off that pier for vessels such as these to navigate without plowing through the surrounding mud and silt, and is chargeable with knowledge that while such vessels, proceeding on their course up or down a river, will ordinarily keep well off from the shoaler water, it is to be expected that, where their own piers are located, they will navigate up, down, across, and in every conceivable course, however tortuous, while making their way through natural difficulties and obstructions to their landing places. Counsel refers to the City of Richmond as "operating in some peculiar mode, or under some special, extraordinary conditions;" but just such mode, and just such conditions of operation, were to be expected at the place selected for the cable. It is not unreasonable, therefore, to hold the owner of the cable, to a greater measure of precaution in maintaining it when laid there than when laid in some other place where such peculiar conditions of navigation do not exist.

It is urged that the City of Richmond is nevertheless liable because the general agents of the Inman Line and the dock superintendent had knowledge that there were Western Union cables running from under the Netherland pier. Neither the pilot, however, nor the ship's navigating officers, knew of the presence of the cables; and there is no evidence of that malicious disregard of another's right of property which was held controlling in *Mayor, etc., of Colchester v. Brooke*, 7 Q. B. 339, and *Cobb v. Bennett*, 75 Pa. St. 326. In the absence of any notice by sign put up at the cable crossing, which the evidence shows is usual, we do not feel warranted in holding the City of Richmond responsible for navigating over the cable; and, even if her officers knew it was there, they might fairly assume it was so maintained as not to obstruct her navigation.

The decrees of the district court are affirmed, with interest and costs.

FRISBIE v. CHESAPEAKE & O. RY. CO.

(Circuit Court, D. Kentucky. January 10, 1894.)

REMOVAL OF CAUSES—REMAND—AMENDED PETITION.

When a cause is remanded for defects in the petition, after the time when an answer is required by the state practice, it is then too late to again remove it on an amended petition. *Brigham v. Lumber Co.*, 55 Fed. 881, followed, and *Freeman v. Butler*, 39 Fed. 4, disapproved.

At Law. Action by H. D. Frisbie, administrator of William Falconer, against the Chesapeake & Ohio Railway Company to recover damages for personal injuries. Heard on motion to remand to the state court. Granted.

C. B. Simrall, Alfred Mack, and J. T. Simon, for plaintiff.

W. H. Jackson and Hallam & Myers, for defendant.

TAFT, Circuit Judge. This is a motion to remand. On the 1st day of March, 1893, the plaintiff, Frisbie, filed his petition against the Chesapeake & Ohio Railway Company in an action for damages for personal injury. On the 15th day of March—the day when the answer to the petition was required under the laws of Kentucky—the defendant filed a petition for removal. The case was removed and the transcript filed in this court. Judge Lurton, on the ground that the petition was defective in not making the proper allegations as to residence and citizenship, remanded the case. 57 Fed. 1. Thereupon, on the 9th day of October, 1893, the plaintiff made a motion to file an amended petition for the removal of this cause to the United States circuit court. This was filed, the bond was accepted and approved, and the transcript was filed in this court.

Motion is now made to remand on the ground that no removal was effected by the amended petition and bond. I think that the motion to remand must be granted. It seems to me clear that under the statute, unless there is filed in the state court a proper petition for removal, at or before the time when the defendant is required to plead, all power is gone to oust the jurisdiction of the state court. The time within which the necessary petition should be filed is fixed by the statute. It cannot be extended in the discretion of either the federal or the state court. For the state court to allow an amendment to the petition for removal which shall relate back to the time when the original petition was filed is merely an indirect mode of extending the time within which a removal can be effected. I very much regret to differ with my colleague, Judge Barr, in this matter, but, after an examination of his opinion in the case of *Freeman v. Butler*, 39 Fed. 4, and a weighing of the arguments therein contained with the opposing arguments contained in the subsequent opinion of Judge Bunn in the case of *Brigham v. Lumber Co.*, 55 Fed. 881, I find myself unable to concur with Judge Barr's reasons.

For these reasons the motion to remand will be granted.

CHAPMAN v. ALABAMA G. S. R. CO.

(Circuit Court, N. D. Georgia. January 20, 1894.)

REMOVAL—CITIZENSHIP OF CORPORATION.

Act Ga. 1853, which authorized a railroad company incorporated in Alabama to extend its road into Georgia, and made it subject to suit in Georgia by citizens of that state, did not deprive the company of the right to remove such a suit to a United States court.

At Law. Action by Phoebe L. Chapman against the Alabama Great Southern Railroad Company, brought in the superior court of Dade county, Ga., and removed therefrom by defendant. Heard on motion to remand. Denied.

C. D. McCutcheon, for plaintiff.

Dorsey, Brewster & Howell, for defendant.

NEWMAN, District Judge. This is a motion to remand. Suit was brought by Phoebe L. Chapman against the Alabama Great Southern Railroad Company, in the superior court of Dade county, in this state and district, to recover damages for personal injuries alleged to have been received on a railroad operated by said company in Dade county, in this state. The petition for removal filed by the defendant alleges, and the same is not controverted, that the plaintiff is a citizen of this state and district, and that the defendant corporation is a citizen of the state of Alabama. The removal was on the ground of diverse citizenship. The motion to remand is based on the ground that the defendant corporation, while conceded to be a corporation and citizen of Alabama, is also a corporation and citizen of the state of Georgia. The Alabama Great Southern Railroad Company is operating, so far as material here, a railroad which was originally known as the Wills Valley Railroad. The legislature of Georgia in 1853 passed an act, the title of which is as follows:

"An act to authorize the Wills Valley Railroad Company, incorporated by the legislature of the state of Alabama, and any railroad company incorporated by the legislature of the state of Alabama, that may be associated with the Wills Valley Railroad Company, to construct a railroad, through the county of Dade, to some point on the Nashville & Chattanooga Railroad, in said county of Dade and state of Georgia, and for other purposes therein specified."

The act then proceeds to give to the Wills Valley Railroad Company, chartered by the legislature of the state of Alabama, the right of extending and constructing its railroad through the county of Dade, and gives it all the privileges, rights, and immunities which had been granted to the Wills Valley Railroad Company, and subjects it to the same restrictions imposed by the general assembly of the state of Alabama. Right is given to acquire land, and then the act provides that it shall be subject to suit by citizens of this state in the counties through which the road passes, without having to go to the state of Alabama to sue. The act then requires it to keep up bridges and ways of passage across the railroad, makes it liable for killing stock, for injuring persons or property, and for

survival of right of recovery, and for certain rules of evidence in actions to enforce such liability.

The claim is that the effect of this act is to make the Wills Valley Railroad Company a Georgia corporation, and that the Alabama Great Southern, by acquiring the right to operate it, and engaging in its operation, stands upon the same footing as the Wills Valley Railroad Company stood in this respect. Special importance is attached to the act of 1853, referred to, which provides "that should any other railroad company, chartered by the legislature of Alabama, become associated with the Wills Valley Railroad Company, all the benefits and restrictions of this act shall be extended to said association."

In the case of *Goodlett v. Railroad Co.*, 122 U. S. 391, 7 Sup. Ct. 1254, the supreme court have set at rest any question that might have existed before as to whether the act of the legislature of Georgia of 1853 created a new and distinct corporation in the state of Georgia. In the case named the question was as to the effect of certain acts of the legislature of Tennessee in reference to the Louisville & Nashville Railroad Company, which had been previously chartered by the state of Kentucky. The contention of the plaintiff was that the effect of this legislation had been to constitute a corporation of the state of Tennessee, which was denied by the defendant. The decision of the supreme court was that the Louisville & Nashville Railroad Company was a corporation of Kentucky, and not of Tennessee. The terms of the act of the legislature of Tennessee in reference to the Louisville & Nashville Company in favor of the contention made by the plaintiff here were much stronger than the language of the act of the legislature of Georgia in reference to the Wills Valley Railroad Company. Consequently, the decision of the supreme court in the case named is controlling authority on the motion submitted here.

Counsel for plaintiff in this case urges the provision in act of the legislature of Georgia in reference to the Wills Valley Railroad Company, authorizing suits by citizens of this state against that company, and providing for service, as an argument against the right to remove the case to this court. This position, carried to its last results, would defeat the right of removal entirely. Suits against foreign corporations are continually removed into the circuit court, and, of course, when such suits have been properly instituted, and when service has been properly perfected, under laws of the state authorizing the same. Their status as citizens of the state where they are created is in no way affected by the fact that suit and service against them is authorized in another state. Nothing more can be made out of the provision as to suit and service in the act in question.

In *Railroad Co. v. Koontz*, 104 U. S. 5, in an opinion by Chief Justice Waite, this language is used:

"It is well settled that a corporation of one state doing business in another is suable where its business is done, if the laws make provision to that effect. We have so held many times. *Insurance Co. v. French*, 18 How. 404; *Railroad Co. v. Harris*, *supra*, [12 Wall. 65]; *Ex parte Schollenberger*,

96 U. S. 369. This company concedes that it was properly sued in Virginia. What it asks is that, being sued there, it may avail itself of the privilege it has under an act of congress, as a corporation of Maryland, and remove into the proper court of the United States exercising jurisdiction within Virginia a suit which has been instituted against it by a citizen of the latter state. The litigation is not to be taken out of Virginia, but only from one court to another within that state."

So here. The right to bring suit in this state is not questioned. The only claim is that the defendant being a citizen of Alabama, and the plaintiff a citizen of this state, it has the right to remove its case into the circuit court of the United States, and have it there tried. The right to remove clearly exists, and should not be confounded in any way with the right to bring the suit originally in the state court.

The motion to remand is denied.

CHEMICAL NAT. BANK v. ARMSTRONG.¹

(Circuit Court of Appeals, Sixth Circuit. November 13, 1893.)

No. 56.

1. BANKS—MISCONDUCT OF OFFICER IN BORROWING MONEY—LIABILITY OF BANK.

A bank is liable for a loan obtained from another bank, dealing in good faith with its authorized officer, although such officer acts without the knowledge of the other bank officials, and appropriates the money to his own use.

2. NATIONAL BANKS—INSOLVENCY AND RECEIVERS — ALLOWANCE OF CLAIMS — COLLATERAL.

Creditors of an insolvent national bank cannot be required, in proving their claims, to allow credit for any collections made after the date of the declared insolvency from collateral securities held by them. 50 Fed. 798, reversed.

3. SAME—DIVIDENDS—INTEREST.

Interest on dividends should not be allowed in favor of one who voluntarily delayed presenting his claim until long after the dividends were declared, although the delay was due to a mistaken belief that he had a right to pay his claim in full from collaterals in his hands.

4. SAME.

The refusal of a creditor to accept the receiver's offer to allow part of a claim without prejudice to a suit for allowance of the remainder, or to the receiver's right to still further reduce the claim if the court should hold such reduction proper, bars the creditor's right to interest on subsequent dividends on the part offered to be allowed, although it is subsequently adjudged that the whole of his claim should have been allowed; but he is entitled to interest on the dividends on the part rejected.

Appeal from the Circuit Court of the United States for the Western Division of the Southern District of Ohio.

In Equity. Bill by the Chemical National Bank of the city of New York against David Armstrong, receiver of the Fidelity National Bank of Cincinnati, Ohio, to establish a claim against that bank. Decree for complainant. 50 Fed. 798. Both parties appeal. Reversed.

William Worthington, for Chemical Nat. Bank.

John W. Herron, for David Armstrong, receiver.

¹ Rehearing granted.

Before BROWN, Circuit Justice, and TAFT and LURTON, Circuit Judges.

TAFT, Circuit Judge. These are cross appeals from a decree of the circuit court for the southern district of Ohio directing the receiver of the insolvent and defunct Fidelity National Bank of Cincinnati to allow a claim of the Chemical National Bank of New York against the assets in his hands for \$205,450. The Chemical Bank, the complainant below, objects to the decree on the ground that the claim should have been allowed for \$300,000 and interest, while the receiver objects to the decree because the claim as allowed was not reduced by about \$10,000.

On March 2, 1887, the Chemical Bank placed to the credit of the Fidelity Bank \$300,000, the proceeds of a call loan, as collateral for which a number of bills receivable had been pledged. E. L. Harper, vice president of the Fidelity Bank, who secured the loan, directed that this credit be transferred on the books of the Fidelity Bank to his individual account. This was done, and the money was checked out by Harper.

On June 21, 1887, the Fidelity Bank suspended payment. Its doors were closed by order of the comptroller of the currency upon that day, and on the 27th of the same month, the comptroller appointed the defendant, Armstrong, its receiver. None of the collaterals on the \$300,000 loan had been collected by the Chemical Bank before the receiver took possession of the Fidelity Bank. Subsequently three notes made by J. W. Wilshire, and indorsed by John V. Lewis, for \$25,000 each, which were among the collaterals for the \$300,000 loan, were collected by the Chemical Bank; and another note, having the same maker and indorser, for another \$25,000, could have been collected, had the Chemical Bank not been negligent in failing to demand payment and to notify the indorser, for, though Wilshire the maker was insolvent, Lewis the indorser was able to pay. The Chemical Bank had made other advances to the Fidelity Bank upon which it had received other collateral. In the belief that it was entitled to use all the collateral in its hands to pay all the obligations of the Fidelity Bank to itself without regard to the particular loans upon which particular collateral had been deposited, the Chemical Bank had gone on making collections, and had applied the proceeds of the collateral indiscriminately to the aggregate debt, so that it had paid the entire indebtedness of the Fidelity Bank owing to it, and had on hand a balance of \$33,000, which it turned over to the receiver. The receiver objected to the "massing" of the collateral, and insisted that the Chemical Bank could not use collateral, given to secure one obligation, to pay another. This resulted in litigation, in which the receiver was successful, and obtained \$286,000 from the Chemical Bank.

And so it happened that on the 25th of April, 1890, and not until then, the Chemical National Bank presented its claim for \$300,000 on the loan already referred to. The receiver objected to the claim, on the ground that \$75,000 which the bank had collected on the collateral before proving its claim, and about \$9,000 thereafter col-

lected, and the \$25,000 which, through its negligence, it had failed to collect, should be credited on the claim.

The answer of the receiver made the defense that the Fidelity Bank could not be held liable for the \$300,000 loan, because Harper had negotiated it without the knowledge of the other officers of the bank, and had fraudulently appropriated the proceeds of the loan to his own uses. The defense has not been pressed on us by counsel for the receiver, and certainly cannot be sustained. The evidence is undisputed that the Chemical National Bank had no knowledge that Harper was engaged in defrauding the Fidelity Bank, and dealt with him as an authorized officer of that bank, and the money was placed to its credit. The debt was, therefore, the debt of the Fidelity Bank.

The next question is, shall creditors of an insolvent national bank, in proving their claims, be required to allow any credit for collections from collateral made subsequent to the declared insolvency, and before proof of claim? If so, shall the claims as proven be also subsequently reduced by collections from collateral made, after proof, and before dividends are declared, thus varying the basis of distribution from dividend to dividend? Or shall the rule in bankruptcy be followed, by which the creditor holding collateral shall be required to reduce his claim by the actual collections and the estimated value of his uncollected collateral?

The court below held that the creditor should be required to allow a credit of all collections made before filing his proof of claim, but not of those made thereafter. The receiver contends that the rule in bankruptcy is the proper one, while the complainant bank maintains that it should be allowed to prove its claim as it existed at the moment of declared insolvency.

It is singular that in the years during which the national banking act has been in force the foregoing questions have not been settled by a decision of the supreme court. It is, for the federal courts, a new and important question, and has received at our hands the consideration it deserves. We have been greatly assisted by the elaborate and able written and oral arguments of counsel for both parties, in which all the many decided cases presenting the same or analogous questions have been industriously reviewed and discussed.

By section 5234, Rev. St., and section 1 of the act of June 30, 1876, (19 Stat. 63,) it is made the duty of the comptroller of the currency to appoint a receiver to wind up a national banking association whenever the comptroller shall, after examination, have become satisfied of its insolvency. It is the duty of the receiver thus appointed to take possession of the books and effects of the bank, liquidate its assets, and pay the money thus realized into the treasury of the United States.

Section 5235 makes it the duty of the comptroller thereupon to give notice by public advertisement for three months, calling on all persons having claims against the association to present the same, and to make legal proof thereof.

Section 5242 declares void all transfers of its property by the national bank after the commission of the act of insolvency, or in contemplation thereof, to prevent distribution of its assets in the manner provided in said national banking act, or with the view to prefer any creditor, except in payment of its circulating notes. And it further provides that no judgment or injunction shall be issued against the bank or its property before final judgment in any suit, action, or proceeding in any state, county, or municipal court.

Section 5236 provides that, after making full provision for the redemption of the circulating notes of the association, "the comptroller shall make a ratable dividend of the money so paid over to him by such receiver on all such claims as may have been proved to his satisfaction or adjudicated in a court of competent jurisdiction, and as the proceeds of the assets of such association are paid over to him, shall make further dividends on all claims previously proved or adjudicated, and the remainder of the proceeds, if any, shall be paid over to the shareholders of such association or their legal representatives in proportion to the stock by them respectively held."

The suspension of the bank, and its seizure by the comptroller and his appointee, the receiver, work, by operation of law, a transfer of the title to the assets of the bank from the bank to the comptroller and receiver, in trust to reduce the assets to money, and apply them, as directed by the national banking act—first, to the redemption of the circulating notes of the bank; and, second, in ratable distribution to the creditors of the bank. *Scott v. Armstrong*, 146 U. S. 499, 13 Sup. Ct. 148; *White v. Knox*, 111 U. S. 784, 4 Sup. Ct. 686.

It is manifest that it would utterly defeat the object of the banking act if, after the suspension, the assets remained subject to levy, execution, or attachment and, therefore, that the passing of the assets into the hands of the receiver removes all the property of the bank from liability to process to secure satisfaction of judgments. *Bank v. Colby*, 21 Wall. 609.

The right which a creditor of the bank had before suspension of levying an execution to satisfy his judgment is gone, and for it is substituted a fixed and definite interest in the assets as a security for the payment of his debt, which it is the purpose of the banking act to reduce to money, and apply on his debt, with all convenient speed. We see no reason why this does not apply as well to creditors who hold collateral as to those who are unsecured. It is well settled that the holding of collateral does not prevent a creditor from enforcing his claim in the ordinary way by judgment and execution against a debtor without any deduction for his collateral. *Lewis v. U. S.*, 92 U. S. 618.

When the secured creditor is required by the transfer of the assets in trust for winding-up purposes to forego his right to satisfy his entire debt out of the property of the bank by levy and execution, why should there be substituted for that right anything less than that which the unsecured creditor gains by yielding up the same right? Take the case of two creditors of the bank for \$1,000 each, one with collateral and the other unsecured. Before suspension, the one has

two modes of collecting his debt—first, by levy and execution for \$1,000; and, second, by reducing and applying the collateral. The other has but one,—that of a levy and execution for \$1,000. When the bank suspends, the unsecured creditor acquires, in exchange for his right to levy on the property of the bank to make \$1,000, an undivided interest in the assets held by the receiver, after the circulating notes are paid, which bears the same ratio to the entire assets of the bank as \$1,000 does to the entire indebtedness. If so, why should not the secured creditor, who, before the suspension, had also the right to make \$1,000 by levy on the property of the bank, receive the same ratable interest in the assets held by the receiver? The suspension of the bank, and its seizure by order of the comptroller, have no effect to change the rights of the creditor with reference to his collateral. He enjoys precisely the same advantage over the unsecured creditor, with respect to the collateral, that he did before the suspension. With reference to obtaining satisfaction out of the general assets of the bank before suspension, their rights were equal. So must their rights be, after the sequestration of the assets for ratable distribution. Illustrations are put to show the injustice of the view we are advocating. A. has a claim of \$1,000 against the bank, for which he holds bonds, worth \$500, as security. B. has a claim of \$500. A dividend of 50 per cent. is declared, and A. receives \$500 on his claim, leaving \$500 due, which he subsequently satisfies out of the collateral. A. is thus paid in full, while B. receives but \$250. Now, it is said that A., who had a claim of \$500, which was unsecured, has had his unsecured claim paid in full, while B., who also had an unsecured claim for the same amount, has only received \$250, which must be unjust and inequitable. The fallacy in this argument is in assuming that A. had an unsecured claim for \$500. He had a claim for \$1,000, secured by \$500 of collateral, all of it applicable to every dollar of the debt. No part of the debt was unsecured. The same thing was true of his interest in the assets of the bank. That was applicable to every dollar of the \$1,000. He had two securities for the payment of his debt, one of which he held in common with all the creditors, the other of which he had obtained by lawful contract from his debtor. It is a rule of equity that, where a creditor holds two securities, one of which he has in common with others, and the other of which he holds for his sole use, he may be required to collect his debt first out of the security for his sole benefit, so that those who hold in common with him may have more to apply to their debts. But this rule can never be invoked where he who has the two securities cannot pay himself in full out of both. He was given the two securities to pay his debt, and he cannot be deprived of this primary equity for the benefit of some one else who is less fortunate in his security. 3 Pom. Eq. Jur. § 1414; Story, Eq. Jur. § 564b.

The national banking act was framed to secure equality of distribution among the creditors, so far as is consistent with the previous contract rights of those creditors. If one creditor secured collateral for his loan when made, that produced an inequali-

ty between him and the other creditors who have no collateral which it cannot have been the purpose of the banking act, in its provisions for winding up the insolvent bank, to modify, reduce, or defeat.

It is true that under the bankruptcy act it was provided that a secured creditor, if he would prove for his full claim, must surrender his collateral, or else be content to prove for the difference between his full claim and the value of his collateral. Rev. St. § 5075. The bankruptcy law is not now in force, however, and it was expressly held in the case of *Cook County Nat. Bank v. U. S.*, 107 U. S. 445, 2 Sup. Ct. 561, that the priorities and method of distribution under the bankrupt law had no application to the winding up of insolvent national banks. It was said that the national banking act contained within itself a complete system for distributing the assets and determining the priorities, and that a priority secured to the United States under the bankrupt law would not be enforced in their favor under the banking act. In delivering the opinion of the court, Mr. Justice Field, referring to the bankruptcy law, said: "That enactment was dealing with the estates of persons adjudged to be insolvent under that law, and covers only the distribution of their estates. It has no further reach."

The rule in bankruptcy was not the rule in equity, because it ignored the rights belonging to the secured creditor before the bankruptcy took place, and materially modified and reduced the advantage over unsecured creditors which, in the original contract of pledge, the debtor had intended to secure him.

The question we are discussing is one which has arisen in determining the proper ratable distribution of assets under nearly all acts for the settlement of insolvent estates and for the winding up of insolvent corporations.

In *Massachusetts*, (*Amory v. Francis*, 16 Mass. 309,) in *Iowa*, (*Wurtz v. Hart*, 13 Iowa, 515,) in *South Carolina*, (*Wheat v. Dingle*, 32 S. C. 473, 11 S. E. 394,) and in *Washington*, (*In re Trasch*, 31 Pac. 755,) it was held that the rule in equity is the same as the rule in bankruptcy, and that the secured creditor can prove only for the balance of his debt after the collateral shall have been applied. It was so held by Sir John Leach, master of the rolls, in *Greenwood v. Taylor*, 1 Russ. & M. 185. In *Amory v. Francis*, *supra*, Chief Justice Parker repudiates the view that the secured creditor should be allowed to prove for his full claim, without deduction for collateral, on the ground that he "would in fact have a greater security than that pledge was intended to give him; for, originally, it would have been security only for a proportion of the debt equal to its value; when, by proving the whole debt, and holding the pledge for the balance, it becomes security for as much more than its value as is the dividend which may be received on the whole debt." With much deference to the great jurist who advanced this argument, we think that it quite incorrectly states the effect of the contract of pledge, which is that the collateral shall be security for the whole debt, and every part of it, and therefore is as applicable to any balance which remains after payments from other sources as to the

original amount due. The view of the supreme judicial court of Massachusetts was adopted into a statute which deprives the subsequent cases in that state of much bearing upon the question before us. The other cases cited, and especially *Greenwood v. Taylor*, seem to rest on the rule in equity requiring a creditor with two funds as security, one of which he shares with others, to exhaust his sole security first. As already said, the rule has no application when its operation would prevent the creditor from paying his whole claim.

The great weight of authority in England and this country is strongly opposed to the view that a creditor with collateral shall be thereby deprived of the right to prove for his full claim against an insolvent estate. *Greenwood v. Taylor* was questioned by Lord Cottenham in *Mason v. Bogg*, 2 Mylne & C. 443, 448, and was expressly repudiated as authority in the court of chancery appeals in *Kellock's Case*, 3 Ch. App. 769,—a case which, upon this point, is cited with approval in *Lewis v. U. S.*, 92 U. S. 618. In this country, the Massachusetts doctrine was dissented from by the supreme court of New Hampshire in the early case of *Moses v. Ranlet*, 2 N. H. 488. Other cases which fully support the views we have expressed are: *People v. E. Remington & Sons*, 121 N. Y. 336, 24 N. E. 793; *In re Bates*, 118 Ill. 524, 9 N. E. 257; *Findlay v. Hosmer*, 2 Conn. 350; *Logan v. Anderson*, 18 B. Mon. 114; *Bank v. Patterson*, 78 Ky. 291; *Brown v. Bank*, 79 N. C. 244; *Kellogg v. Miller*, 22 Or. 406, 30 Pac. 229; *Miller's Estate*, 82 Pa. St. 113; *Graeff's Appeal*, 79 Pa. St. 146; *Patten's Appeal*, 45 Pa. St. 151; *Miller's Appeal*, 35 Pa. St. 481; *Allen v. Danielson*, 15 R. I. 480, 8 Atl. 705; *Bank v. Haug*, 82 Mich. 607, 47 N. W. 33; *West v. Bank*, 19 Vt. 403. Compare, also, *Kortlander v. Elston*, 2 C. C. A. 657, 52 Fed. 180; *Bank Cases*, 92 Tenn. 437, 21 S. W. 1070.

The exact point which is common to all the foregoing authorities, and which they all sustain, is that a creditor who has proved his claim against an insolvent estate under administration can collect his dividends without any deduction from his claim as proven for collections made from collateral after his proof of claim is filed. There is one authority, and only one, which upholds the view that a creditor who has once proved his claim shall reduce that claim by all collections made before the declaration of each dividend, on the theory that he is entitled to a ratable distribution on his debt as it is at the time of distribution, and the collections made after proof of claim and before each dividend must reduce the debt pro tanto. This authority is *Bank v. Lanahan*, 66 Md. 461, 7 Atl. 615. The argument *ab inconvenienti* would weigh strongly against following this case, even if its conclusion were not wrong in principle. The rule it lays down would require a readjustment of the basis of distribution at the time of declaring every dividend, and would involve endless labor and confusion. But the rule cannot be sustained, because its adoption proceeds on the theory that the claim of the creditor in reference to the sequestered assets of the debtor and the debt against the debtor are and continue to be one and the same thing. This is a fundamental error. The amount

of the claim as proven is a mere measure of the creditor's right and interest in the fund realized from the assets. The claim as proven is a claim in rem, and not in personam. This may be illustrated in respect to interest. As against the insolvent bank the debt of the creditor continues to bear interest. As against the assets, interest is calculated only to the date of the suspension and the vesting of the title of the assets in the receiver. *White v. Knox*, 111 U. S. 784, 4 Sup. Ct. 686; *Richmond v. Irons*, 121 U. S. 27, 64, 7 Sup. Ct. 788; *Warrant Finance Co.'s Case*, 4 Ch. App. 643; *In re Joint-Stock Discount Co.*, 5 Ch. App. 86.

It is true that if the assets are more than sufficient to pay all debts, then the creditors are allowed dividends to pay the interest due from the debtor bank, (*National Bank of Commonwealth v. Mechanics' Nat. Bank*, 94 U. S. 437;) but in the measuring of the share of each creditor in the fund, interest beyond the date of suspension is not calculated. It will not do to say that the date fixed for stopping of interest on all claims is a mere matter of convenience in calculation, which works no injury to any one, because all are treated alike. The creditor with a debt bearing 8 per cent. interest is very injuriously affected in comparison with the creditor whose debt bears but 4. The contract of the former against the debtor entitled him to double the compensation for delay in payment which the latter was to receive, and yet in the distribution of the assets, for which they both may have to wait several years, the former has no advantage over the latter. If the ratable share of creditors in the assets must vary with the increase or decrease of the debt against the debtor, the refusal to allow interest on claims beyond the date of suspension would be a gross injustice to those who are entitled by contract to the higher rates of interest. The only principle upon which the rule adopted by the supreme court in *White v. Knox*, 111 U. S. 784, 4 Sup. Ct. 686, and by the court of chancery appeals in *Warrant Finance Co.'s Case*, 4 Ch. App. 643, can be supported is that, upon the transfer of the assets by operation of law to a trustee for creditors, the rights of creditors in the assets are fixed, and are to be determined as of that date, and are not affected by what may subsequently affect the debt by reason of which they acquire their interest therein, subject always to the limitation that the amount to be received by them from all sources shall not exceed their original debt and interest. Said Chief Justice Waite in *White v. Knox*, supra:

"The business of the bank must stop when insolvency is declared. Rev. St. § 5228. No new debt can be made after that. The only claims the comptroller can recognize in the settlement of the affairs of the bank are those which are shown by proof satisfactory to him, or by adjudication of a competent court, to have had their origin in something done before the insolvency. It is clearly his duty, therefore, in paying dividends, to take the value of the claim at that time as the basis of distribution."

This principle, thus applied to interest, must have equal application to credits from collections on collateral.

The cases we have already cited fully confirm the foregoing view as to credits after the filing of the proof of claim. It is vigorously

contended, however, that they do not countenance the view that credits shall not be allowed on claims for collections made after insolvency declared and before proof of claim. The exact point has been passed upon in but a few cases. In *Kellock's Case*, 3 Ch. App. 769, the court of chancery appeals adopted the rule that collections on collateral before filing proofs of claim in proceedings to wind up an insolvent company should be deducted, but that subsequent collections should not be.

The supreme court of Pennsylvania, in *Miller's Appeal*, 35 Pa. St. 481, in *Patten's Appeal*, 45 Pa. St. 151, and in several subsequent cases; and the supreme court of Rhode Island, in *Allen v. Danielson*, 15 R. I. 480, 8 Atl. 705,—took the contrary view, and held that no collections made on collaterals after the transfer of the assets in trust could be used to reduce the claims of secured creditors, whether made before or after filing proof of claim. In *Morton v. Caldwell*, 3 Strob. Eq. 162, the chancellor, in a most convincing opinion, reached the same result; but in *Wheat v. Dingle*, 32 S. C. 473, 11 S. E. 394, the supreme court of South Carolina destroyed the authority of that case in that state by adopting the rule in bankruptcy as to the claims of secured creditors.

A careful consideration of the question and of the principles which must govern its decision satisfies us that there is no logical basis for any distinction between the effect of collections made after insolvency and before filing proof, and of those made after filing proof. Either they must both reduce the claim before dividend, or they must be given no effect. The theory upon which all the cases refusing to reduce the claim by collections subsequent to filing proof must be supported, is that, at the time of filing proof, the interest of the claimant in the assets is a fixed one, not to be varied by subsequent increase or decrease in the debt against the original debtor. What reason is there for fixing the date of filing proof as the time when the interest of creditors in the assets is to be determined? That is a date varying with each creditor, and dependent on all sorts of contingencies. The time when a man's interest is fixed and limited in property is when the act is done by which either the legal or the equitable title is transferred to him. As we have seen, the time for fixing the amount of the claim, so far as stoppage of interest is concerned, is the date of the declared insolvency. The same date, by the closest analogy, must be taken as the date for stopping reduction of the claim by credits from collections on collateral. That is the time when the creditor is deprived of his usual remedy of suit, judgment, and execution, and his equitable interest in the assets is substituted therefor. Upon that date each creditor becomes the owner, for the purpose of securing his debt, of that part of the assets of the bank which bears the same ratio to the whole property as his debt bears to the aggregate indebtedness. This interest in the assets remains fixed and constant until his debt is paid. In *Miller's Appeal*, 35 Pa. St. 481, a debtor executed a general assignment for the benefit of creditors. Subsequently the assignor became entitled to a legacy, which was attached by a creditor. It was held that such creditor was, not-

withstanding, entitled to the dividend out of the assigned estate on the whole amount of his claim from the time of the execution of the assignment. Justice Strong, afterwards of the supreme court of the United States, said:

"In the deed of assignment the equitable ownership of all the assigned property passed to the creditors. They became general proportioners, and each creditor owned such proportionate part of the whole as the debt due to him was of the aggregate of the debts. The extent of his interest was fixed by the deed of trust. It was, indeed, only equitable; but, whatever it was, he took it under the deed, and it was only as a part owner that he had any standing in court when the distribution came to be made. It amounts to very little to argue * * * that Miller's recovery of the legacy operated with precisely the same effect as if a voluntary payment had been made by the assignor after the assignment; that is, that it extinguished the debt to the amount recovered. No doubt it did, but it is not as creditor that he is entitled to the distributive share of the trust fund. His rights are those of the owner by virtue of the deed of assignment. The amount of the debt as to him is important only so far as it determines the extent of his ownership. The reduction of that debt, therefore, after the creation of the trust, and after his ownership had become vested, it would seem, must be immaterial."

The theory of the rights of creditors, secured and unsecured, in the assets, so admirably stated by Mr. Justice Strong, is the only one which will support the many cases we have cited above in which collections after proof of claim were not credited in reduction of dividends. In no one of them is there any limitation of the ratio *decidendi* inconsistent with our view, excepting in Kellock's Case, 3 Ch. App. 769, and perhaps in the language of the supreme court of Vermont in *West v. Bank*, 19 Vt. 403. In the cases cited from New York, New Hampshire, Connecticut, Kentucky, North Carolina, Illinois, Oregon, and Michigan the only reason why the exact point here raised was not decided as we have decided it was because in those cases no collections had been made between insolvency and proof of claim. In Kellock's Case, after deciding on principle that the rule in bankruptcy as to collateral is not the rule in equity, the learned lord justices fix the date of filing proof of claim as the date after which claims should not be reduced by proceeds from collateral. They do this as if they were making a rule of court, and do not base their conclusion on any argument as to the rights of the creditor, but chiefly on the ground of convenience. Under the companies' acts, the court of chancery was vested with a large discretion in formulating rules for the winding up of insolvent companies. The conclusion in Kellock's Case on this point is what Lord Justice Giffard, in the *Warrant Finance Co.'s Case*, 4 Ch. App. 643, 647, calls "judge-made" law. The American cases in Pennsylvania and Rhode Island fix the claim of the creditor as a constant quantity from and after the declared insolvency. They argue out this result as a matter of right, and not as a rule of convenience. We fully concur in the conclusion reached for the reasons stated, and we are of opinion that, even as a matter of convenience, the date of declared insolvency is the better date from which to estimate all claims. The date is the same for every creditor. It is fixed for him, and depends on no

volition of his. It is pressed upon us that under this rule much inequality will result. It is said that a man who collects his collateral the day before the declared insolvency will have the right to prove and receive dividends on but a part of the original debt, while the man who collects his collateral the day after the declared insolvency can use his full claim to draw dividends. We see no anomaly or injustice in this. It grows out of the nature of the transfer in trust for the benefit of both. It is much more logical to have such a difference created by operation of law or by deed of assignment and change of title than by the mere voluntary act of the creditor in filing proof of claim.

Our conclusion upon this main question in the case makes it unnecessary for us to consider other questions discussed by counsel, which were material only in the view taken by the court below on the issue just considered. If the Chemical Bank should receive from dividends and collections payment of the debt, principal and interest, now owing to it by the Fidelity Bank, the question would arise whether it could not properly be charged with the note for \$25,000 which, through negligence, it failed to collect. It is quite clear, however, that dividends declared and to be declared, together with all collections from collaterals, including, as such, the note just referred to, will fall far short of paying the \$300,000 and interest due the Chemical Bank on the original debt. The question suggested, therefore, does not arise on the facts of the case.

The decree of the court below is reversed, with instructions to enter a decree ordering the receiver to allow the claim of the Chemical National Bank for \$300,000, with interest to the day when the Fidelity Bank suspended and was taken charge of by the agent of the comptroller.

(January 2, 1894.)

TAFT, Circuit Judge. In the opinion already filed in this case consideration was not given to the question of interest upon dividends due to the Chemical National Bank. Dividends on claims against the Fidelity National Bank were declared by the comptroller of the currency as follows: October 31, 1887, 25 per cent.; June 15, 1889, 10 per cent.; June 30, 1890, 10 per cent.; and August 5, 1891, 5 per cent.

Although the receiver took charge of the assets of the Fidelity Bank in June, 1887, the Chemical Bank did not present its claim for allowance until April 5, 1890. The delay was due to the fact that the Chemical Bank had in its hands when the Fidelity Bank suspended payment a large amount of bills receivable belonging to the Fidelity Bank, the proceeds of which the Chemical Bank supposed it could lawfully apply on this claim, and pay it in full.

On April 25, 1890, the receiver made the following offer to the attorney for the Chemical Bank:

"The receiver of the Fidelity National Bank hereby rejects the accompanying claim for the amount stated, he claiming that all sums realized or which should have been realized on the collaterals left with the Chemical

National Bank as security for this loan should be credited on the same, and said claim reduced in that amount; and that all sums that may hereafter be realized on said collateral should be used to reduce the amount of this claim. He is willing, and now offers, to accept a proof of claim from the Chemical National Bank for the sum of two hundred thousand dollars, and to pay to it the dividends heretofore paid and to be hereafter paid to other creditors thereon, without prejudice to its rights to sue upon the balance of said account not so allowed; with this stipulation, however: that should the court hold in any action that the receiver is right in his said claim, and is entitled to have all sums realized or which should have been realized on said collaterals credited on said claim, and a dividend paid only on the balance of the same, then, and in that case, all sums hereafter realized from said collaterals shall be applied to reduce the amount of said claim herein offered to be allowed, and the same percentage on such collections accounted for, by the Chemical National Bank, to the receiver, as have been paid to it by them.

David Armstrong,

"Receiver Fidelity National Bank."

The offer thus made was not accepted.

We are of the opinion that no interest can be allowed on any dividends due the Chemical Bank for the period intervening between the time when such dividends were declared payable and the presentation of the claim of the bank. The damage to the Chemical Bank from this delay was self-imposed. The money applicable to such dividends lay during this period of two years and six months in the treasury of the United States drawing no interest. It would be manifestly unjust to the other creditors to reduce their share in the assets of the defunct bank to compensate the Chemical Bank for a loss of its own making. However bona fide its belief may have been in its power to pay its debt in another way, we do not see why the other creditors should be made to suffer for its mistake.

The question whether the Chemical Bank should receive interest on the dividends to be paid on the \$200,000 which the receiver offered to allow, turns on the further question whether he affixed to his offer to pay these dividends a condition which would prejudice in any way the rights of the Chemical Bank. The counsel for the bank contends that the receiver's offer, properly construed, required the bank to agree that if the court should decide that the claim must be reduced by all sums which had been or should have been realized before the presenting of the claim, then the bank would reduce its claim not only by so much thus adjudicated to be a proper reduction, but also by any sums realized after presentation, though not adjudicated to be proper reductions. The language of the receiver in his offer is not as fortunate as it might be, but we do not think it can bear the construction contended for.

When the offer was made, the Chemical Bank had collected \$75,000, and had negligently failed to collect \$25,000. This, according to the receiver's contention, reduced the claim of the bank to \$200,000. The Chemical Bank had other collateral applicable to the debt, but this had not then been collected. According to the receiver's contention, collections on this latter collateral should also reduce the claim.

The obscurity in the receiver's language arises from the clause in the second paragraph which follows the clause "that the receiver is right in his said claim." The following clause reads thus:

"And is entitled to have all sums realized or which should have been realized on said collaterals credited on said claim, and a dividend paid only on the balance of the same." It is manifest that "his said claim" refers to the receiver's statement of his rights in the first paragraph, in which he maintained that the Chemical Bank must reduce its claim by all sums then or thereafter realized from collateral, or which should have been realized therefrom. The clause following the words "his said claim" was evidently intended to be a mere repetition of that statement. If the statement and its repetition are capable of having the same meaning, they should be given it. "All sums realized" may mean "all sums now realized," or it may mean "all sums now or hereafter realized." To have the same meaning as the claim of the receiver already stated in the first paragraph, and specifically referred to, the words must be given the latter meaning. The receiver's proposition was, therefore, to allow and pay dividends upon \$200,000 of the claim without prejudice, on the one hand, to the right of the Chemical Bank to sue for the allowance of the remaining \$100,000, and without prejudice, on the other hand, to the right of the receiver to reduce the claim below \$200,000 in case the court should hold such reduction proper. Thus construed, the offer was an equitable one, and the refusal of the Chemical Bank to accept dividends under conditions which did not prejudice its right in any way must prevent the payment of interest to it on dividends due the \$200,000 part of its claim. The money which it could have drawn on this part of the claim remained in the United States treasury, earning no interest. The Chemical Bank cannot charge the other creditors with interest for its own delay.

It remains only to consider the interest on the dividends to be paid on the \$100,000 which should have been allowed by the receiver in accordance with the opinion of this court at the time that he rejected the claim. The question at issue between the receiver and the Chemical Bank was one of such doubt that it would have been quite improper for him not to try it in court. The chance of his sustaining his view was sufficiently great to make any reasonable expense, in seeking to maintain it in court, a fair charge against the other creditors because of the possible benefit they might derive by a successful issue of the litigation. Now, a part of the reasonable expense of refusing to pay what is believed to be an unjust claim, but which is held thereafter to be a just one, is the damage from the delay to the person to whom the payment should have been made, —a damage which is measured by interest on the amount due and unpaid during such delay. It is equitable and just, therefore, that the share of the other creditors in the assets of the bank should be reduced by enough to pay the interest on the delayed dividends on the \$100,000 from the date of the rejection of the claim until such dividends are paid. This conclusion is fully sustained by the decision of the supreme court in the case of *Armstrong v. Bank*, 133 U. S. 433, 10 Sup. Ct. 450. In that case—which also grew out of the failure of the Fidelity Bank—the creditor bank had presented its claim to the receiver, in September, 1887, and it was rejected. The

circuit court held that the claim should have been allowed, and adjudged that interest must also be allowed on the dividend declared October 31, 1887, until the dividend should be paid. The supreme court affirmed the circuit court both in regard to the validity of the claim and also as to the interest, saying, upon page 470, 133 U. S., and page 450, 10 Sup. Ct.: "The allowance of that interest is necessary to put the plaintiff on an equality with other creditors."

We think that the receiver was entitled to take a reasonable time in which to consider and reject or accept the claim of the Chemical National Bank after its presentation; that 20 days was not unreasonable; and, therefore, that no interest should be allowed on any dividend until after April 25, 1890.

Interest will be allowed on the first two dividends, on one-third of the claim as allowed, from April 25, 1890, until the dividends shall be paid. Interest will also be allowed on the dividend declared June 30, 1890, on one-third of the claim, as allowed, from the date the dividend was declared payable until it shall be paid. Interest will also be allowed on the dividend declared August 5, 1891, on one-third of the claim, until the dividend shall be paid. It is admitted that upon July 25, 1892, the receiver paid to the Chemical National Bank \$100,000. We think it just that this \$100,000 should be applied as a credit upon the dividends on the two-thirds of the claim, as allowed, which do not bear interest.

The judgment of this court, therefore, will be that the decree of the court below is reversed, and that the cause be remanded, with instructions to enter a decree in accordance with this opinion.

CENTRAL TRUST CO. OF NEW YORK v. ST. LOUIS, A. & T. RY. CO. IN
TEXAS, (ST. LOUIS SOUTHWESTERN RY. CO. IN
TEXAS, Intervener.)

(Circuit Court, E. D. Texas. February 24, 1893.)

Nos. 132 and 133.

FEDERAL COURTS — RECEIVERSHIPS — FORECLOSURE SALE — ENJOINING STATE
COURTS.

A federal court which decrees that railroad property shall be sold on foreclosure, subject only to such claims against the receiver as shall be held valid by that court on interventions to be filed before a given date, has authority, on a subsequent intervention of the purchaser, to enforce these terms by enjoining the prosecution against him in the state courts of damage claims arising during the receivership; and it will exercise this power when it appears that the purchaser will be subjected to a multiplicity of suits, subject to the same defenses.

In Equity. Petition of intervention by the St. Louis Southwestern Railway Company in Texas in the consolidated foreclosure suits brought by the Central Trust Company of New York against the St. Louis, Arkansas & Texas Railway Company in Texas. Decree for injunction.

Finley, Marsh & Butler, F. C. Dillard, and Sam. H. West, for interveners.

McCORMICK, Circuit Judge. The intervener holds, as purchaser at a foreclosure sale made under a decree of the United States circuit court in these consolidated cases, certain railroad property, which, pending the foreclosure proceedings, was in the custody and under the management of said court, through its receivers, duly appointed, qualified, and acting. On May 11, 1891, the property was ordered by said court to be surrendered to said purchaser, or to the purchasing trustee, subject to undisputed claims against the receivers, and to such disputed claims as had been or should be adjudged valid by said court, on interventions pending, or to be filed, prior to the 1st day of December, 1891, in the United States circuit court for the northern district of Texas, at Waco, or in the United States circuit court for the eastern district of Texas, at Tyler, in both of which courts the foreclosure proceedings were pending. This intervention shows that the defendant in said intervention, William Kitchens, has sued the intervener in another court (a state court) for damages claimed to have been done his property by the operation of the railroad property while it was under the management of said receivers; that there are very many similar claims set up and held by divers persons in the state of Texas, through which its line of railway is constructed, and intervener fears it will be subjected to innumerable suits, similar to that of the said defendant, William Kitchens, and to incalculable litigation and expense, unless it can be protected by process of injunction from the court in which said foreclosure proceedings were had. At Dallas, Tex., on November 16, 1892, I granted a restraining order, and an order requiring the defendant, after notice, to show cause at New Orleans, on December 15, 1892, before one of the circuit judges of this circuit, why he should not be enjoined and restrained from prosecuting against the intervener any proceedings to enforce against it any claim arising against said receivers, except by application to the court in this suit. After due notice to the defendant, the motion for injunction came on for hearing before me at New Orleans on December 15, 1892, and was argued by counsel for the intervener, no one appearing for the defendant. The matter has been held under advisement until now, partly because somewhat kindred questions were involved in an appeal pending before the circuit court of appeals for this circuit, and partly because there are other questions involved in this intervention of recognized difficulty, on which we have not been furnished or been able to find satisfactory authority. The authorities are satisfactory to the effect that the purchaser of such property at a foreclosure sale becomes a party to the foreclosure suit, without regard to his citizenship, so far as it is necessary to enforce against him liabilities growing out of his purchase, and to secure to him the property purchased on the terms of the sale; and the United States courts, having jurisdiction of the matter, can enforce its jurisdiction by injunction, when necessary, and section 720 of the United States Revised Statutes does not apply. *Railway Co. v. Kuteman*, 54 Fed. 547,¹

¹ 4 C. C. A. 503.

(just decided by the circuit court of appeals for the fifth circuit,) and cases therein cited. I am of opinion that, in ordering the sale to be made subject to certain charges, the court did not exceed its jurisdiction in limiting the charges to such as were undisputed, or had been or should be adjudged valid by the said United States circuit courts at Waco and Tyler, in which, as before said, the foreclosure proceedings had been conducted, and were and are still pending; and I do not doubt the intervenor's right to hold the property so purchased by it free from any claims arising against the receivers, and not embraced in the terms of the reservation made in the decree ordering the delivery of the property to the purchaser.

However clear all of the foregoing may be, whether in such a case the court can and should apply the extraordinary remedy of injunction, as here asked by the purchaser, presents a question on which I have been able to obtain little aid from precedents, and on which cogent reasons both for and against may be given. It seems to me, however, that a fair preponderance of reason is in favor of granting the relief here sought. The very bulk of such property, and its peculiar character, the chief element of value in it being the vital breath of economic and skillful operation, calling for such various skill in mechanics and in finance, and the constant outlay of such amounts of capital, as few command, render it difficult to realize adequately on a judicial sale of such property under the most favorable conditions. Pending the necessary proceedings preparatory to such a sale, it has generally, if not uniformly, been found necessary, in order to preserve such property and meet its obligations to the public, that it should be operated by, or under direction of, the court, through receivers. From the very nature of the case, the accounts of the receivers and the claims against them, as such, cannot be all settled until after the surrender of the property and of its operation to the purchaser. It is therefore judicious, if not necessary, that some reservation should be made in the sale of liability for such unsettled claims as could not be accurately stated in amount, or so safely approximated as to require or justify exacting a cash deposit to cover them. Before the sale, certainly, claims arising out of the receiver's management could not be enforced against the property, except through the court, under whose orders he was holding and operating it. Why, then, may not, and why should not, the court have the same continuing and exclusive control of the settlement of all such claims as well after as before the sale? And if it is necessary or judicious to make the reservation of liability in the sale, as above mentioned, is it not incumbent, just, and necessary, that correct procedure may be observed, the dignity of the court respected, and its contract with the purchaser fulfilled, to exert so much of the power of the court as may be required to maintain the limits of that reservation as fixed by the court in its decrees affecting the sale? The fact that, pending the operation of the property by receivers, parties setting up claims against the receivers may sue without leave of the court, does not affect the question; for the judgment in such cases, if against the receivers, could not be executed on the property, except through the court that

commissioned and controlled the receiver. In this connection, it is to be observed that the defendant, William Kitchens, has not been restrained, and is not to be enjoined, from prosecuting his suit against the receivers. If it appeared that the defendant in this intervention was the only claimant who had joined, or who was likely to join, the intervener in such a suit against the receivers, or if it was not made affirmatively to appear that he was only one of many who would thus assail it, this court might, without injustice and with propriety, withhold its grace, and leave the intervener to its defenses, which must appear good to receive such grace, and, if good, could be as well maintained in the suit sought to be enjoined as in this court.

Leaving out of view any question of the propriety of regular and correct proceeding, respect for the court's dignity, and the obligation of its contract with the purchaser, the fact that the intervener has a good defense, and can avail of it in the court where the suit is brought against him, or in the courts of last resort, which he may reach by appeal or writ of error, will not deprive this court of the power or relieve it from the duty of protecting the intervener from the oppression of a multiplicity of suits, subject to the same defenses.

For the reasons barely indicated by the foregoing brief suggestions, I feel constrained to order the injunction restraining said William Kitchens from prosecuting his said suit against the intervener.

GROSS v. GEORGE W. SCOTT MANUF'G CO. et al.

(Circuit Court, N. D. Georgia. January 3, 1894.)

EQUITY—RESCISSION OF SALE OF LANDS—DOUBLE AGENCY.

The mere fact of a double agency in the sale of land gives the vendor no right of rescission, when he had full knowledge that the agent was acting for the purchaser, and of all other facts, including the nature and value of the land, which were known either to the agent or the purchaser, and were necessary to intelligent action, especially when the price was the full market price of like lands at the time.

In Equity. Suit by Charles H. Gross against the George W. Scott Manufacturing Company and the De Soto Land & Phosphate Company to rescind a sale of lands. A demurrer to the bill was heretofore overruled. 48 Fed. 35. The cause is now heard on the pleadings and evidence. Bill dismissed.

Bisbee & Rinehart, for complainant.

Candler & Thompson, for defendants.

NEWMAN, District Judge. In this case, which is on the equity side of the court, there was a demurrer to the bill, and an opinion of the court overruling the demurrer. Gross v. Manufacturing Co., 48 Fed. 35. There has now been a final hearing in the case on the bill, answer, and evidence. The complainant in this suit seeks to rescind a contract of sale of certain lands in Florida, made in the year 1889. The right of complainant to have a rescission of this

sale is based by counsel for complainant on two grounds: First, that there was a double agency on the part of John Cross, through whom the transaction was made; and, secondly, that even if this double agency did not exist, or is ineffectual for the purpose stated, there were misrepresentations on the part of Cross, acting as agent of defendants, which were made to complainant, as to the nonexistence of phosphate in or on the land, by reason of which complainant was induced to part with the land for much less than its real value. John Cross was a real-estate agent in the state of Florida, and doing an extensive business. He represented a large number of nonresidents who owned land in that state. He was the agent for complainant, Charles H. Gross. As to some of the lands of complainant, not embracing those involved in this suit, Cross was authorized to sell at a price agreed upon between himself and his principal without consultation with his principal. As to the land now in controversy, Cross was the agent of Gross to look after it, pay the taxes, keep off trespassers, etc., but had no authority to sell without first submitting the offer to Gross.

George W. Scott was the president of the George W. Scott Manufacturing Company, and of the De Soto Land & Phosphate Company. The same individuals, substantially, were the officers and members of both companies. In August, 1889, when negotiations for the purchase of this land by Scott were commenced, Scott had already purchased a considerable amount of lands on Peace river, in Florida, near where the land afterwards purchased from Gross was located. On the 7th of August, 1889, George W. Scott, in writing, requested John Cross to purchase for him several different tracts of land in this locality, to wit, a portion of section 30, township 35 S., of range 25 E., and section 10, township 33 S., of range 25 E. Gross refused to sell a portion of the tracts mentioned unless he could sell all, and finally, upon telegraphic authority from Scott, Cross purchased from Gross all of the two sections mentioned except the S. $\frac{1}{2}$ of S. E. $\frac{1}{4}$, and N. W. $\frac{1}{4}$ of N. W. $\frac{1}{4}$, which was not owned by Gross. It seems that, at the time Scott requested Cross to buy, neither Scott nor Cross knew that Gross owned the land in question, and that a few days afterwards, by investigation of records, Cross ascertained that the sections which Scott desired were owned by Gross, and that he thereupon communicated that fact to Scott. This fact of Cross' ignorance of Gross' ownership of this particular land at the time of Scott's instructions to him, which must be taken as clearly established by the evidence, seems, at first glance, inconsistent with the fact of his agency for Gross in reference to his lands; but this is easily explained, for the reason that Cross seems to have been largely engaged in this business of acting as agent for nonresidents, and the land was simply given to him by the section and township numbers, by which he would not recognize them as Gross' land until the records called this fact to his attention.

Other parties in Boston, Mass., and Philadelphia, Pa., owned lands which were embraced in the list which Scott had requested Cross to purchase. Gross himself was a resident of Philadelphia. After Cross ascertained the ownership of the various tracts of land which

Scott desired to purchase, he informed Scott that he thought it would be better if he (Cross) could go north, and see the parties who owned the lands, in reference to their sale. This was acquiesced in by Scott, who, at Cross' request, advanced some money to pay the expenses of the trip. Cross then went to Philadelphia, and saw Gross about the sale of the land. Cross had been instructed by Scott not to pay more than \$2.50 per acre, and Gross refused to sell unless he could sell the entire sections, of which Scott only desired to purchase a part. Cross telegraphed Scott to this effect, and received, in reply, authority from Scott to purchase the entire sections. Gross then agreed to sell, and two days later deeds to the land were executed and delivered by Gross to John Cross; Scott having deposited the money to make the payment for the purchase to Cross' credit, with which money the purchase money was paid. During the conversation between Gross and Cross in reference to the sale of the land, Gross testifies that he asked Cross "if there was phosphate on the land." To this inquiry Cross replied, "No." The other witnesses to the transaction, including Cross, testify that, in reply to the question named, Cross replied "that the land was not being purchased for that purpose, but for the purpose of controlling the river front."

The bill alleges that Cross stated to Gross that the George W. Scott Manufacturing Company desired to buy the land in question. While there is some difference in the evidence about this, it is conceded by counsel for complainant that this must be taken as established, namely, that Gross knew that Cross was buying the land for the Scott Manufacturing Company. The De Soto Land & Phosphate Company, of which George W. Scott was the president, was engaged in mining phosphate on Peace river, a few miles from the land sold by Gross, prior to and at the time of this transaction. Scott's company—either the De Soto Company or the Scott Manufacturing Company—owned lands both above and below that sold by Gross, on Peace river, and the acquisition by Scott of the land in question, for one or the other of his companies, seems to have been an entirely natural thing, independently of the question of phosphate on the land.

The evidence further shows that Peace river is winding and full of sharp bends, that along the bed of this river and its banks the deposits of phosphate shift and change with the rise and fall of the river, and that the location of one of these deposits one year is no evidence that it will be found there another or succeeding years. As pertinent at this point, a reference may be made to certain interrogatories propounded by complainant in the bill to defendants, and the answers thereto. Interrogatory 11 is as follows:

"Whether or not, prior to October 7, 1889, the defendants, or either of them, owned in whole or in part, or had contracted to purchase, any lands on Peace river near or in the vicinity of the lands described in the bill of complaint as having been conveyed to John Cross by complainant, and, if so, what quantity of such lands did defendants, or either of them, own or had contracted to purchase prior to said date; and state how near any of said lands were located to the lands conveyed to John Cross by complainant, and whether or not any of such lands which defendants, or either of them,

owned or had contracted to purchase prior to the date aforesaid, to the knowledge of the defendants, or either of them, prior to said date, had on or in them phosphates or phosphates of lime."

The answer of the defendants to the above interrogatory, so far as material here, is as follows:

"They, [defendants,] nor either of them, had any knowledge of what sort of phosphatic material the land contained, but simply had a theory or belief that most of the lands along said river contained phosphatic material or gravel in greater or less quantities, and that the same was being washed out of the land into the bed of said river, where bars and deposits of the gravel were formed in basins at the bends of the river, and which bars and deposits contained all of such material defendants knew or know to exist in or on said lands, in quantities that it would pay to work."

In answering interrogatory 12, which is practically the same as interrogatory 11, defendants repeat the greater part of their answer to interrogatory 11, and state, in addition, that they considered the lands as being valuable to them, outside of the existence of phosphate, for the purpose of controlling the river; that they do not now know what said lands are worth, but considered that, at the time they were purchased, \$2.50 per acre was all they were worth, and would not have paid any more; that, for two years prior to the purchase of the lands by the Scott Manufacturing Company, its president, George W. Scott, had been making examinations of the bed of said river, and had not deemed lands of complainant valuable for phosphatic material, and therefore did not purchase them. Afterwards, when he discovered how deposits were made in the bed of the river, he decided that, whether or not said lands contained phosphate in paying quantities, they would be worth \$2.50 per acre to his companies, to enable them to control the river.

Cross testifies that at the time of the sale by Gross he did not know of any phosphate on the land in question, and that at the same time, he sold land of his own in the same locality at the same price. Cross, some months after the sale, in response to an inquiry from Gross as to why he did not tell him that there was phosphate on the land, replied that he did not know it, and that he sold land of his own at the same price; and this reply of Cross to Gross is urged as an argument that there was phosphate on the land. Now, this question as to whether or not there was phosphate in paying quantities on the land in question is left somewhat in doubt by the evidence. There is one witness who testifies to having made experiments on the land with a view of determining this matter, and he found, according to his evidence, considerable deposits of phosphate. It is quite clearly shown, however, that no phosphate has been taken from any part of this land; and whether there is such an amount of deposit as to make it profitable to work it, is really undetermined.

So that these propositions may be considered as established by the evidence: First, that the defendants did not know, and that Cross did not know, at the time of this transaction, whether there was phosphate on the land or not; second, that Cross made no intentional misrepresentation of the facts, even assuming that he answered Cross categorically, as Cross stated he did, to wit, that there was no phosphate on the land, and assuming that he did not answer,

as the preponderance of the testimony is, that the land was not being purchased for phosphate purposes, but for other purposes; and, third, that Gross knew that the land was being bought for Scott, and that the general purpose for which Scott was engaged in buying lands in Florida was to mine phosphate. It cannot be held, therefore, taking the propositions contended for by the complainant in inverse order, that there were such misrepresentations of facts by Cross to Gross, acted on by Gross, as to justify a court of equity in rescinding the contract of sale for that reason. There is no proof to show that Scott had ever made any special investigation of this particular land, or had any special knowledge concerning it, so far as relates to the existence of phosphate. Gross knew, therefore, just as much as Cross knew, or as Scott knew. He had the whole situation in his mind, and, with all these lights before him, seems to have acted, as he expressed it himself, "because his pocketbook told him to do so."

If the evidence showed, as the bill alleged, that Scott knew of the existence of phosphate on the land, and induced Cross for a consideration, knowing him to be Gross' agent, to falsely represent to Gross that there was no phosphate on the land, a very different case would be presented, and one which, as was held by the court in overruling the demurrer, would justify the interposition of a court of equity. Such, as has been stated, is not the case here, however. Scott did not know, at the time he employed Cross, that he was Gross' agent, and, so far as the evidence shows, subsequently made no effort whatever to influence him to disregard any obligations that he may have been under to Gross; and Cross, so far as the evidence shows, did not knowingly wrong Gross in any way, because it is undisputed that he sold land of his own in the same locality at the same price, and at the same time.

The other proposition which is insisted upon in this case is that the double agency which it is said existed vitiates the contract, and justifies and requires its rescission. The doctrine relied upon is that one being the agent of a person to sell cannot at the same time act as the agent of another person to buy, and that, upon the admission or proof of this inconsistent employment, the court will presume the contract injurious, and consequently fraudulent. Conceding this rule to exist in all the strictness contended for by counsel for complainant, a contrary or reverse proposition must also be conceded, namely, that if the principal, being the seller under such circumstances, has all the knowledge that the agent possesses—has all the facts before him that the agent has—which would lead to intelligent action in the premises, including the fact that the agent was also acting for the purchaser in the transaction, the seller could not afterwards set up the fact of double agency as a ground for voiding the contract. While silence on the part of the agent, and ignorance on his principal's part of the agent's opposing interests in a transaction, would justify the law's interposition, yet a full communication of the facts on the part of the agent, and complete knowledge of the facts on the principal's part, would just as certainly lay no foundation for judicial interference with a transaction to

which it applied. In this case Cross stated to Gross that he wanted to buy the land for Scott; and while the deed was made, in the first instance, to Cross, it is clearly shown to have been with the knowledge of the fact on Gross' part that the conveyance was made thus simply for convenience in the transaction, and that Scott, for himself or one of his companies, was the real purchaser. The matter of the existence or nonexistence of phosphate on the land, and the conversation between Cross and Gross in reference thereto, has already been discussed and disposed of. There is much force in the contention made here that if Cross, prior to the time the sale was consummated, was the agent of Gross in any way connected with the sale of the land, he was his agent to do exactly what he did in this case, namely, to find somebody who wanted to buy, and bring the offer to Gross. The only compensation which it is claimed that Cross received from Scott as to this particular land was the money advanced to pay Cross' expenses on his trip north. This trip was made, it appears, for the purpose of buying various other tracts of land besides those bought from Gross, and it seems that the amount advanced was simply the amount of Cross' expenses on the trip. After the sale was consummated, Gross paid Cross' commission of 10 per cent. on the amount of the purchase money. To this extent Gross certainly recognized Cross' services to him in finding a purchaser for the land, and paid him for it; but the sale, it is entirely clear, he made himself, and on his own judgment. Cross' relation to this transaction as an intermediary in bringing about the sale is clearly shown, but the matter of agency to either of the principals is more obscure when the facts are analyzed.

On the whole, the conclusion must be that no such concealed double agency existed as to justify the rescission of the contract on that ground.

Besides all this, the preponderance of the evidence shows that this land, when sold, brought what was at that time a fair market price. It was several months after the sale before any investigation was made as to the existence of phosphate on this land, and while, as has been stated, it is uncertain under the evidence whether phosphate exists in paying quantities or not, even conceding that such is the case, it was not known to any one at the time of the sale, and large tracts—in fact, vast tracts—of land seem to have been sold about the same time, (a little before and after the time of this transaction,) and for no greater price. Conceding, therefore, what must be admitted from this evidence,—that no one connected with the transaction knew at the time whether this land was particularly valuable or not, and that the purchaser and seller both took their chances on the existence or nonexistence of phosphate thereon,—the price paid was all that the land was fairly worth, according to the evidence, in the market at the time. From this evidence it clearly appears that large portions of the land bought by Scott and his companies were valueless except from the fact that it was connected with other land which was valuable. Phosphate seems to have been found here and there along this river, constantly

changing its location, and a person buying land there without careful investigation, which certainly had not been made in this case before the sale, took the chances on what he purchased, and paid accordingly. The fact that Cross himself, a real-estate dealer, living and doing business in the vicinity, trading largely in these lands, accepted the same price for his own land, (which is not disputed,) ought to be conclusive that it was as much as the land was fairly worth in the market at the time.

For the reasons which have been given, no sufficient ground exists for granting a decree to rescind this contract as prayed for, and there must be a decree dismissing the bill, with costs.

CLYDE et al. v. RICHMOND & D. R. CO., (GARST, Intervener.)

(Circuit Court, N. D. Georgia. January 18, 1894.)

1. INJURY TO SERVANT — CONCURRENT NEGLIGENCE OF MASTER AND FELLOW SERVANT.

Receivers operating a railroad are liable for injuries to a fireman from derailment of a train, caused by the worn condition of a rail over which the train was run by the engineer at a speed greater than that authorized by the schedule, though but for such improper speed the derailment would not have happened.

2. SAME—PROXIMATE CAUSE.

In such a case the condition of the rail is as much a present and effective cause of the derailment as the rate of speed.

3. APPEAL—WEIGHT OF EVIDENCE—FINDINGS OF MASTER.

The finding of a master that a rail of a railway track was so worn as to render its use negligence, made on conflicting testimony, and an examination of the rail by him in person with counsel, will not be reviewed.

4. PLEADING—AMENDMENT.

When a master has finished the hearing on an intervener's claim for personal injuries, and is considering the case and preparing his report, an amendment setting up a distinct ground of negligence as a basis of recovery is too late.

In Equity. Petition by James E. Garst, intervening in a suit by William P. Clyde and others against the Richmond & Danville Railroad Company, and claiming damages for personal injuries against the receivers of said railroad appointed in said suit. Heard on exceptions to master's report. Judgment for intervener.

Arnold & Arnold, for intervener.

Jackson & Leftwich, for defendants.

NEWMAN, District Judge. This was an action to recover damages for personal injuries received by the intervener in an accident to, and derailment of, a train on the Richmond & Danville Railroad, operated by Huidekoper and Foster, receivers of this court. The intervener was a fireman on the wrecked train, was in the discharge of his duties on the engine, and conceded to be entirely free from fault himself in the matters which caused the injuries. The wheels of the tender first left the track, some cars were drawn from the rails, and the tender was turned over. The plaintiff, Garst, when in the act of jumping, was thrown about 30 or 35 feet, according to

his testimony, and was badly hurt. No question is made in the case as to the fact of the injury, and as to the amount of the special master's finding in his favor,—\$2,500.

The case comes before the court now upon exceptions to the special master's report, and, while there are a number of exceptions, the real issue and the controlling one in this case is as to whether or not there was any negligence on the part of the receivers for which they were responsible. The special master found that the cause of the accident was the worn condition of the outer or bearing rail (the accident happening on a curve) at the point where the derailment occurred, combined with the speed of the train, which he finds to have been considerably greater than that which the schedule authorized at the time of the accident.

The statute of this state (Code, § 3036) which provides that a railroad company shall be liable to an employe for damages for injuries sustained by reason of the negligence of a co-employe, when the employe injured is free from fault, has been held by the supreme court of this state to be inapplicable in a case against a receiver who is engaged in operating a railroad under appointment of court. *Henderson v. Walker*, 55 Ga. 481. The speed of the train is not set up in the declaration as a substantial ground of negligence. The negligence relied upon is the worn condition of the rail, which it is said was such as to make the defendant receivers guilty of negligence; and that, the evidence showing that this negligence, and the negligence of the engineer in running the train at the improper rate of speed, each contributing to cause the injury, the case is one which authorizes and justifies recovery.

From what is distinctly and expressly found by the master in his report, and from what must be necessarily inferred from his finding, it seems that the speed of the train would not have resulted in an accident had there been a proper and suitable rail at the point where the accident occurred, and that the worn condition of the rail would not have caused the derailment had the train not been running at an improper rate of speed. So that it is contended for the receivers that, they having furnished a rail sufficient to carry the train at the rate of speed they expected and authorized it to run, there can be no recovery against them. It is on this contention of defendants that their case must rest as to the question referred to, and upon which the case seems to turn. Now, is this argument sound, namely, that where the employer furnishes to the employe material and appliances which are defective and unsafe, but which, if used by the employe in the manner directed by the employer, would not result in injury to any one, and the employe fails to obey instructions, and to use the defective machinery or appliances in the manner directed, and injury results to a coemploye from this defective and unsafe condition, combined with the failure of the employe to properly use them, the employer is relieved from liability from damages to such coemploye?

The rule clearly established at common law is that where an employe is injured by the negligence of the master in furnishing defective machinery and appliances, combined with the negligence of

a fellow servant, both contributing thereto, the master is liable. The case of *McMahon v. Henning*, 3 Fed. 353, was a suit by an employe against a receiver for damages for injuries sustained in the service of the receiver. Plaintiff sought to recover upon two grounds: First, that his coemploye was guilty of negligence in running the cars which were to be coupled at a dangerous rate of speed; second, that the defendant receiver furnished cars dangerous and defective in their construction. The case was heard in the United States circuit court for Kansas, and in that state there was a statute similar to the statute in Georgia, and the construction given the statute in Georgia, which has been referred to, was contended for there. The court, in the opinion delivered by McCrary, circuit judge, and concurred in by Foster, district judge, left this question undecided; saying that its decision was unnecessary, in the view taken by the court of the case, which was that the receivers were liable to the plaintiff, independently of this question. The court (on page 355) uses this language:

"This presents the question whether, upon the facts found by the jury, the defendant is liable, independently of the statute, and upon the principles of the common law. The rule of the common law is that a master is not liable to his servant for the negligence of a fellow servant, and it was to abrogate this rule in the state of Kansas that the statute was enacted. But the common-law rule has never, to my knowledge, been carried so far as to permit the master to exempt himself from the consequences of his own personal negligence by showing that one of his servants (not the party injured) has been likewise negligent. In the present case the master was negligent, while the plaintiff—the injured party—was not negligent. This makes out a case at common law, notwithstanding the negligence of Bowles, the fellow servant. The plaintiff recovers upon the ground of the negligence of the defendant, which is, of itself, a good and sufficient ground. The doctrine of contributory negligence has no application to such a case. That doctrine applies only to cases of negligence on the part of the person injured. The true doctrine of the common law is that the master is liable to his servants, as much as to any one else, for the consequence of his own negligence; and it is no defense for him to show that the negligence of a fellow servant (for which he was not responsible) also contributed to bringing about the injury. *Shear. & R. Neg.* § 89; *Fifield v. Railroad*, 42 N. H. 225; *Hough v. Railway Co.*, 100 U. S. 213; *Cayzer v. Taylor*, 10 Gray, 274; *Paulmier v. Railroad Co.*, 34 N. J. Law, 151, 157."

In *Booth v. Railroad Co.*, 73 N. Y. 38, this is held, (quoting second headnote:)

"If an injury is caused to an employe of a railroad corporation by the neglect of the corporation to send out a sufficient number of brakemen on a train, and the negligence of the engineer in running the train, the corporation is liable therefor."

In this last case the duty of the master, it was held, was to furnish a proper number of employes to do the work assigned them, which is similar, of course, to the duty to furnish suitable machinery and appliances.

In the case of *Cone v. Railroad Co.*, 81 N. Y. 206, the rule is stated in this way:

"A master who negligently employs unsafe and defective machinery is liable to his servant injured in the use of it by means of its defective condition, although the negligence of a coservant contributed to the injury."

This question has been before the supreme court of the United States in *Railway Co. v. Cummings*, 106 U. S. 700, 1 Sup. Ct. 493, and the rule announced in the decisions just cited is clearly sustained. The opinion of the court shows that the plaintiff claimed that the collision which resulted in his injury, he being a servant of the company, was caused by the fault and neglect of the company, and that the company claimed that it was caused by the negligence and disobedience of a fellow servant, and that this was the issue at the trial. The court below, on the trial of the case, gave the jury this instruction:

"That if Noyes [the person claimed to be a coservant] was negligent, and if the company was also wanting in ordinary care and prudence in discharging their duties, and such want of ordinary care contributed to produce the injury, and the plaintiff did not know of such want of ordinary care and prudence, the defendant would be liable; that, if two of those causes contributed, the company would be liable; that the mere negligence of Noyes, of itself, does not exonerate them, if one of their own faults contributes."

There was a verdict for the plaintiff, and exception to the instruction just quoted. The supreme court say:

"In the instruction which was given we find no error. It was, in effect, that, if the negligence of the company contributed to—that is to say, had a share in producing—the injury, the company was liable, even though the negligence of a fellow servant of Cummings was contributory also. If the negligence of the company contributed to, it must necessarily have been an immediate cause of, the accident, and it is no defense that another was likewise guilty of wrong."

The case of *Cayzer v. Taylor*, 10 Gray, 274, was also an action for an injury received by a servant in the master's employment. One of the exceptions made by the defendant in that case involved the same question as that made by the defendant in this case. The exception was to the refusal of the presiding judge to instruct the jury that, if the accident would not have happened without negligence on the part of the engineer, the defendant would not be liable. The court say:

"We think such instruction could not have been given. The default of the defendant might have been not only in having a boiler imperfectly constructed and guarded, but an incompetent and habitually careless and negligent engineer. It is now well-settled law that one entering into the service of another takes upon himself the ordinary risks of the employment in which he engages, including the negligent acts of his fellow workmen in the course of the employment. *Farwell v. Railroad Co.*, 4 Metc. (Mass.) 49; *King v. Railroad Co.*, 9 Cush. 112; *Gillshannon v. Railroad Corp.*, 10 Cush. 228. It has not been settled that the master is not liable for an injury which results from the employment of an incompetent servant, or use of a defective instrument. If the defendant employed a competent engineer, and used a boiler properly constructed and guarded, he would not be liable for injuries resulting from an act of carelessness or negligence of such engineer. But we are not prepared to say that, if one uses a dangerous instrumentality without the safeguards which science and experience suggest or the positive rules of law require, he is not to be responsible for an injury resulting from such use because the negligence of one of his servants may have contributed to the result, or because a possible vigilance of the servant might have prevented the injury. The very object and purpose of a safeguard like the fusible plug are protection against the occasional carelessness and negligence of the engineer. It is intended to be, in some

degree, a substitute for his vigilance,—to keep watch if he nods. To say that the master should not be responsible for an injury which would not have happened had a safeguard required by law been used, because the engineer was negligent, would be to say, in substance and effect, that he should not be liable at all for an injury resulting from the failure to use it."

In all of these cases, as well as the last case, it might have been contended that the injury would not have resulted but for the negligence of the fellow servant. The rule established by the foregoing decisions is clearly correct, and the master cannot escape liability for the consequence of his own negligence because a fellow servant was also guilty of negligence contributing to the injury.

It is urged with great earnestness that the rail complained of, where the tender left the track, was not worn to such an extent as to make an actionable defect; that it was not worn to an extent to render it unsafe for ordinary and general use in running railroad trains over it. The evidence is conflicting as to the extent of the wear of the rail, running from one-twelfth of an inch to as much as a half an inch. The special master not only heard considerable evidence upon this question, but examined the rail in person, with counsel in the case, and he finds against the defendant on this question. He finds that the rail was sufficiently worn to constitute negligence. The court is not prepared to say that the master's finding was erroneous on this subject. It is a question of fact for him to pass upon; he saw the witnesses, saw the manner of their testimony, and examined the rail in person.

It is contended that, even if the defendants were guilty of negligence, their negligence was not the proximate cause of the accident. If the worn condition of the rail was instrumental at all in causing the derailment, it was just as much a present and effective cause of the accident as was the improper rate of speed. It was not in any sense a remote cause, for, whatever it contributed, it contributed at the time and place. Both the improper speed of the train and the worn condition of the rail (assuming the report of the master to be correct) were the proximate causes.

The conductor of this train was on the engine with the engineer at the time the accident occurred, and on the authority of *Railroad Co. v. Ross*, 112 U. S. 377, 5 Sup. Ct. 184, it is claimed that his presence there, and his necessary acquiescence in the improper rate of speed, makes the receivers responsible for his act, under the rule in the case named. But, there being no averment in the intervention placing the right to recover on this ground, the intervener cannot rely upon it as a substantive ground of negligence justifying a recovery. The only ground of negligence set out in the intervention, and which is supported by the evidence, is that of the worn condition of the rail. An amendment alleging a high rate of speed as a ground of negligence was presented to the court by the intervener, with the request for an order allowing it, after the evidence in this case had all been heard by the special master, after the argument of counsel had been concluded, and after the master had taken the case up for consideration, and was said to be engaged in the preparation of his report. The court refused to allow the amend-

ment at that stage of the proceedings, on the ground that it came too late. Even conceding the right of an intervener to amend by leave of the court, in a case referred to a special master, during the whole time the master is engaged in consideration of the case, it is certainly too late after the master has entirely finished the hearing, and is engaged in considering the case and in preparing his report, to amend the pleadings. The intervener has certainly had time enough, and abundant opportunity, during the taking of the evidence and during the argument before the special master, to discover any oversight in the pleadings, or any lack of conformity of the pleadings to the proof; and it seems entirely too late, after the case is thus closed, to come in with a distinct and separate ground of negligence, and have it allowed as a basis of recovery. So that the improper speed of the train is not a ground for recovery in this case, and is only considered, as has been hereinbefore expressed, in connection with the worn condition of the rail, for the purpose of determining whether such wear of the rail was negligence which caused or contributed in such way to the disaster as to render the receiver liable.

It is further claimed by counsel for the receivers that the derailment which resulted in the injury to the intervener was an unavoidable accident,—one of those accidents which occur without any apparent cause; at least without fault attributable to any one. Tracks are constructed, and rails are laid, for engines and cars to pass over in safety, and engines and cars are constructed for the purpose of passing regularly and safely over the tracks. When a train, or any part of it, leaves the track, something is wrong, and any tribunal investigating the matter will naturally look for a cause. No other reasons for the derailment appear in this case except those which have been referred to. Nothing whatever was found to be wrong with the engine or tender; there was no trouble or defect with the machinery of any kind, so far as could be ascertained; nothing was placed upon the track; and the only two things which the master could find to which to attribute the accident were the worn condition of the rail and the improper rate of speed. Therefore, he naturally and properly found in accordance with this conclusion.

Conflicting questions of fact were for the determination of the special master in this case. The presumption is that the decision of the special master and his findings on these conflicting questions were correct. The rule universally recognized is that they will not be lightly set aside, but that it must clearly appear that he has made an error or mistake. The case here is not one which, under this rule, justifies an interference with the conclusions of the master, and, the amount found for the intervener being satisfactory, the report must stand, and judgment be rendered in favor of the intervener in accordance therewith. *Medsker v. Bonebrake*, 108 U. S. 66, 2 Sup. Ct. 351; *Tilghman v. Proctor*, 125 U. S. 136, 8 Sup. Ct. 894, *Callaghan v. Myers*, 128 U. S. 617, 666, 9 Sup. Ct. 177; *Kimberly v. Arms*, 129 U. S. 512, 524, 9 Sup. Ct. 355.

LITTLE ROCK & M. R. CO. v. ST. LOUIS, I. M. & S. RY. CO., (two cases.)
SAME v. ST. LOUIS S. W. RY. CO., (two cases.) SAME v. LITTLE
ROCK & FT. S. RY. CO., (two cases.)

(Circuit Court, E. D. Arkansas. January 5, 1894.)

1. CARRIERS—INTERSTATE COMMERCE ACT — CONNECTING LINES — DISCRIMINATION.

A railroad company is not required by the interstate commerce act, § 3, cl. 2, to furnish to competing connecting carriers equal facilities for the interchange of traffic, when this involves the use of its tracks by such carriers, and it may still permit such use by one carrier to the entire exclusion of the others.

2. SAME—THROUGH BILLING AND ROUTING.

Nor is a connecting road which permits through billing and routing with one forwarding road obliged to do likewise with another forwarding road, although the latter possesses all the necessary tracks and terminal facilities; and it may still insist on carrying all freight offered by such road in its own cars, and to that end require reloading and rebilling at local rates.

3. SAME—PREPAYMENT OF CHARGES.

Nor does the fact that a connecting road carries freight offered by some forwarding roads without prepayment of its charges oblige it to do likewise with freight offered by other forwarding roads.

These are six suits, of which two are brought against each of the three defendants; one being at law, and the other in equity. Heard on demurrers to the bills and complaints. Demurrers sustained.

Rose, Hemingway & Rose, for plaintiff.

J. M. & J. G. Taylor and Sam. H. West, for defendant St. Louis S. W. Ry. Co.

Dodge & Johnson, for other defendants.

WILLIAMS, District Judge. The Little Rock & Memphis Railroad Company filed separate bills in equity against the St. Louis, Iron Mountain & Southern Railway Company and the Little Rock & Ft. Smith Railway Company. The bills are substantially alike as to allegations of fact, as well as the prayers for relief. At the same time the plaintiff company filed complaints at law against the same companies. The complaints at law are couched in substantially the same words as are used in the bills in equity.

It is stated in the bills that the plaintiff and defendants are corporations owning and operating railroads under the laws of the state of Arkansas; that all of the railroads mentioned are engaged in interstate commerce; and the termini of the respective roads are stated. The wrong complained of is—

"That the defendant refuses to receive any freight from your orator, except upon the prepayment of all charges thereon, at the same time that it receives freight from all other persons and corporations without demanding the payment of freight charges, but collecting such charges upon the delivery of the goods, as is customary in the railroad business."

In the other case the language is somewhat different, and is as follows:

"The defendant company, for the purpose of injuring and oppressing your orator, refuses to accept interstate freight at Little Rock upon through billing from the line of your orator, in conjunction with the defendant's line, at the same time that it accepts freight upon through billing from all other lines of railroad terminating at the city of Little Rock, and it refuses to accept freight from your orator except upon a prepayment of all freight charges, at the same time that it accepts freight from all other individuals and corporations without the prepayment of freight charges, collecting its freight charges, as is customary with railroad companies, upon the delivery of the freight at its destination; that the St. Louis, Iron Mountain & Southern Railway Company, a corporation organized under the laws of the state of Arkansas, and likewise engaged in the business of interstate commerce, has a line from Memphis to Little Rock, and parallel to that of your orator, and for the like purpose of oppressing and injuring your orator the defendant accepts from said company passengers on through tickets at greatly reduced rates, and with through checking of baggage, at the same time that it refuses to accept passengers over your orator's lines at through rates, but charges to such passengers local rates, and requires them to recheck their baggage at Little Rock."

To these bills, demurrers have been interposed, upon the ground that no cause of action is stated therein, and because there is no equity in the bills. The defendants urge that the questions presented by the bills have all been settled adversely to the plaintiff by this and other courts. The plaintiff insists that the law, as applicable to the facts now presented, has not been settled by any court, and undertakes to distinguish the cases at bar from the cases cited by defendants. To the end that the contention of the plaintiff may be stated fairly, I will state its exact position, as found in the brief of counsel, which is:

"Both cases are brought under the act to regulate commerce, approved February 4, 1887, as amended by the act of March 2, 1889. The second clause of the third section bears directly upon the question; and to it, as construed in the light of other provisions, we must look for a solution of the questions presented in these cases. It reads as follows:

"Every common carrier, subject to the provisions of this act, shall, according to their respective powers, afford all reasonable, proper and equal facilities for the interchange of traffic between their respective lines, and for the receiving, forwarding and delivering of passengers and property to and from their several lines and those connecting therewith, and shall not discriminate in their rates and charges between such connecting lines, but this shall not be construed as requiring any such common carrier to give the use of its tracks, or terminal facilities, to another carrier engaged in a like business."

"The requirements of the clause are four; three mandatory, and one prohibitory. Of the mandatory provisions, two relate to all connecting carriers, without reference to the existence or nonexistence of competing lines. The others apply only to the duty of the carrier in its relation to competing carriers. In the first place, it is made the duty of all carriers coming within the act to afford all reasonable and proper facilities for the interchange of traffic; and it must do this whether it connects with one line only, or with competing lines. The third requirement demands that the reasonable and proper facilities afforded shall also be equal, and the fourth prohibits discrimination among competing lines in rates and charges. It is not necessary to consider, in this case, the duty of the carrier under the first two requirements. The defendant determined what were reasonable and proper facilities for the interchange of traffic, and we do not complain of the determination reached. The basis of our complaint is that the facilities afforded have not been equal, and that the defendant has discriminated against the plaintiff, in withholding from it facilities afforded to competitors of the plaintiff connecting with defendant under the same circumstances and conditions as plaintiff. * * *

The court is not required to determine what contract would be reasonable. That has been fixed by the defendant in its contract with the plaintiff's com-

petitors. And, as the plaintiff does not controvert the reasonableness of the terms of that contract, it is necessary only for the court to coerce the defendant to give the plaintiff the benefit of it."

In *Little Rock & M. R. Co. v. East Tennessee, V. & G. R. Co.*, 47 Fed. 771, Judge Hammond, in delivering the opinion of the court, said:

"If this bill averred that the East Tennessee, Virginia & Georgia Railway refused to give passengers going over the Little Rock & Memphis Railroad the same rates and facilities, including through tickets and traffic transfers, that it affords to the Iron Mountain road for passengers going to Little Rock, or any other point on the plaintiff's road, the court would not hesitate to say that it would be a violation of this [third] section of the interstate commerce act."

The state of case to which this language was applied was not made by the bill, nor had counsel been heard upon that state of facts. Plaintiff, however, insists that that precise state of case is now made by the bills before the court, and that the law, as announced by Judge Hammond, is applicable to it. Plaintiff further urges that the law applicable to the facts, as presented by the bill, is declared in *New York & N. Ry. Co. v. New York & N. E. R. Co.*, 4 Interst. Commerce Com. R. 702, where it is claimed it has been decided—

"That when a railroad connects with two competitors, under substantially similar conditions, even at points a little apart, that, if it makes through rates with one, it must make the same with the other, and that this duty is enforceable."

The relief asked is—

"That the said defendant be enjoined from further discriminating against your orator, and that it be required to afford your orator the same facilities and conveniences in the transaction of business that it affords to other corporations and individuals."

The concluding portion of the third section of the act, under which the plaintiff asks relief, declares:

"But this shall not be construed as requiring any such common carrier to give the use of its tracks, or terminal facilities, to another carrier engaged in like business."

It is clear from this language, that none of the grants, if they may be called such, in the preceding portion of the section, include, or were intended to include, the use of the tracks or terminal facilities of the receiving railway company. Therefore, in construing the section, we must at all times look to see whether what is asked includes the use of the defendant's tracks and terminal facilities. If it does, the law itself denies the prayer. In short, in ascertaining whether "equal facilities" have been denied, and whether "discrimination" exists, the court is not to call that a discrimination which arises from a refusal to permit the forwarding company to perform an act which involves the use of the tracks and terminal facilities of the receiving company, nor shall the court declare that to be a denial of "equal facilities" which flows from a refusal to a forwarding company to perform an act which involves the use of the track or terminal facilities of the receiving company. In *Kentucky & I. Bridge Co. v. Louisville & N. Ry. Co.*, 37 Fed. 567, in construing

the third section of the act, to which the plaintiff has appealed, Judge Jackson says:

"The provision in the third section of the act to the effect that a common carrier shall not be required 'to give the use of its tracks and terminal facilities to another carrier engaged in like business' is a limitation upon, or qualification of, the duty of affording all reasonable, proper, and equal facilities for the interchange, or for the receiving, forwarding, and delivering of traffic to, from, and between connecting lines; and therefore it is left open to any common carrier to contract or to enter into arrangements for the use of its tracks and terminal facilities with one or more connecting lines without subjecting itself to the charge of giving an undue or unreasonable preference or advantage to such line, or of discrimination against other carriers who are not parties to, or included in, such arrangements. No common carrier can, therefore, justly complain of another that it is not allowed the use of the other's tracks and terminal facilities upon the same or like terms and conditions which, under private contract or agreement, are conceded to other lines."

The point of connection of the plaintiff's railway with that of the defendant is not stated in the bill with any more accuracy than that it is at Little Rock. Nor is it stated that at the point of connection, or near thereto, the plaintiff company has facilities, in the way of tracks, switches, yards, and depots, for the interchange of interstate traffic, equal to those possessed by the Iron Mountain road at its connection with the defendant's railway. Judge Jackson, in speaking of that condition of affairs, in the same case, says:

"It by no means follows, because certain facilities for the interchange of freight are furnished by a railroad to another connecting line or lines, at one point, upon certain terms, conditions, and considerations, and where ample accommodations for the transaction of such business are provided and maintained at the joint expense of the companies using them, that another company, making physical connection with the road furnishing such facilities, at another, different, and distant place, is entitled to demand, at said different point of connection, the same or equal facilities. The company making the physical connection at a point other than that at which the established road has already provided its facilities, and conducts its interchange with other connecting lines, cannot demand or require an interchange at such point of physical connection without first furnishing at such point reasonable and proper facilities for the interchange sought. It cannot rely upon the terminal facilities at another point of the road with which it has formed the physical connection, nor can it compel the road with which the connection is made to join with it in the expense of providing at that point the facilities necessary and proper for the interchange."

In *Oregon Short Line & U. N. Ry. Co. v. Northern Pac. Ry. Co.*, 51 Fed. 465,—a case having many of the phases of the cases at bar,—Judge Field, in construing the third section of the act of March 2, 1889, said:

"The first subdivision of this section does not make all preferences or advantages which may be given by a common carrier unlawful. Only those which are undue or unreasonable are forbidden. The second subdivision is similarly guarded in its provisions. Common carriers are there only required, according to their respective powers, to afford all reasonable, proper, and equal facilities for the interchange of traffic between their respective lines, and are forbidden to discriminate in their rates and charges between them; and even this provision is subject to the limitation that it shall not be construed as requiring any common carrier to give the use of its tracks or terminal facilities to another carrier engaged in like business."

After having made this statement, the learned justice continues by quoting approvingly from the opinion of Judge Jackson in *Kentucky & I. Bridge Co. v. Louisville & N. Ry. Co.*, 37 Fed. 624, where it is said:

"No provision of the interstate commerce act confers equal facilities upon connecting lines, under dissimilar circumstances and conditions. * * * The provision in the second subdivision of the third section of the interstate commerce act, that a common carrier shall not be required to give the use of its tracks and terminal facilities to another carrier engaged in a like business, is a limitation upon, or qualification of, the duty declared of affording all reasonable, proper, and equal facilities for the interchange of traffic, and the receiving, forwarding, and delivering of passengers and property to and from the several lines, and those connecting therewith. It follows from this, as was decided in that case, (*Kentucky & I. Bridge Co. v. Louisville & N. Ry. Co.*) that a common carrier is left free to enter into arrangements for the use of its tracks or terminal facilities with one or more connecting lines without subjecting itself to the charge of giving undue or unreasonable preferences or advantages to such lines, or of unlawfully discriminating against other carriers. In making arrangements for such use by other companies, a common carrier will be governed by considerations of what is best for its own interests. The act does not purport to divest the railway carrier of its exclusive right to control its own affairs, except in the specific particulars indicated."

These adjudications establish four propositions: First, that the tracks and terminal facilities of the defendants can only be used by the plaintiff railway for the exchange of interstate freight, with the consent of the defendants; second, that no common carrier can justly complain of another because it is not allowed the use of the tracks and terminal facilities of such other railway company in the same manner and to the same extent another is; third, that the fact that one connecting railway company has a contract for the interchange of interstate commerce freight, which involves the use of the receiving railway's tracks and terminal facilities, would not authorize a court of equity to compel the receiving railway to grant a like contract or concession to another connecting company; fourth, that the connecting railway company, desiring an interchange of freight and passengers, cannot demand, as a matter of right, an interchange of freight at the point of physical connection without first furnishing at such point reasonable and proper facilities for the interchange sought, and cannot rely upon the terminal facilities at another point, nor compel the receiving railway to go to any expense of providing proper facilities at the point of physical connection. These propositions having been established by two justices of the supreme court, I have no disposition to disregard their construction of the interstate commerce act. There is nothing in the bills from which it may be inferred that the plaintiff owns, or has the proper, or any, facilities for the interchange of interstate commerce freight.

The effect of granting the relief asked would be to put the plaintiff in a position where it could receive interstate freight at Memphis, Tenn., destined to Ft. Smith, Ark., bring such freight a distance of 135 miles, to Little Rock, over its own line, and deliver it to the Little Rock & Ft. Smith road, to be taken a further distance of 165 miles. In a case of that kind, by whom and how is the rate to be fixed from Little Rock to Ft. Smith? The plaintiff answers:

"By the same rate the defendant would receive if the freight had been brought by the Iron Mountain road from Memphis to Little Rock. That the compensation must be the same."

The answer savors of equity, and is certainly persuasive; but the contract existing between the Little Rock & Ft. Smith Railway and the Iron Mountain Railway may have been based upon the use of the tracks, switches, yards, stations, depots, and terminal facilities granted by one of these roads to the other, and, if so, it would not furnish a guide for any rate. But suppose the contract was not based upon any of these considerations. Has a court of equity, under the interstate commerce act, been clothed with the power to compel the receiving company, which has made a contract or agreement with another connecting and competing company, to establish the same rate, as against the receiving company, at the instance of a railway company with which there is no contract, and compel the receiving company to accept that rate?

It is said that this precise question was decided by the interstate commerce commission in *New York & N. R. Co. v. New York & N. E. R. Co.*, 4 Interst. Commerce Com. R. 702. While such a decision, in the absence of adjudications by the courts, is entitled to great respect, and while it might be persuasive, if it went to the extent claimed for it, such decisions are not binding on this court. In the cases of the plaintiff against the East Tennessee, Virginia & Georgia Railway Company and the St. Louis, Iron Mountain & Southern Railway Company, (3 Interst. Commerce Com. R. 16,) Judge Walker, in speaking for the commission upon the question of whether, under the interstate commerce act, a compulsory through routing and through rating had been provided for by that act, said:

"The facts in the present case clearly develop the importance of such an amendment, or of some amendment which shall provide a mode of procedure for carrying into effect the establishment of through routes and through rates, and the equitable apportionment of the rate established, in case where the refusal of such routes and rates works an unlawful preference. As the statute now stands, there is no way apparent in which practical relief can be afforded to the complainant, without authority to provide for the necessary divisions being conferred, either upon the commission, the courts, or some other tribunal."

It appears from this that under the act, as it then stood, there was no authority "to provide for the necessary divisions" conferred either upon the commission, the courts, or other tribunal. The act has not been amended since that expression of opinion, although congress has been appealed to to amend it so as to confer that power on the commission and courts. If it be true that the act does not confer the power on any tribunal to provide for the necessary divisions growing out of a through routing and a through rating, that ends the matter. The fact that the receiving company has fixed a through routing and a through rating by contract or agreement with another connecting company neither extends the jurisdiction of this court, nor confers upon it powers under the act which it did not have before. Ascertaining the rule by which the rights of litigants, and the damages consequent upon their invasion, may be measured, is one thing; and ascertaining whether the court has

jurisdiction to use the measure offered, or any other, is quite another.

The supreme court of the United States, in *Atchison, T. & S. F. Ry. Co. v. Denver & N. O. Ry. Co.*, 110 U. S. 682, 4 Sup. Ct. 185, held that the refusal of a common carrier to make through traffic arrangements at or upon joint rates with one connecting railroad company, such as it makes or enters into with another connecting line, does not constitute any undue or unreasonable discrimination in charges or facilities. It is true that decision was rendered before the enactment of the interstate commerce act. But Judge Jackson, in the *Kentucky & I. Bridge Co. Case*, after quoting what the court had decided, said:

"That decision is conclusive of the present question, unless some provision of the act to regulate commerce has expressly, or by clear implication, provided otherwise. It is insisted for the petitioner that such is the case, and that the second clause of the third section of that act, in connection with section 5258, Rev. St. U. S., has established a different rule and regulation from that announced in the above decision."

After stating that neither section 5258 nor the interstate commerce act had changed the common-law rule in relation to common carriers, the learned judge asks:

"Is it a public duty, imposed by the act to regulate commerce, that every common carrier subject to the provisions of that law shall concede or afford through routing and through rates to all connecting lines whenever and so long as it voluntarily makes or enters into such arrangements with connecting lines? After a careful examination of the act, and the argument of counsel and authorities cited, we fail to discover any such requirement. * * * Such arrangements, which usually include the reciprocal interchange of cars and the use of each other's tracks and terminal facilities, are prompted by considerations varied and complex, as shown in the above statement of facts. In some instances, and between some companies, they may be mutually desirable and beneficial, while in other cases, and with other connecting lines, they might be prejudicial and injurious to the interests of one or both. Can companies in the latter situation (that is, those with whom a connection might be prejudicial or injurious) properly claim, as a matter of right, what the former have acquired under and by virtue of private contract and arrangement? No provision of the law, rightly construed, sanctions or supports such a proposition. The statute does not undertake to create, between connecting lines, such an agency or quasi partnership relation as is necessarily involved in agreements or arrangements for the establishment of through rates, as such arrangements exist by contract, express or implied. The fact that a common carrier enters into them with one or more connecting lines does not impose upon such carrier the duty or obligation to make the same or like contracts with all other lines."

One of the things complained of is that the defendant railway refuses to accept interstate freight upon through billing in conjunction with the plaintiff's line, and accepts such freight on through billing in conjunction with all other lines of railroad terminating at Little Rock. This is but another way of stating that one railway company has, by contract or agreement, acquired an arrangement for a through routing and a through rating with the defendant company, and that the defendant company refuses to make a like contract with the plaintiff, and, because it will not, it should be compelled by mandatory injunction to so do. This court possesses no such power. The bills do not allege whether the freight refused was in cars belonging to the plaintiff, or other railway corporations

other than the defendants, or whether the defendants were without cars of their own in which to carry such freight. It was urged before Justice Field, in the Oregon Case, that there was a custom among railways to receive freight from connecting lines, and not demand the prepayment of freight, and the alleged custom was pleaded as the foundation of a right, and in response to that he says:

"There is no law or custom requiring a railway company receiving freight from a connecting line to advance, or assume the payment of, charges thereon for the transportation from its origin to the connecting line. * * * A railway company, like any other common carrier, has a right to demand that its charges for transporting shall be paid in advance, and it is under no obligations to receive goods for transportation unless such charges are paid, if demanded."

It follows that if the receiving railway company is under no obligations to receive freight unless the prepayment of freight charges is tendered, if payment is demanded, and if there be no law or custom requiring it to do so, no right can grow out of an alleged law or custom which does not exist. A railway company may, undoubtedly, waive the right of prepayment, and retain a lien upon the goods until payment is made, and, in case of delivery before payment, may hold the consignee responsible, or it may refuse to do either, and demand prepayment. The exercise of these rights, or the waiver of some of them, at different times, can no more be construed to be a denial of "equal facilities," or a "discrimination," than it would be on the part of an hotel keeper to require some of his guests to pay in advance, and allow others to pay when they had concluded their stay at the hotel.

At the same time the bills were filed in the cases to which attention has thus far been directed, a bill was also filed against the St. Louis Southwestern Railway Company by the plaintiff. The only difference in the bills is that in the last-mentioned bill there is an averment which is not in the others, to wit:

"The lines of railway of your orator and the defendant intersect at the town of Brinkley, at which place switches, and all other conveniences for the interchange of traffic, have been established; that the St. Louis, Iron Mountain & Southern Railway owns a line that parallels that of your orator, about thirty miles north of Brinkley, which extends from Memphis westward; that the defendant refuses to receive freight or passengers coming over your orator's line, except at local rates, and refuses to honor through tickets or through bills of lading over the line of your orator in conjunction with its own, but requires all freight to be rebilled and reloaded, and all passengers to purchase new tickets, at the said town of Brinkley, while, at the same time, it issues and accepts through tickets and through bills of lading from other railway companies," etc.

That the plaintiff has the facilities at Brinkley for an interchange of interstate commerce freight, (an allegation not contained in the other bills,) is distinctly alleged, but the bill shows that the defendant requires the freight offered to be rebilled and reloaded. The inference is that the plaintiff tendered the freight in its own cars, and the defendant declined to take it in that condition, as it had cars of its own, in which it preferred or desired to carry the freight. The refusal was, not to transport the freight, but to transport it in the cars of the plaintiff, or in the cars of others. That

precise question was presented in the Oregon Case, and Justice Field, speaking for the court, said:

"Its chief contention is that the defendant, as a common carrier by railway of freight and passengers, is obliged—First, to receive freight tendered to it by the complainant at Portland, Or., (that being a point where it connects with the road of the complainant,) in the cars in which it is tendered, and transport the same to the point of destination in such cars, over its road, and pay to the company owning the cars the current rate of mileage for their use, and also pay the charges for transportation from the point of origin to Portland; second, to honor tickets or coupons for passage over its lines, north of Portland, issued by the complainant. This obligation of the defendant is asserted on three grounds: First, the alleged established custom between railroad companies operating connecting lines; second, the third section of the interstate commerce act; and, third, the fifth section of the defendant's charter. * * * As the receiving company is under no obligations to take the freight in cars in which it is tendered, and transport it in such cars, when it has cars of its own, not in use, to transport it, there can be no question that it shall pay the owner of such cars, should it receive them in such case, car mileage for their use. The car mileage, in that case, must be upon an arrangement between the parties."

It would seem from this case that the defendant had the right, if it had unemployed cars of its own, which is not negated by any allegation in the bill, to carry the freight in its own cars, and to refuse to pay for the use of cars it did not need in the conduct of its business. Prior to the enactment of the interstate commerce act, it would hardly have been contended that a connecting railway company would have had a remedy in equity, to compel the company with which the connection was made to accept freight in the cars of other companies than its own, and transport the same to a point of destination on its line, or that a remedy at law, for damages for such refusal, existed. It seems to me that to allow the plaintiff company to load one or more of its cars at Memphis, Tenn., with freight to Ft. Smith, Ark., bring it to Little Rock, and compel the Little Rock & Ft. Smith Railway to transport the cars to Ft. Smith, without any agreement as to rates, and without the Little Rock & Ft. Smith Railway having any privilege to haul the freight in its own cars, would be giving the plaintiff the absolute use of the tracks of the defendant, to enable the plaintiff to carry on an interstate commerce business. The "use of the tracks" of a common carrier for such a purpose is denied, in express terms, by the concluding clause of section 3 of the act. If it may thus tender cars of freight for transportation, it is difficult to see why the locomotive and tender should be detached from such cars. If a court of equity, by mandatory process, has the power to compel the receiving company to accept and transport interstate commerce freight in other cars than its own, it has the same right to say that such cars shall, if it will facilitate the business of delivery, be transported to the point of destination with and by the same motive power that brought them to the connecting road. The running of freight cars over the track of another railroad, without its consent, is just as much "use of the tracks" as if the locomotive was attached.

I have given these causes my best consideration, and it seems to me that if the court undertakes to adopt a rate agreed upon between

the defendants and other connecting companies, or any other rate, the court would be making a contract which the law does not authorize it to make, between the plaintiff and defendants. In *Atchison, T. & S. F. Ry. Co. v. Denver & N. O. Ry. Co.*, 110 U. S. 679, 4 Sup. Ct. 185, the court said:

"A court of equity is not, any more than a court of law, clothed with legislative power. It may enforce, in its own appropriate way, the specific performance of an existing legal obligation, arising out of contract, law, or usage, but it cannot create the obligation."

In the *Express Cases*, 117 U. S. 1, 6 Sup. Ct. 542, 628, the court below had rendered just such a decree, in form, as this court is now asked to make, and the court said:

"Having found that the railroad company should furnish the express company with facilities for business, it had to define what those facilities must be; and it did so by declaring that they should be furnished to the same extent and upon the same trains that the company afforded to itself, or to any other company engaged in conducting an express business on its line. It then prescribed the time and manner of making the payment for the facilities, and how the payment should be secured, as well as how it should be measured. Thus, by the decrees, these railroad companies are compelled to carry these express companies, at these rates and these terms, so long as they ask to be so carried. * * * In this way, it seems to us, the court has made an arrangement for the business intercourse of these companies, such, as in its opinion, they ought to have made themselves. * * * The regulation of matters of this kind is legislative in its character, not judicial. To what extent it must come, if it comes at all, from congress, and to what extent it may come from the states, are questions we do not now undertake to decide; but that it must come, when it does come, from some source of legislative power, we do not doubt."

If a decree was entered in this case in favor of the plaintiff, would it not have to be in substantially the same language as the decree in the *Express Cases*—

"To accord to the plaintiff the same facilities, in the matter of the interchange of interstate commerce freight, that the defendant accords to other companies connecting with defendant's railway, as to freight delivered to defendants at Little Rock, and destined to Ft. Smith."

Suppose there were three or more railways connecting with the Little Rock & Ft. Smith Railway at Little Rock, all engaged in interstate commerce, and that two of them had contracts with that company for through routing and through rating, and that these contracts were dissimilar as to rates and charges. Which of the rates would the court be compelled to accept, when it undertook to decree a rate for the plaintiff? But admit they should be found to be alike, and that the court should adopt the rate so found, and that the contracts were to expire on the 1st day of January next, and that after that time the rate, by contract, should be increased. Is this litigation to remain open as long as these corporations exist, and interstate commerce continues, and is the court to make orders from time to time to meet the varying changes? Again, suppose the contracts shall not be renewed at all. Could the defendant come into this court, and plead the expiration of the contracts, and have the mandatory injunction set aside? If it could, does that not show that the power of the court to act in the first instance de-

pendent, not upon any provision of the interstate commerce act, but upon evidence by which an equitable rate might be ascertained?

In *Little Rock & M. R. Co. v. St. Louis, I. M. & S. Ry. Co.*, 41 Fed. 559,—a case involving a construction of the third section of the interstate commerce act, and many of the questions now presented,—Judge Caldwell, in delivering the opinion of the court, said:

"The precise question in this case is, can the United States circuit court, in the exercise of its equity powers, require a railroad company engaged in interstate commerce traffic to enter into an agreement with another railroad company, engaged in like traffic, for a joint through routing and joint through rates; and, upon the refusal of the company to comply with such a requirement, may the court itself make such a contract for the parties?"

The question is answered in the negative. The fact that in the case at bar there exists a contract with another company for similar services, while that was not true in the other case, cannot confer jurisdiction in this case, if there was none in the other. Through routing and through rating cannot be effected without the use of the tracks of the companies creating the through routing and rating. Such contracts are entered into for the very reason that they do away with rebilling and reloading freight, and give to the parties to the arrangement the use of each other's cars and tracks for the purpose of forwarding the freight from its origin to its destination without breaking bulk. If this be true, and if it also be true that nothing contained in the third section of the interstate commerce act is to be so construed as "requiring any such common carrier to give the use of its tracks or terminal facilities to another carrier engaged in a like business," where does the court get the power to say, in the absence of a contract giving the plaintiff such a right, that it shall have the use of the defendants' tracks in order to aid it in carrying on interstate commerce traffic? The prayer of the bills cannot be granted without compelling the defendants to permit the plaintiff to run its own, or cars other than those of the defendants, over their tracks. To stop the cars at the point of physical connection, and reload the freight into the cars of the receiving company, is to break a through routing; and to break a through routing is to break a through rating.

Being of opinion that the defendants are not required to allow the plaintiff the use of their tracks for the purpose of enabling the plaintiff to do an interstate commerce business, and that the relief asked cannot be granted without the use of the defendants' tracks, and compelling the defendants to haul freight, in other cars than their own, over their own tracks, and at a less rate than they would receive, or be entitled to receive, if the freight was hauled in their own cars, I cannot see my way clear to grant the relief asked.

The demurrers to the bills, as well as those to the complaints at law, are sustained.

BENTON v. WARD et al.

(Circuit Court, N. D. Iowa, E. D. January 13, 1894.)

EQUITY—RESCISSION OF CONTRACTS—FALSE REPRESENTATIONS.

One who, while negotiating for the purchase of stock in a corporation represented to own a new and secret process for treating metals, and to have applied for a patent therefor, learns, before completing the purchase, all that the vendors know in relation to such process, its invention and ownership, and that the patent has been rejected because of a prior expired patent covering substantially the same process, and nevertheless completes the purchase as a speculative venture, cannot, after the expiration of a year, during which he endeavored to effect a sale of the process in behalf of the company, rescind his contract, tender back his stock, and sue for the purchase price.

In Equity. Suit by Harlan P. Benton against Julius A. Ward and others for rescission of a contract for sale of certain shares of capital stock in the Hawkeye Metal Company. A demurrer to the bill was heretofore overruled. 47 Fed. 253. The cause is now on final hearing. Bill dismissed.

Carman N. Smith, for complainant.

Charles A. Clark and Rickel & Crocker, for defendants.

SHIRAS, District Judge. This is a suit in equity brought to rescind a contract of sale, in pursuance of which the defendants each assigned to the complainant 500 shares of stock in the Hawkeye Metal Company. In the bill of complaint it is averred that, for the purpose of inducing the complainant to buy the shares of stock in question, the defendants represented and stated to him that the Hawkeye Metal Company was the owner and sole proprietor of a secret process of treating metal, known only to the stockholders in the company; that said process was new and valuable; that a patent therefor had been applied for, and would unquestionably be granted; that such process would greatly increase the value of metal treated thereby; that the Hawkeye Company was prepared to commence the business of applying such secret process to the treatment of metals; and that, if complainant would purchase the shares of stock in question, he would be employed at once in the capacity of president and general manager of the company at a salary of \$3,000. It is further charged in the bill that, relying upon these statements, the complainant purchased the thousand shares of stock, paying therefor the sum of \$4,000, but that it now appears that substantially the representations made as above set forth were false, and that the complainant, upon discovery of the fraud, had tendered back the shares of stock and demanded the repayment of the \$4,000; and the court is asked to decree a rescission of the contract of sale, with a judgment for the repayment of the purchase price. The case has been submitted upon the pleadings and proofs, and, from the evidence, the general history of the transaction appears to be as follows:

In October, 1889, the defendant Ward visited Minneapolis, Minn., and there met the complainant, Benton. Ward had with him a specimen of metal, which he exhibited to Benton, informing him that

it was treated by a secret process owned by the Hawkeye Metal Company; that the company wished to secure the services of a competent person to take an interest in the business, and undertake the management of the affairs of the company; that an application for a patent in the interest of the company was being made; that he could not divulge the secret of the process, as the stockholders were under obligation not to make the same known to outsiders,—and thereupon Ward proposed to Benton that he should buy some of the stock of the company, and become interested in the enterprise. To this Benton replied that, if he was to take an interest in the matter, he must know more about the metal. It was thereupon agreed that the parties should meet in Chicago about November 1, 1889, which meeting took place. While in Chicago the complainant visited the place where the metal was being made for the Hawkeye Metal Company, and saw Mr. Worrall, who, as it was then understood, was the discoverer of the process in question. He also interviewed the street-railway companies who were using the product of the metal treated by the secret process, and learned their views of the value of the metal. He was also introduced to the attorneys who had charge of the application for a patent on behalf of the Hawkeye Company. Finally, he entered into negotiations with Mr. Ward for the purchase of stock in the company, coupled with the conditions that he should be made president and general manager of the Hawkeye Company at a fixed salary. These negotiations resulted in a written contract, dated December 20, 1889, whereby the defendants agreed to sell to complainant 1,000 shares of stock in the Hawkeye Metal Company for the sum of \$4,000, payable January 7, 1890, and further agreed to use their influence and best efforts to have the complainant elected to the position of president and general manager of the company at a salary of \$250 per month; the said defendants further agreeing to contribute in stock or money their proper share of the expense needed to carry on the contemplated business.

At the stockholders' meeting held in January, 1890, the complainant was duly elected president and general manager of the Hawkeye Metal Company at a salary of \$250 per month, and thereupon, on the 7th day of January, he completed the purchase of the stock by paying to Henry Rickel the sum of \$2,000 for the 500 shares sold by him, and to Julius A. Ward \$2,000 in cash, with a duebill of \$2,000, it appearing from the evidence that complainant had agreed to pay Ward double the amount that was to be received by Rickel. When the complainant thus completed the purchase of the stock, and took charge of the affairs of the Hawkeye Metal Company, the evidence shows that he then fully knew the nature of the process for treating metals which it was expected would be followed in the business of the company; that he had as full knowledge, and the same means of knowledge, as any of the parties in regard to the product of the process and the value of the same; that he knew that a patent therefor had not been obtained, and that the application originally made had been denied by the patent office; that he knew that the defendants and the company had been deceived in supposing that Worrall was the original discoverer, it then appearing that one

Cole was in fact the discoverer thereof; and he knew that the defendants and other stockholders expected him to take charge of the business of the company, relying upon him for the business ability needed to successfully manage the affairs of the company. Under these circumstances, the complainant paid the purchase price of the stock bought by him, and entered upon the management of the affairs of the company. It appears that there was a difficulty in getting a suitable place to carry on the work of the company, and also there was a lack of funds such as would be needed to engage in the manufacturing of the metal, and thereupon the complainant entered into negotiations with the Bromley Brake-Shoe Company for a transfer of the interest of the Hawkeye Metal Company; and subsequently a new company, called the Chicago Refined Metal Company, was organized by the complainant and Cole for the purpose of taking the interest of the Hawkeye Metal Company, but it seems that this purpose was not finally completed. The complainant testifies that in August, 1890, he had seen the application for a patent, with the ruling of the patent office thereon, and had become satisfied that a patent could not be had, owing to the patent issued to John Burt in 1869, and therefore, as a director in the Chicago Refined Metal Company, he voted against completing the contract with the Hawkeye Metal Company; and from this time forward he seems to have abandoned all effort to further advance the affairs of the Hawkeye Metal Company.

In the correspondence carried on between the complainant and the defendant Ward, which is very voluminous, the first and main ground of complaint relied upon by the complainant was the alleged failure to furnish sufficient funds to carry on the business of the company. It was not until in January, 1891, that the complainant tendered back the shares of stock, and demanded a repayment of the \$4,000 cash by him paid for the stock. In the argument of counsel for complainant it is stated that the representations made by the defendants to induce complainant to purchase the stock were false in two particulars: (1) The process which they claimed to own was not a new, secret process; (2) the Hawkeye Metal Company did not own the process.

In support of the first proposition, reliance is placed upon the claim that the patent to John Burt, issued in 1869, covers the same process, and therefore, in the language of counsel, "it had been a matter of public record for twenty years." Granting the claim that the Burt patent in fact described the process used by the Hawkeye Metal Company, the question arises whether that fact proves that the representations made by the defendants were substantially false. It is not shown in the evidence that Burt, or any one claiming under him, ever manufactured or put in use any metal treated by his process. So far as the proof is concerned, it simply appears that in 1869 a patent was issued to Burt, but it does not appear that the knowledge of the process proceeded further. Many an invention and many an idea of value are doubtless to be found in the records of the patent office, but, so far as public actual knowledge thereof is concerned, they might as well be nonexistent. The fact that a

patent had been issued in 1869 to Burt might be sufficient to defeat the issuance of another patent, but it does not necessarily show that the representations made by the defendants were false. It is not claimed on behalf of the complainant that ground exists for a rescission of the contract by reason of the failure to procure a patent, and, in view of the evidence, such claim, if made, could not be sustained. In the first place, it is not claimed that the representations were falsely made knowingly. In the second place, so far as the representations referred to the procurement of a patent, they could be only the expression of opinion touching a future event. In the third place, the complainant himself testified that, when the negotiations for a sale of the stock were in progress, the proposition made to him was to charge him \$6,000 for the stock if sold before the issuance of a patent, and \$8,000 if he waited until the patent was issued. He elected to purchase at the rate of \$6,000, and in the written contract there was no guaranty of the issuance of a patent. It must, therefore, be held that the validity of the sale of the stock was not made dependent upon the success or failure to procure a patent. The complainant was not willing to pay \$2,000 to be assured that a patent would be issued, and he must now abide by the election he made when he entered into the contract. Upon the issue whether the process was in fact a new and secret one, the burden is upon complainant to establish the fact that it was not, and I do not think the evidence clearly shows such to be the case. It does not appear that metal treated by this process was in the market, or was in use by any one except the few who procured it from the Hawkeye Metal Company and those connected therewith. The Burt patent issued in December, 1869, expired in 1886, and it would not prevent the use of the process.

As already stated, it does not appear that the use of the metal had been introduced under that patent, and, so far as the public were concerned, the process remained unknown. It was therefore open to any one who should rediscover the process to enter upon the manufacture of metal under that process, and, by guarding the secret of manufacture, reap all the benefit possible therefrom. The representations claimed to have been made by the defendants in regard to the process being new and secret must be reasonably construed. The meaning thereof cannot be held to have been an affirmation of absolute novelty. If the knowledge of the process was not had by those engaged in that line of business to which the process pertained, then it was practically a new and secret process. The defendants cannot be held liable for having made false statements in this particular by showing that one person, years ago, had knowledge of the process; and that is all that is shown by proof of the granting of the Burt patent. When the representations complained of were made by the defendants, it might well be that Burt and all who had ever acquired knowledge of his process were dead. So far as the evidence shows, the only knowledge extant of his process was that afforded by the record of his patent, issued in 1869. In the absence of evidence showing that in 1889, when the sale was made to the complainant, any one had actual knowledge of the existence of this

patent, or of the process therein described, or showing that the process was in use or was known to the business world, it cannot be held that the representations charged against defendants were false simply because it now appears that the Burt patent was of record.

The second ground taken by counsel for complainant is that the Hawkeye Metal Company did not own the process, and therefore the sale of stock was procured by false representations. The Hawkeye Metal Company had knowledge of the process, and possessed appliances for the practical use of the same, and thus owned the process to the extent that ownership is possible of an invention not covered by a patent. When the sale of stock was made to the complainant he then knew that the company did not have a patent upon the means of applying the process in question, and he must have known that the only ownership possible to be had by the Hawkeye Company was that predicated on the possession of the knowledge of the process, and of the means necessary to its application. The fact that James W. Cole, the original discoverer of the process, had assigned the same to John Cole, did not deprive the Hawkeye Metal Company of the knowledge of the process nor of the right to use it. The fact that the company was defeated in its application for a patent does not show that the defendants had made false representations in regard to the ownership of the process. The denial of the patent applied for was not put upon that ground, and the main position taken by the complainant is that the issuance of the Burt patent was what defeated the issuance of a patent in the interest of the Hawkeye Metal Company.

For these reasons it must be held that the evidence fails to sustain either one of the two grounds upon which complainant rests his case in the written argument submitted on his behalf. It might be further claimed that there was evidence tending to show that some other parties in Chicago and elsewhere had knowledge of the process derived from James W. Cole, and parties associated with him. It appears, however, from the evidence, that complainant knew these facts as well as the defendants before he completed the contract of purchase, and he must be held to have assumed the risk arising from this knowledge. The evidence clearly shows that the enterprise which the Hawkeye Metal Company was organized to carry on was speculative in its nature. The complainant, when he purchased his stock, knew this fact, and bought the same as a speculation. He was placed in full charge of the affairs of the company, and devised several plans looking to making advantageous sales of the interest of the company. He was in position, on and after the 7th of January, 1890, to fully ascertain all the facts connected with the business of the company. He did not tender back the stock until in January, 1891. He himself testified that in August, 1890, he became fully satisfied that the process was not new or secret, having been anticipated by the Burt patent of 1869; yet he took no action to secure a rescission of the contract until the following January. Even if the evidence had shown a state of facts which would have justified a court of equity in granting a decree of rescission, if the application had been promptly made, the delay on part of complain-

ant is fatal to his case. The complainant was made president and general manager of the company, and he accepted the position, and, so long as there was a prospect that the speculation might prove remunerative, he retained the stock and the control of the company's affairs. When the tender back of the stock was made to the defendants, in January, 1891, the whole situation had greatly changed, and the parties could not be placed substantially in the position they occupied when the contract for the sale of the stock was made.

For these reasons it must be held that the complainant has failed to make out a case which entitles him to a rescission of the contract of sale. That the expectations which he had formed at the time he assumed the management of the affairs of the Hawkeye Metal Company have not been met is undoubtedly true, but that seems to be equally true of the expectations of the defendants. The enterprise was largely speculative, and was so known to be to the complainant when he connected himself therewith. Having retained the control of the affairs of the company for so long a period, and having retained the stock sold him for months after he had ceased to work in the interest of the company, he cannot expect that a court of equity will now throw the whole burden of the failure of the speculation upon the defendants, and relieve him wholly therefrom.

The bill will therefore be dismissed upon the merits, at the cost of complainant.

MESSINGER v. NEW ENGLAND MUT. LIFE INS. CO.

(Circuit Court, W. D. Pennsylvania. January 15, 1894.)

No. 16.

RES JUDICATA—DISMISSAL OF BILL.

A decree dismissing a bill, made after sustaining a demurrer (which set up that the facts alleged constituted no cause of action) and no application to amend, is a final adjudication, and bars a subsequent suit between the same parties on the same subject-matter.

In Equity. Bill to cancel and rescind a release. Heard on a plea in bar. Plea sustained and bill dismissed.

D. W. Cox, Lorenzo Everett, and S. C. McCandless, for complainant.

A. A. Leiser and Shiras & Dickey, for defendant.

BUFFINGTON, District Judge. A bill in equity is here filed by I. N. Messinger, administrator d. b. n. of Joseph O. Raudenbush, against the New England Mutual Life Insurance Company, to cancel and rescind a release executed by a former administrator of all claims under a policy issued by the respondent company upon the life of said decedent. To this bill a plea is filed, setting forth that a final decree had been entered in favor of the respondent (which was unappealed from) in a suit in this court, at No. 34, November term, 1892, between the same parties, and involving the same subject-matter. In the former case the respondent demurred to the bill because it did not disclose facts sufficient to constitute a cause

of action, which demurrer was sustained by the court; and subsequently, no application to amend being made, a final decree was entered, dismissing the bill. Such a decree is a final judgment of the rights of the parties, and is a bar to a subsequent suit between the same parties on the same subject-matter. *Alley v. Nott*, 111 U. S. 473, 4 Sup. Ct. 495; *Bissell v. Spring Valley Tp.*, 124 U. S. 232, 8 Sup. Ct. 495.

The parties to the present suit, and the subject-matter, being the same as those in the former suit, we are of opinion the plea is well founded, in point of law, and presents a complete defense to the bill, and the latter should be dismissed.

NETHERLAND-AMERICAN STEAM NAV. CO. v. HOLLANDER.

(Circuit Court of Appeals, Second Circuit. January 12, 1894.)

No. 48.

1. PARENT AND CHILD—LOSS OF SERVICE—PARENT'S RIGHT OF ACTION FOR INJURIES.

The right of action of a father for an injury to his minor child is based on the parental relation, not that of master and servant, and he is entitled to be indemnified for his expenses in the care and cure of the child, and for loss of services past and prospective.

2. SAME—DAMAGE—PROVINCE OF JURY.

Whether a girl who was injured at five years of age, and had not recovered at the time of the trial,—over a year later,—could render any service, past or prospective, of pecuniary value to her father is a question of fact which the jury may determine upon consideration of the injury, the continued disability, and the age and sex of the child, without other evidence as to ability to render services.

In Error to the Circuit Court of the United States for the Southern District of New York.

At Law. Action by Morris Hollander against the Netherland-American Steam Navigation Company for injuries to his minor child, brought in the supreme court of the state of New York, and removed therefrom by defendant. Verdict and judgment for plaintiff. Defendant brings error. Affirmed.

In charging the jury the court said, among other things: "In assessing the value of damages, you are to take into consideration that it is only the loss to the father for which this suit is brought, and which this particular jury is to assess. He has given testimony of money paid out, which aggregates about twenty-one dollars. Besides that, he is entitled to such sum for the loss of services of his child as may be reasonable in view of what the circumstances of the case are, to wit, the age of the child, and the amount of services which it might have rendered to him from the date of the accident until the present time. He is also entitled to such compensation as is proper to take the place of any services of this child which he may lose in the future in consequence of the accident. You are not to guess at that. You are not, without evidence, to assume that because the child's arm was broken two years or a year and a half ago, and at this moment of time she does not use her arm as her brother does his, that the child is going to be disabled; and I know of no evidence in this case as to what the probabilities are. You are not entitled to guess at that. You must reach your conclusion from evidence."

The errors alleged are as follows:

In the refusal of the court to direct a verdict for the plaintiff in error upon the whole evidence, as requested by defendant's counsel.

In refusing to charge, as requested:

(1) "That this action is based upon supposed loss by plaintiff of services of his daughter, and that there can be no recovery in this action except of the actual expenses proven to have been incurred by the plaintiff in consequence of the injury, except for loss of actual services."

(2) "That there is no evidence in this case that plaintiff's daughter was able to render any services of value."

(3) "That loss of services cannot be inferred without evidence."

(4) "That there is no evidence in this case that would justify the jury in finding that the injury to the child is permanent."

Wing, Shoudy & Putnam, (J. A. Shoudy, of counsel,) for plaintiff in error.

Benno Loewy, for defendant in error.

Before WALLACE and SHIPMAN, Circuit Judges.

WALLACE, Circuit Judge. This is a writ of error by the defendant in the court below to review a judgment for the plaintiff rendered upon the verdict of a jury. It was proved upon the trial that the plaintiff and his daughter, the latter being of the age of about five years, were passengers on the defendant's steamship Amsterdam, on a voyage from Rotterdam to New York, in September, 1891; that while they were walking upon the deck of the vessel an iron gate fell on the child, breaking her arm; that the plaintiff had employed a surgeon, and had taken the child to the hospital every fortnight for about six months after her injury; that he had incurred expenses for surgical treatment and medicines; that since the accident—a period of something over a year before the trial—the child had suffered from her injuries, and had not been able to use her arm as she did before the accident; that she continued to have restless nights, and had no one to take care of her but the plaintiff. The evidence tended to show that the child's injuries were caused by the negligence of the defendant. No testimony was introduced to show that the child had ever rendered any services for the plaintiff, or that she was capable of doing so.

The exceptions taken upon the trial, and the assignments of error which have been argued at the bar, raise the questions (1) whether the action was maintainable either for expenses or for loss of services; and, (2) if maintainable for the loss of services, whether there was any evidence which justified the trial judge in instructing the jury that they might award damages for prospective loss of services.

A father whose infant child has been injured by the tort or negligence of a third person has a right of recovery to the extent of his own loss. He cannot recover for the immediate injury to the child. His action rests upon his right to the child's services, and upon his duty of maintenance. When he is deprived of the right, or put to extra expense in fulfilling the duty, in reason and justice he ought to be permitted to have recourse to the wrongdoer for indemnity. He is entitled to be indemnified for his expenses necessarily incurred in the cure and care of the child, and for the loss of the

child's services, past and prospective, during minority, consequent upon the injury. By some authorities the loss of service has been regarded as the foundation of the action; and the English courts, influenced by this strict view of the gravamen of the action, have decided that a father has no remedy, even for his expenses, where the child is of such tender years as to be incapable of rendering any services. The authorities in this country approve a more liberal and more reasonable doctrine, and, basing the right of action upon the parental relation, instead of that of master and servant, allow the father to recover his consequential loss, irrespective of the age of the minor. *Dennis v. Clark*, 2 Cush. 347; *Cuming v. Railroad Co.*, 109 N. Y. 95, 16 N. E. 65; *Clark v. Bayer*, 32 Ohio St. 300; *Durden v. Barnett*, 7 Ala. 169; *Sykes v. Lawlor*, 49 Cal. 236.

It was within the province of the jury to form an estimate of the damages which would compensate the plaintiff for his present and prospective loss upon the facts which were before them. Whether the plaintiff's daughter, in view of her age, could render him any services having a pecuniary value, was a question of fact. It could not have been ruled as a question of law that a child of her years was incapable of doing so. The evidence showed the child's disability had lasted for more than a year, and still continued, thus raising the presumption that it would continue in the future for a longer or shorter period. Having these facts and the age and the sex of the child before them, the jury were as well qualified as any expert could be to form a correct opinion as to the duration of her incapacity, and the value of her services to her father. A case could hardly be imagined in which it would be more impracticable to furnish direct evidence of any specific loss by deprivation of services. Any evidence respecting the prospective loss would necessarily have been speculative and hypothetical, and could not have been of any real assistance to the jury. *Railroad Co. v. Jones*, 1 C. C. A. 282, 49 Fed. 343; *Ihl v. Railroad Co.*, 47 N. Y. 317; *Railway Co. v. Fielding*, 48 Pa. St. 320. There was no error in the refusal of the trial judge to direct a verdict for the defendant, or in his instructions to the jury upon the subject of damages, and the exceptions of the defendant were not well taken.

The judgment is affirmed.

FINLEY v. RICHMOND & D. R. CO.

(Circuit Court, W. D. North Carolina. December 18, 1893.)

1. MASTER AND SERVANT — RAILROAD COMPANIES — POWER OF ENGINEER TO WAIVE RULES.

An engineer in charge of a working train with the knowledge or assent of the temporary conductor, the regular conductor being absent, has power, by ordering a brakeman to go between the cars, and place in position, by hand, a coupling link which, being bent, cannot be properly controlled with coupling sticks, to waive a rule of the company, subscribed by the brakeman at the time of his employment, requiring brakemen to use coupling sticks, and not to go between the cars. *Railroad Co. v. Baugh*, 13 Sup. Ct. 914, 149 U. S. 368, distinguished.

2. SAME--DEFECTIVE MACHINERY.

A railroad company is liable for injury caused to a brakeman by the failure of a defective engine brake to work properly, although there was a good brake on the tender, by which he could have controlled the train.

At Law. Action by J. S. Finley against the Richmond & Danville Railroad Company to recover damages for personal injuries.

J. M. Morphew and H. C. Jones, for plaintiff.

George F. Bason and R. B. Glenn, for defendant.

DICK, District Judge, (charging jury.) The plaintiff entered into the service of the defendant upon an express written contract not to go between the cars for the purpose of coupling and uncoupling, and that service was to be performed by means of a stick provided by the company. Now, if he violated such contract of his own volition, or by the direction of a fellow servant, he was guilty of contributory negligence, and cannot recover; but if he went between the cars under the order of the conductor, or of a person managing the operation of the train in the absence of the conductor, and by the direction or knowledge of the conductor, then the written contract was waived, and if plaintiff attempted to perform the assigned service with reasonable care, and was then injured, he is entitled to recover compensatory damages for the injury sustained.

A railroad company, in operating a train on its railway, must have some person authorized to control the movement and operation of the train, and such person represents the company, and may waive general rules and special contracts by other instructions required by the circumstances of the occasion. The evidence tends to show that the regular conductor was not on service, but he had been directed by the company to put Mr. Burgin in charge of the train on that day; that Mr. Burgin was a state officer having charge of a number of convicts who were in the service of the company as laborers; that said convicts were employed at the coal chute about one-fourth of a mile from the place of the injury, and were under the immediate supervision of Mr. Burgin; that the engineer had operated the train in transporting cars to the coal chute in the absence of, and with the knowledge and assent of, Mr. Burgin, and caused the movement of the engine that produced the injury.

I charge you that, if you believe that the engineer had charge of the movement and management of the cars with the assent or knowledge of the temporary conductor,—the regular conductor being absent,—then the engineer had the authority of a conductor in giving directions to subordinate employes, and could waive the general rules and contracts of the company; and if you are satisfied from the evidence that the engineer directed plaintiff to go between the cars to place a bent link in position for coupling, which could not be done with a coupling stick, and he exercised ordinary care in doing as he was directed, then he is entitled to recover compensatory damages for the injuries sustained. There is not the

slightest evidence to show that the engineer was willfully negligent in the act that caused the injury. There is evidence tending to show that the engineer intended to act with caution, and failed to prevent injury by reason of defective machinery, the defect being unknown to the plaintiff. If the machinery was defective, and had been so for some time, and such defect was the proximate cause of the injury, then the doctrines relating to fellow servants do not apply, as the fellow servant had not the power of preventing the injury, although he did the best he could under the circumstances of the transaction.

The evidence tends to show that the engineer knew that the plaintiff was between the cars, and that the engineer did not do the injury willfully or carelessly, but that it was caused by the engine not operating as he anticipated. The evidence tended to show that there was a brake on the tender which was in good working order, and if the engineer had used this brake he could have controlled the movement of the train, and no injury would have occurred; that the brake on the engine, and the reverse lever, were not in good order; that a brake on an engine is not necessary, and many engines are used without brakes. I charge you that if the engineer, on the exigency of the occasion, used the appliances most convenient, and they failed to operate properly, then the defective machinery was the proximate cause of the injury, and the plaintiff is entitled to recover.

There is no evidence that authorizes you to find exemplary damages. You have heard the evidence as to the pain and sickness suffered by the plaintiff, the expenses incurred, the permanent injury sustained by the loss of three fingers of his right hand, and his efforts to obtain employment. If, considering the evidence and the legal instructions given you by the court, you are of opinion, from a preponderance of the evidence, that the plaintiff is entitled to recover, then you may assess such reasonable damages as will compensate him for the sufferings, expenses, and injuries sustained. If you assess excessive damages, the court can interfere to make them just and reasonable, or set aside your verdict, and grant a new trial. I decline to give the written instructions requested by counsel of defendant otherwise than as complied with in my charge.

NOTE.

DICK, District Judge. A motion for a new trial in this case was not allowed, as I was of opinion that my charge to the jury was not in conflict with the principles of law enunciated in *Railroad Co. v. Baugh*, 149 U. S. 368, 13 Sup. Ct. 914. In that case the fireman brought an action to recover damages sustained by reason of the negligence of the engineer in charge of a locomotive running alone, without any train attached, and which was a mere "helper" to regular trains. The plaintiff and engineer had been in the same common employment on the helper for several months, and both were familiar with the rules of the company regulating the running of the locomotive, and the hazardous nature of the service. The injury complained of was not in consequence of the fireman obeying any order of his superior officer, but resulted from negligence of the engineer, there being no defect in the machinery. The question was not involved as to the right and power of the actual manager of a train to give an order to a subordinate

employee to meet a sudden exigency in the operation of a train arising from defective machinery, where no regular conductor was in charge.

The evidence in the case before us tended to show that the necessity for the order to the plaintiff to go between the cars to couple them arose from a bent link, which could not be placed in proper position with the coupling stick ordinarily employed under the regulations of the company; that the injury was not caused by the fault or negligence of the engineer, but resulted from defects in the reverse lever and the brake on the engine, which prevented the engineer from properly controlling the movement of the train. In *Mason v. Railroad Co.*, 111 N. C. 482, 16 S. E. 698, many cases are cited and reviewed, and in an able and well-considered opinion the doctrine is clearly announced that, "a rule of a railroad company agreed to by the plaintiff [an employee] may be waived or abrogated for the company by the conductor making an order contrary to such rule, when it was the duty of the plaintiff to obey such order." The facts in that case are somewhat similar to the facts in this case. The conductor had given a general order to the brakeman to go between the cars and use his hands whenever he found that the coupling could not be made with the coupling stick provided by the company. The brakeman, in going between the cars to adjust a pin to a bent link, exercised his own judgment, and no positive order was given at the time by the conductor. In this case a specific order was given by the engineer to the plaintiff to go between the cars to meet a necessity which had occurred in the operation of the train. The engineer was the superintending, de facto officer of the company, and had entire charge of the management and movement of the working train; and I was of opinion that under such circumstances he was necessarily the personal representative of the company, and, from the nature of things, he was invested with the power of conductor, and could waive a general rule or special contract of the company with an employee, when such waiver was required by a sudden necessity, caused by a defective appliance of the operating train. The order to plaintiff to go between the cars to couple them with his hands was deemed necessary by the engineer, and was a command to a subordinate employee, which demanded prompt obedience. If the plaintiff had refused or failed to obey, he could at least have been reported by the engineer for disobedience, which would probably have caused a discharge. There was evidence that the bent link could have been thrown out of its place by the coupling stick so as to fall upon the ground; but such action would not have been in strict obedience to the express terms of the order, and would not have accomplished the purpose for which the order was given. I told the jury that they must be satisfied that the plaintiff used reasonable care in attempting to execute the order.

The plaintiff testified that he regarded himself as subject to the orders of the engineer, who required him to leave the place of his ordinary duty as switch tender, and assist in the coupling of the cars; and he felt bound to obey the positive order to go between the cars and couple them with his hands, and he feared that he would be discharged from service if he failed to obey an imperative command. He had a right to presume that the company would have some superintending officer in charge of an operating train competent to give orders to subordinate employees, and secure the prompt and proper management of the train engaged in the performance of the business of the company. The evidence tended to show that defects in the reverse lever and the brake on the engine were the proximate cause of the injury to plaintiff. I was of opinion that it was not negligence on the part of the engineer to attempt to use the machinery near at hand to control the train, although he might have prevented the injury by using the good brake on the tender. He might well suppose that he could safely rely upon the effective operation of appliances furnished by the company for the purpose of controlling, with skill and care, the management of the train, so as not to cause damage to its own property or injury to its employees.

The only questions involved were whether the engineer had a right, by an order, to waive a rule of the company, and whether the safe execution of the order with reasonable care was prevented by defects in the machinery.

HONEY v. CHICAGO, B. & Q. RY. CO.

(Circuit Court, S. D. Iowa, W. D. December 5, 1893.)

1. CONTRIBUTORY NEGLIGENCE—INJURY TO WIFE—HUSBAND'S RIGHT OF ACTION.
Contributory negligence in a wife does not defeat her husband's right of action for medical expenses, loss of society, and of aid in household affairs, in a state where she had been relieved of all common-law disabilities and he of all responsibility for her torts.
2. SAME—IMPUTED NEGLIGENCE.
To render the contributory negligence of a wife, regarded as the agent or servant of her husband, imputable to him, the circumstances must be such that he would be liable for her negligent act if it had resulted in injury to a third person.
3. SAME.
Where a wife is struck by a train while crossing the tracks to the depot, whither her husband has preceded her for the purpose of purchasing tickets, her contributory negligence is not imputable to him, either on the theory that she was his agent or servant, or that he was bound to care for and protect her.

At Law. Action to recover damages resulting to plaintiff from personal injuries caused to wife of plaintiff. Motion for new trial. Denied.

Harl & McCabe and J. M. Junkin, for plaintiff.

Smith McPherson and Wright & Baldwin, for defendant.

SHIRAS, District Judge. Upon the trial of this case before the jury the facts developed in the evidence were as follows: In the year 1891 the plaintiff, W. O. B. Honey, and his wife, Ellen F., resided on a farm in the vicinity of the town of Red Oak, Iowa, which is a station upon the line of railway owned and operated by the Chicago, Burlington & Quincy Railway Company. On the 15th day of August in that year the plaintiff and wife went to Red Oak for the purpose of taking a train upon the defendant's railway. In order to secure tickets, the plaintiff preceded his wife to the depot. To reach the depot it was necessary to cross several tracks which lay between the station building and the town of Red Oak, and the railway company had built a board walk several feet in width across the intervening tracks for the use of passengers passing to and from the depot. As Mrs. Honey approached the depot, a train of cars came in upon a track which crossed the walk upon which she was, and thus cut off, for the moment, her direct access to the depot. For the purpose of reaching the depot by passing around the western end of the intervening train, Mrs. Honey left the board walk, and after taking a few steps in a westerly direction she was struck by a switch engine crossing from the east, and was badly injured. For the injuries thus caused to her person Mrs. Honey brought suit against the railway company, and for the damages in the nature of surgical expenses, and for the loss of the society of his wife and of her aid in taking care of the household the husband, W. O. B. Honey, brought a separate action against the company. For trial purposes the court ordered that the two

cases should be consolidated and tried before the same jury. In both cases the defendant pleaded that the negligence of Mrs. Honey contributed to the accident. Upon the trial the jury was instructed in each case that there could be no recovery unless it appeared from the evidence that the company had been guilty of negligence of such a character as to be a proximate cause of the accident; and, further, that if Mrs. Honey, by negligence on her part, had contributed to the accident, she could not recover, but that negligence on her part would not defeat the action on behalf of her husband. Under these instructions the jury found for the defendant in the suit brought by Mrs. Honey, and for the plaintiff in the suit brought by Mr. Honey. Thus by these verdicts the jury found that the railway company and Mrs. Honey had alike been guilty of negligence. The motion for new trial presents the question whether the court erred in holding, as was done in the instructions to the jury, that the right of action on behalf of the husband based upon the negligence of the railway company and resulting in pecuniary loss and damages to him, could not be defeated by showing that the negligence of the wife contributed to the accident.

It is well settled that if one negligently inflicts injuries upon the person of the wife of another, two causes of action are thereby created,—one in favor of the wife for the bodily injuries received, including the pain and suffering endured; and one in favor of the husband for the surgical and other expenses incurred by him in having his wife properly cared for, and for the deprivation of the society of the wife, and the loss of her assistance in taking care of his household. By section 2562 of the Code of Iowa it is enacted that "a married woman, may in all cases sue and be sued, without joining her husband with her, to the same extent as if she were unmarried." And in *Musselman v. Galligher*, 32 Iowa, 383, the supreme court of Iowa held that an injury to the person of the wife gave rise to a cause of action in her behalf, which was her separate property; and that the husband could not, under the statute, be rightfully joined with her as coplaintiff, but that she must sue in her own name for the damages caused her; and that for any consequential damages caused the husband he could sue in his own name and right for the recovery thereof. It is also clear that the right of recovery on part of the wife, being her separate property, cannot be released and discharged by the husband; nor can the wife release or discharge the right of action accruing to the husband. *Mewhiter v. Hatton*, 42 Iowa, 288; *Pancoast v. Bunell*, 32 Iowa, 394; *Tuttle v. Railroad Co.*, 42 Iowa, 518.

To constitute a right of action based upon negligence it must appear that there has been an invasion of the legal rights or injury to the person or property of the plaintiff as the proximate result of an inadvertent or nonintentional failure on part of the defendant to use the degree of care imposed by the law upon the defendant under the circumstances and relations affecting the parties when the injury happened of which the plaintiff complains. In other words, the right of action is the combination of negligence on

part of the defendant, with a resulting injury to the person, property, or legal rights of the plaintiff. It is therefore evident that under the statutes of Iowa, which have practically removed the common-law disabilities of married women, there is no legal connection or interdependence existing between the right of action accruing to a married woman for injuries caused to her person or her property through the negligence of another and the right of action accruing to the husband for the invasion of his rights caused by the same negligence. As already stated, the supreme court of Iowa, in construing the statute of the state, has declared the law to be that there cannot be a joinder of the husband and wife in actions of this character. The wife must sue alone upon the cause of action accruing to her, and so also must the husband. A judgment rendered in the one case cannot be availed of even as evidence, and much less as an adjudication, in the other. The plaintiff in the one case cannot release or discharge the right of action belonging to the plaintiff in the other. The payment of damages in the one case has no legal effect upon the damages to be awarded in the other. The admissions or statements of the wife, not forming part of the "*res gestae*," are not admissible as evidence against the plaintiff in the suit by the husband, although they are evidence against the plaintiff in the suit brought by the wife; and so also the admissions of the husband, though provable against him, are not admissible in the suit of the wife. In all particulars the right of action accruing to the wife and that accruing to the husband are separate and distinct.

Passing now to a consideration of the principle established in regard to the defense of contributory negligence, we find it settled that if injury has resulted to the plaintiff from the negligence of the defendant as a proximate cause, it is no defense to show that the negligence of a third party co-operated in causing the injury, unless the negligence of such third party is legally imputable to the plaintiff. Thus, in the leading case of *Little v. Hackett*, 116 U. S. 366, 6 Sup. Ct. 391, it was held that a passenger being conveyed in a public hack could recover against a railway company for injuries resulting from the combined negligence of the hack driver and the railway company. In *Railway Co. v. Lapsley*, 2 C. C. A. 149, 51 Fed. 174, it was held by the court of appeals for this circuit that where a person accepts the gratuitous invitation of the owner and driver of a vehicle to ride with him, and exercises no control over such driver, the latter's negligence cannot be imputed to him, so as to defeat his recovery against a third person for injuries resulting from the concurring negligence of the driver and third person. In *Railway Co. v. Cummings*, 106 U. S. 700, 1 Sup. Ct. 493, in which case it appeared that a locomotive engineer had been injured in a collision of trains brought about by the negligence of the company and the negligence of a fellow servant of the plaintiff, it was ruled that the plaintiff could recover against the company, even though the negligence of a fellow servant aided in causing the accident. In *Nisbet v. Town of Garner*, 39 N. W. 516, the

supreme court of Iowa, after a review of the previous decisions of that court, held the rule to be:

(1) "That when several parties are engaged in a common enterprise, and one is injured by the joint negligence of one of his associates and another, the negligence of his associate will be imputed to him, and will defeat all right of recovery against the other party; and (2) that when a person is injured through the common negligence of one who, from their relation, is bound to care for and protect him, and another, the negligence of the former will be imputed to him, and will defeat a recovery against the other party."

The court then proceeds to show that these rules would not justify an instruction to the effect that the driver of a private conveyance is the agent or servant of the person riding in such conveyance, and that, as a matter of law, the negligence of the driver is imputable to the others in the conveyance; and in set terms the court repudiates the rule laid down in *Thoroughgood v. Bryan*, 8 C. B. 114, and adopts and affirms that announced in *Little v. Hackett*, 116 U. S. 366, 6 Sup. Ct. 391. The general principle derivable from the adjudged cases is stated in *Beach on Contributory Negligence*, (129, 132, 133,) as follows:

"The rule upon this branch of our subject is that the contributory negligence of third persons, constitutes a valid defense to the plaintiff's action only when that negligence is legally imputable to the plaintiff. There must, in order to create this imputability, be some connection which the law recognizes between the plaintiff and the third person, from which the legal responsibility may arise. The negligence of the third person and its legal imputability must concur. * * * When the defendant pleads the negligence of a party other than the plaintiff in bar of the action, it must appear, not only that such third person was in fault, but that the plaintiff ought to be charged with that fault."

"We remark at the outset that, in order to create this imputability, there must be a pro tanto identification of the third person with the plaintiff, and that such an identity will be found to exist or be in dispute in two classes of cases,—the first, where the third person was guilty of the contributory negligence as the agent of the plaintiff, and the second, where the cause of action is derived from the third person."

"The rules as to the first class of cases may be expressed as follows: The contributory negligence of a third person, who is guilty thereof as the agent of the plaintiff, must be imputed to the plaintiff. An agent, in the contemplation of this rule, is a person whose negligence, as understood in the rule, would be treated as the principal's in an action for such negligence brought by a third person against the principal. Whenever the contributory negligence of the third person is of such a character, and the third person is so connected with the plaintiff that an action might be maintained against the plaintiff for damages for the consequences of such negligence, then, when the plaintiff himself brings the action, that negligence is, in contemplation of law, the plaintiff's negligence, and it is justly imputed to him."

It cannot be successfully maintained that the right of action in behalf of the husband is derived from the wife, so as to bring the case within the second class named in the foregoing citation. If Mrs. Honey had assigned the right of action accruing to her by reason of the injuries to her person, and suit had been brought in the name of such assignee, the company could have answered to such action that the negligence of Mrs. Honey had aided in causing the accident, because, in that event, the right of action declared upon had originally accrued to Mrs. Honey. The right of action on be-

half of the husband to recover the damages resulting to him never belonged to the wife. She could not assign or release the same. The husband's right of action is based upon the invasion of his rights, and recovery is sought of the consequential damages caused him. The legal injury complained of is that caused to the husband, and not that caused to the wife. The argument of counsel that the right of action in favor of the husband is derived from the wife, and that the latter is the source of his title and claim, is not well founded. The physical injury caused to the person of Mrs. Honey must not be confounded with the legal injury resulting therefrom to her husband. The pain, suffering, and lameness caused by the accident to Mrs. Honey are injuries to her, and do not create a right of action in favor of her husband. When, however, the accident to the wife resulted in depriving the husband of her society, and of her aid in conducting the affairs of his household, and he was put to expense in securing proper surgical care for his wife, then his legal rights were invaded, and for the damages consequent therefrom a right of action accrued to him, which was wholly separate and distinct from that accruing to the wife. The negligence of the wife cannot, therefore, be availed of as a defense to the husband's action on the ground that he stands in the position of an assignee or representative of a right of action accruing to the wife, or upon the theory that his right of action is derived through her. The husband's right of action legally and logically is based upon the negligence of the defendant, resulting in an invasion of his legal rights, and not upon any right of action accruing to or derived from the wife.

Can it be said, in any proper sense, that the wife, with relation to the accident, occupied the position of agent for her husband? In going to the depot, in order that she might take passage upon the train, she was not acting for her husband in any proper sense. She was not undertaking to do anything in furtherance of any business belonging to the husband, nor was she exercising any rights, powers, or authority derived from him. She was acting in her own right, for a purpose personal to herself. The legal relation of principal and agent did not exist between the husband and wife with respect to the matter of her going to the depot for the purpose of taking passage upon defendant's train. As is pointed out in *Little v. Hackett*, supra, to constitute the relation of principal and agent in such sense that the negligence of the latter can be imputed to the former, the relation must be such that responsibility to third parties would attach to the principal for injuries resulting from the negligence of the agent; or, to apply the rule to this case, the relation must be such that W. O. B. Honey would be liable to third parties for injuries caused them by the negligence of Ellen Honey. The point now under consideration can be more clearly apprehended if we assume for the moment that the relation of husband and wife did not exist between the parties named, but that in fact Ellen F. Honey was in the employ of W. O. B. Honey, so that, in a general sense, the relation of principal and

agent or master and servant existed between them. To render the principal or master liable to third parties for the consequence of the negligence of the agent or servant, it must appear that the negligent act is one that is incident to the employment, or is done in the furtherance of the business of the principal or master, or in pursuance of his directions or authority, express or implied. If the act in which the negligence inheres is one aside from the business of the principal or master, and not within the scope of the employment, then it is but a personal act of the doer thereof, for which he alone is legally responsible.

Thus, if Ellen F. Honey had been employed by W. O. B. Honey as a housekeeper, with full charge over his household affairs, she would have occupied the relation of agent or servant to him in all that pertained to that employment. If, however, while this relation existed, she undertook, for her own pleasure, to go to Villisca, for the purpose of attending a social gathering, she would not, while pursuing that journey, be acting within the scope of her employment, nor be engaged in furthering the business of her employer, and hence responsibility for her acts of negligence would not attach to W. O. B. Honey. If the facts of this case be viewed solely in the light of the legal relation of master and servant or principal and agent, it is clear that the negligence of Ellen F. Honey cannot be imputed to W. O. B. Honey, unless it appears that when the accident happened, and in what she was then doing, Ellen F. Honey was acting within the scope of her employment, or in furtherance of the business of W. O. B. Honey; or, in other words, that she was in fact acting for him; and this the evidence wholly fails to show. To enable the defendant company to impute the negligence of Mrs. Honey to W. O. B. Honey, so as to defeat his right of action for the damages caused him by the negligent act of the company, it must be true that the marital relation existing between the parties gives the right to the company to thus interpose the defense of the negligence of the wife as a bar to the action of the husband. The rules of law governing the relation of master and servant or principal and agent certainly do not confer this right upon the defendant under the facts of this case. The action of W. O. B. Honey for the damages caused him cannot be defeated on the ground that Mrs. Honey was his agent or his servant, and as such was negligent.

Can it be defeated on the ground that she was his wife? In considering this aspect of the case it must be always remembered that the legal fiction of the common law, that a husband and wife are one, and that one is the husband, has been wholly abrogated in Iowa by the legislation of the state. Upon this subject the supreme court of Iowa in *Spofford v. Warren*, 47 Iowa, 47, uses the following language:

"Under the statutes of this state the wife is clothed with the same property rights and charged with the same liabilities as the husband. Indeed, it cannot be said that, as to her property, she is deprived of any rights which the husband enjoys that relate to his, or that any remedy is denied her, or any liability removed from her which are possessed by or imposed upon the hus-

band. She can control her own property, vindicate her individual rights, and bind herself by contract, as fully and to the same extent as her husband. * * * These provisions, it must be admitted, completely emancipate the wife from all the bonds recognized by the common law, saving those of affection and moral obligation."

Touching liability for the acts of a wife, it is declared by section 2205 of the Code of Iowa that:

"For all civil injuries committed by a married woman, damages may be recovered from her alone, and her husband shall not be responsible therefor, except in cases where he would be jointly responsible with her, if the marriage did not exist."

This section abrogates the common-law liability of the husband for the acts of the wife, and there is no longer any legal liability on part of the husband to third parties for the consequences of her negligent acts, simply on the ground that she is his wife. To hold the husband responsible for the consequences of her negligence, it must appear that he would be responsible if he was not her husband. In the present case, is there any ground for holding W. O. B. Honey responsible for the consequences of the negligence of Ellen F. Honey, except upon the theory that he is her husband? The statute declares that the relation of husband and wife shall not render the husband responsible for the civil injuries committed by the wife; and, of necessity, some other ground must be sought upon which to found the liability of the husband, if in fact it exists.

The theory of the defense of contributory negligence is that, admitting that the negligence of the defendant was a proximate cause of the injury complained of, nevertheless it was contributed to by the negligence of the plaintiff, or of some third party, for whose conduct, in connection with the injury, the plaintiff is legally responsible. It is the responsibility of the plaintiff for the contributory negligence that makes it available as a defense to his action, and to charge the plaintiff with the responsibility of the negligence of a third party it must appear that the relation between such third party and the plaintiff is such that the defendant or others can hold the plaintiff legally liable for the consequences of the negligent conduct of such third party. In the case now under consideration, suppose the facts had been that the company was not in fault, but that Mrs. Honey had negligently gotten in front of the engine when going to the depot, and that the engine had been derailed and injured, and the persons in charge thereof had likewise suffered personal injuries, could the company or the injured persons recover damages from W. O. B. Honey, on the ground that the accident was due to the negligence of Mrs. Honey? The statute of Iowa relieves the husband from all liability for civil injuries committed by the wife, except in case where he would be liable if the marital relation did not exist. Therefore, in the supposed case, recovery could not be had against W. O. B. Honey simply because he was the husband of the person whose negligence caused the injury.

To hold him responsible, it would be necessary to show that he had personally caused the accident through negligence, or that his agent or servant had been guilty of negligence under such circum-

stances that he was legally liable therefor. The evidence shows that W. O. B. Honey had no personal connection with the accident, and therefore did not aid in bringing it about, and the evidence also fails to show that Mrs. Honey was acting as his agent or servant when going to the depot for the purpose of taking passage on defendant's train. There being, therefore, no ground for holding W. O. B. Honey responsible, for the consequences of the accident, to third parties, by reason of Mrs. Honey being his wife, his agent, or his servant, and as he did not personally aid in causing the accident, why should the defendant company be permitted to defeat the plaintiff's right of action for damages caused him by the negligence of the company upon the theory that the negligence of a third party contributed to the accident, when it cannot be shown that the plaintiff is in any way legally responsible for the actions of the third party?

In some instances, as is held in *Nisbet v. Town of Garner*, supra, negligence may be imputed when it is caused by one who is bound to care for or protect another,—that is to say, the negligence of a parent may be imputed to a child, or the negligence of a guardian to the ward, or the negligence of a husband to the wife; but even in such cases the tendency of the modern decisions is to restrict the application of the principle, and in some cases to wholly repudiate it. This doctrine is not applicable to the case now under consideration. It is not claimed or pleaded that the husband was in any respect guilty of negligence. He stands wholly free from fault, both with respect to himself and with respect to his wife. The aim of the company is to hold him responsible, not for any failure of duty on his part, but for the negligent conduct of his wife. The negligence complained of has no relation to the duties or obligations created by the marital connection existing between Mr. and Mrs. Honey.

The contention of the company is that Mrs. Honey was negligent, because she did not keep a proper lookout for moving trains or engines when she was on or near the railway track. The duty to exercise watchfulness, under these circumstances, did not grow out of or have any legal connection with the marital relation existing between Mrs. Honey and her husband. When she went to the depot she went in her own right, for her own convenience, and not in the performance of any marital duty she owed her husband. In fact, in going to the depot Mrs. Honey was not acting in the relation of agent, servant, or wife to Mr. Honey. By the verdict of the jury it is settled that the negligence of the defendant company was a proximate cause of the accident which deprived Mr. Honey of the society and aid of his wife, and subjected him to the burden of paying the expenses caused by her illness. It cannot be questioned that a cause of action was thus created in favor of Mr. Honey and against the railway company. As a defense thereto the defendant pleads and shows that Mrs. Honey, by negligence on her part, aided in causing the accident, and claims that Mr. Honey is legally responsible for the consequences of the negligence of his wife, and that by reason of such responsibility her negligence defeats his right of action for the injuries caused him by the negligence of the company. The Code of Iowa (section

2205) expressly declares that a husband is not responsible for the civil injuries committed by his wife, simply by reason of the marital relation existing between them; and, as the evidence wholly failed to show that Mr. Honey was, for any other reason responsible for the accident, or for the conduct of his wife in connection therewith, I can see no legal ground for holding that the negligence of Mrs. Honey is a defense to the action on behalf of Mr. Honey.

The motion for new trial is therefore overruled.

McSLOOP v. RICHMOND & D. R. CO.

(Circuit Court, W. D. North Carolina. December 15, 1893.)

1. CARRIERS OF PASSENGERS—ALIGHTING FROM TRAINS—QUESTION FOR JURY.

It is the duty of railroad companies to have safe and convenient places for the alighting of passengers, and to stop trains for a reasonable time for that purpose, and what is a reasonable time in each case is a question for the jury.

2. SAME—CONTRIBUTORY NEGLIGENCE.

As a general rule, passengers cannot properly get off a moving train except by direction of the conductor; but when a train stops at a station without allowing a reasonable time for passengers to alight, one who gets off as it is slowly starting, and is injured thereby, is not guilty of contributory negligence.

At Law. Action by J. M. McSloop against the Richmond & Danville Railroad Company to recover damages for injuries sustained by the alleged negligence of the company.

Jones & Tillett, H. Clarkson, and C. N. Duls, for plaintiff.

George F. Bason and R. B. Glenn, for defendant.

DICK, District Judge, (charging jury.) The plaintiff had purchased a ticket from the agent of the defendant, which authorized him to expect that he would be safely transported from Charlotte to Harrisburg, a station eight miles distant on defendant's railway. It was the duty of the railway company to have a safe place, with convenient surroundings, for the departure of passengers; to stop the train at such place, and remain there a reasonable time to allow those to get off who wished to do so. What is a reasonable time for the departure of passengers is a question of fact for the jury to determine after considering the evidence in the case. In his testimony the conductor said that he knew that there were several passengers on the train who expected to get off at Harrisburg. He should have seen them off safely, or have allowed them sufficient time to get off, without hazard, with the baggage they had in their possession on the cars, with his express or implied assent.

The surroundings at a railway station must be such as not to retard, mislead, or hazard the safety of passengers in their departure from the train. As a general rule, a passenger cannot properly get off a moving train, unless so directed by the conductor, whose experience teaches him when a passenger can make a safe departure.

But if the train stops, and does not remain a reasonable time, and a passenger, to avoid being carried beyond his destination, gets off a slowly starting train, and he is thus injured, he is not guilty of contributory negligence. If, however, the train only "slows up," and does not stop, and is moving with accelerating speed, and a passenger had knowledge, or by reasonable observation might have obtained knowledge, of such increasing movement, and he jumped off, and is injured, he is guilty of contributory negligence, and cannot recover damages. We had an illustration of the application of this last-mentioned principle of law in a case tried in this court to-day, where a companion of the plaintiff brought an action to recover damages for injuries received, and he failed to obtain a verdict, as the evidence showed that he jumped off the train after he had seen the plaintiff in this case fall in his effort to alight.

The evidence in this case shows that at the station there was a freight train on the side track, alongside the passenger train, and both the plaintiff and his companion, when they went on the platform for departure, thought that the passenger train had stopped, and that the freight train before them was slowly moving. You have heard the conflicting evidence as to whether it was night or twilight when the accident occurred, and you can determine what opportunity the plaintiff had of seeing the ground and surrounding objects so as to guard against danger. The plaintiff had a ticket for Harrisburg. The signal whistle was sounded, and the porter called out the name of the station. The plaintiff had a right to presume that the train would stop at Harrisburg; and if he believed, and under the circumstances had good reason for believing, that the train was not moving, and he got off, and was injured, he is entitled to recover reasonable compensatory damages. The evidence is conflicting as to the stopping of the train. If it stopped, and the defendant did not have reasonable time to get off, and the train was slowly starting, and he stepped down, and was injured, he was not guilty of contributory negligence. If you are satisfied from the evidence that the train did stop, then you can consider whether the stop was sufficient for five or six passengers to get off safely, and have their checked baggage delivered, and carry with them a reasonable quantity of bundles and packages which they had in their own possession on the train.

If under the instructions which I have given you as to questions of law, you are satisfied from a preponderance of the evidence that the plaintiff is entitled to recover, then you can assess reasonable compensatory damages. In fixing the amount of such damages you can consider the physical pain and injury sustained, and the mental suffering of plaintiff arising from apprehension of great bodily harm and imminent danger to his life while prostrate close to the track of the moving train.

It is your province to determine the amount of damages, but they must be reasonable. If, in the opinion of the court, the damages assessed are excessive, the court can reduce them, with the consent of the plaintiff, or grant a new trial. If you think from the evidence that the plaintiff is entitled to recover, then I hope there will be no

disagreement in opinion between the court and jury as to the reasonable amount of damages.

I decline to give, in the order presented, the specific written instructions requested by counsel of defendant, as I am of opinion that they have been substantially covered by my charge to you.

GAHAN v. WESTERN UNION TEL. CO.

(Circuit Court, D. Minnesota, Third Division. January 2, 1894.)

TELEGRAPH COMPANIES—FAILURE TO DELIVER TELEGRAM—MENTAL ANGUISH.

There can be no recovery for mental anguish caused by mere negligence in failing to deliver a telegram sent by plaintiff's agent, announcing the death of a relative, either at common law, or under the Minnesota statute, which limits recovery to actual damages.

At Law. Action by Michael Gahan against the Western Union Telegraph Company to recover damages for failure to deliver a telegram. Verdict directed for defendant.

Statement by WILLIAMS, District Judge:

Plaintiff's brother Thomas Gahan, on January 14, 1891, filed at Chicago, Ill., for transmission to plaintiff, at South St. Paul, Minn., paying the tolls thereon, the following message:

"Chicago, January 14, 1891.

"To Michael Gahan, South St. Paul: Your brother Wm. Gahan is dead. Come at once. Will be buried Friday.

[Signed]

"Thomas Gahan."

The message was transmitted to St. Paul, and there lost, in some way not explained, and not forwarded to its destination, and plaintiff was therefore not apprised of the death of his brother until some days after his burial. Plaintiff brings this action to recover damages for mental anguish suffered on account of the negligent failure to deliver the message. The action is ex contractu, the complaint alleging that Thomas Gahan, who sent the message and paid the tolls,—40 cents,—did so as the agent of plaintiff. Defendant objected to the introduction of evidence as to mental anguish, and, at the close of the case, moved for an instruction to the jury to return a verdict for defendant.

Jos. A. Schroll, for plaintiff.

C. M. Ferguson, for defendant.

WILLIAMS, District Judge, (after stating the facts.) The case is somewhat new, and yet it has been pretty well adjudicated, and, outside of the decision of Judge Maxey, (Beasley v. Telegraph Co., 39 Fed. 181,) every time it has been touched by the federal courts, it has been clearly and unequivocally held that the action cannot be maintained. The state courts have pretty generally passed upon the question, and, outside of the cases cited by counsel for plaintiff, I do not think you will find another state court that upholds that doctrine. A large majority of the state courts have held that the action cannot be maintained, and that no recovery can be had. Counsel has read from the Carolina report, (Young v. Telegraph Co., 107 N. C. 370, 11 S. E. 1044,) and I think that is the strongest the case can be put; and that is very much in consonance with the

sentiment which must arise, to a large extent, in the breasts of all men; but, when you come to analyze it, I think the best you can say is that this sentiment has carried away the better judgment of the court. There is nothing to maintain it, and it is not, as a principle of law, sound in any respect. Furthermore, the statute of Minnesota is clear and unequivocal, and under it no action can be maintained except for actual damages. The term "actual damages" has a significance and meaning of its own, and any attempt to reason a claim of this kind into actual damages certainly must fail. This court holds, in accordance with the position taken by defendant, that the action cannot be maintained. Counsel has stated that it is agreed that plaintiff disclaims anything on the ground of any willful or malicious disregard of the rights of plaintiff, and seeks to recover entirely upon the ground of negligence in the performance of the contract. There is a claim that 50 cents was expended in searching for this telegram, but I think that is too remote. There is another claim of 40 cents for sending the telegram, but counsel for plaintiff says he makes no claim for that.

Let the record be fairly made up, showing that counsel for plaintiff expressly disclaims anything on the ground of any willful and malicious disregard of the rights of plaintiff, and asks the recovery simply on the ground of negligence on the part of the defendant company in the nondelivery of the telegram, thereby causing plaintiff to suffer great mental anguish, and that the court then directed the jury to find a verdict for the defendant. Ordered accordingly.

BROWN et al. v. CRANBERRY IRON & COAL CO.

(Circuit Court, W. D. North Carolina. February 7, 1894.)

DEEDS—CONSTRUCTION—MINERAL RIGHTS.

A deed which conveys "the following tract of land, situate," etc., "that is, the one-half of the mineral interest in the said land," (described by metes and bounds,) to have and to hold "the one half of the mines and minerals" therein, must be held to convey the grantor's entire mineral interest, even if considered upon its face alone; but especially so in the light of the facts, known to both parties, that the grantees had already purchased the fee of the lands for the purpose of making a sale to a company having sufficient capital to develop its mineral deposits, that the sale had fallen through because of the grantor's claim to an interest in the mineral rights, and that the grantees desired to purchase the same in order to perfect, and make salable, their title.

At Law. Action brought by John E. Brown against the Cranberry Iron & Coal Company, under the direction of the court of equity, to establish his title, as tenant in common, to the land of which he prayed for partition; the defendant, in its answer, having asserted "sole seisin." 40 Fed. 849.

Long before bringing the suit, the plaintiff had made the following deed to the parties under whom defendants claim:

This indenture, made and entered into this 7th day of June, A. D. 1867, between John E. Brown, by his agents and attorneys in fact, Z. B. Vance and William J. Brown, of the first part, and Thomas J. Sumner and Robert

F. Hoke, of the second part, witnesseth that the said John E. Brown, for and in consideration of the sum of twenty-two thousand dollars in hand paid, and secured to be paid, before the execution of this deed, the receipt whereof is hereby acknowledged, the said John E. Brown hath bargained and sold, and by these presents doth bargain, sell, release, relinquish, and confirm, unto the said Thomas J. Sumner and Robert F. Hoke, the following tract of land, situate and being in the county of Mitchell, in the state of North Carolina; that is, the one-half of the mineral interest in the said land: Beginning on a hickory and sugar tree marked "W. F. P.," west of Cranberry creek, in the gap of the humpback of the Yellow mountain, and runs west 123 poles, crossing a branch at 8 poles, and another at 88 poles, to a Spanish oak and maple tree; then south 74 poles, crossing a branch at 20 poles, to a large Spanish oak on the top of a ridge; the same course, 120 poles, crossing a branch at 83 poles, to a small chestnut on the east of the humpback of the said Yellow mountain; then east 40 poles, to a large sugar tree; then south 114 poles, crossing a branch at 8 poles, and Roaring creek at 108 poles, to a beech marked "W. F. P.;" then east 130 poles, to a buckeye and sugar tree; then south 70 poles, to a poplar in a flat; then west 30 poles, to a buckeye; then south 120 poles, crossing a branch at 100 poles, and another at 110, to a maple in a flat; then east 574 poles, crossing Cranberry creek, 9 poles, to a stake on the West fork, east of Cranberry creek; then north 949 poles, to a stake; then west, crossing said creek, 489 poles, to a black oak, white oak, and chestnut; same course, 92 poles, to a stake; then south to the beginning,—containing some three thousand acres, and being the same lands condemned for the Cranberry Iron Works, known as the "Bounty Lands," and the same conveyed by Thomas M. Pettit to William Dugger, and the same purchased by the said Jno. E. Brown, under the decree of the court of equity for Buncombe county, as the property of Thomas M. Pettit and the heirs of Wm. Cathcart. To have and to hold, the one-half of the mines and minerals and mineral interest in said land, and the appurtenances thereunto belonging. And the said John E. Brown doth warrant and defend the title to the one-half of the mines, minerals, ore bank, and mineral interest within the boundaries of the said lands, except the five tracts granted to Waighstill Avery, and one to Reuben White, within said grant of prior date to the grant to William Cathcart, to the said Thomas J. Sumner and Robert F. Hoke, and their heirs, forever, against the lawful claims of all and every person whatsoever. In testimony whereof, the said John E. Brown, by his agents and attorneys, Z. B. Vance and Wm. J. Brown, has hereunto set his hand and seal the day and date above written.

[Signed]

For Jno. E. Brown.

[Seal.]

W. J. Brown, Agt.

[Seal.]

Zebulon B. Vance, Agt. [Seal.]

Witness:

Geo. W. Swepson,

B. S. Gaither.

Chas. A. Moore, P. J. Sinclair, M. E. Carter, and P. A. Cummings,
for plaintiff.

R. H. Battle, Geo. N. Folk, W. H. Malone, and J. W. Bowman, for
defendant.

DICK, District Judge. On the trial of this case the defendant offered in evidence a deed executed by the plaintiff, and insisted that he was estopped thereby from asserting title to any minerals embraced within the boundaries mentioned in the deed. This question of law was fully discussed by counsel in the argument, and was reserved by the court for subsequent determination. An issue was then submitted to the jury, as to whether the plaintiff was estopped by matters of fact occurring previous to and contemporary with the negotiation of sale, and the execution of the deed, as disclosed in the

pleadings and evidence; and that issue was found in favor of the defendant.

As the counsel of plaintiff presented written requests for instructions, and filed a bill of exceptions to the charge of the court, with the view of carrying the case to the circuit court of appeals by a writ of error, I think the record of the trial will not be complete, without a determination of the question of law reserved by the court. The deed of the plaintiff, made to the grantees under whom the defendant claims, was properly executed by the fully-authorized agents and attorneys in fact of the grantor; was founded on a valuable and adequate consideration; was duly registered, and embraced within its description of boundary the entire tract of land in which the plaintiff claimed an undeveloped mineral interest; the fee in the soil then being in the grantees by previous purchase from other parties, who had title and a right to convey. In this case, it is unnecessary to consider whether the title of the grantor was legal or equitable, or the right to the subject-matter was corporeal or incorporeal in its nature, or what is the form and operation of the conveyance, as the common-law rule is well settled in this state, that, if a deed cannot operate fully in the way intended by the parties, the court will endeavor to construe it so that it shall operate in some other manner, to effect the objects and purposes intended, and in accordance with the good faith and the manifest merits of the transaction.

The plaintiff insisted that at the time of the execution of the deed he had a mineral interest in said lands, as tenant in common with the grantees and with other parties, amounting to more than an undivided half, and that he conveyed only an undivided half of such mineral interest under the express description of the subject-matter set forth in his deed, and that he is now entitled to the part interest not conveyed. The interest claimed by the plaintiff was not an undivided right, as tenant in common, to the minerals in all the lands within the boundaries of the deed. It was attached to some parts of the land which he had previously sold, reserving some or all the minerals, and the location, extent, and value of his interest was unascertained. There were other persons who owned tracts of land and minerals within said large boundaries. The claim of the plaintiff, as to quantity and value, was indefinite, and not capable of being accurately fixed; and the description of "the one-half of the mineral interest in said lands" probably largely exceeded his interest, as the most valuable minerals had been developed, and then belonged to the grantees.

The question of construction presented for determination is whether such description of the subject-matter of the deed was intended to convey all the mineral interest then owned by the grantor, or only an undivided half of the mineral interest in said lands.

The counsel of defendant insisted that the law presumes that a legal instrument is grammatically written, and it should be construed according to the rules of grammar, to give effect to the intelligible meaning and purpose of the parties. The deed purports to transfer or release the interest of the grantor in the entire tract

of land described by metes and bounds, and then the definite article is employed to make cumulative and more particular description, and shows that the grantor only claimed "the one-half of the mineral interest in said lands" and intended to convey or release his entire interest to his cotenants in possession. They further insisted that the legal force and effect of the deed was to convey such entire interest, as there was no express reservation or exception distinctly and definitely excluding any right or interest from the operation of the deed; that where a deed is executed by one party only, and it contains an indefinite or ambiguous clause, susceptible of two plausible but inconsistent significations, the one is to be adopted which is most strongly against the grantor and in favor of the grantee, and that this construction is more especially required where the intention and objects of the grantee were well known and understood by the grantor, and were induced by his conduct and declarations previous to and contemporary with the transaction; that where one construction of a clause in a deed will work injustice, and the other is consistent with the right of the case, that one should be adopted which standeth with the right; that the intention of parties to a contract is the contract, and should prevail, although such intention may not come strictly within the letter of the instrument employed; that the state of things and the surrounding circumstances in which an agreement is made should be looked at as a means of throwing light upon its meaning, especially for the purpose of ascertaining the true subject-matter; that a deed should be construed with reference to the subject-matter. When the property conveyed is capable of definite ascertainment and description, an accurate description may well be required. But, where the nature and condition of the property is such that a definite description of its extent and value cannot be ascertained,—an indefinite description can, by extrinsic evidence, be fitted to the subject-matter by showing the intention of the parties at the time the deed was executed. These legal propositions—founded in reason, justice, and common honesty—seem to be well sustained by authorities, and they appear to be in accordance with the intention of the parties, manifested on the face of the deed, when considered in the light of the previous and contemporary negotiation and transaction of the parties. 2 Bl. Comm. 379; 1 Shep. Touch. 86; Noonan v. Bradley, 9 Wall. 394-407; Steinbach v. Stewart, 11 Wall. 566-576; Canal Co. v. Hill, 15 Wall. 94; Bank v. Kennedy, 17 Wall. 19-28; Chicago, etc., Ry. Co. v. Denver, etc., R. Co., 143 U. S. 596, 12 Sup. Ct. 479; Topliff v. Topliff, 122 U. S. 121, 7 Sup. Ct. 1057; District of Columbia v. Gallaher, 124 U. S. 505, 8 Sup. Ct. 585; Rowland v. Rowland, 93 N. C. 214; Lowdermilk v. Bostick, 98 N. C. 299, 3 S. E. 844.

In the construction of the language of a deed or other contract, the fundamental rule is that the intention of the parties must be supported, as to the extent of its operation, if not contrary to the rules of law. This intention must, if possible, be ascertained from the deed itself, by considering all its parts. The words in a deed

cannot, as a general rule, be added to, explained, or contradicted by extrinsic evidence, but where any part is indefinite or ambiguous, or cannot be fully understood as to the intention of the instrument, it may be construed in the light of surrounding circumstances, in which may be considered the position and relation of the respective parties, the objects of the conveyance, and the subject-matter at and subsequent to the transaction. A court may avail itself of the same light which the parties possessed at the time the deed was executed, and may consider previous and contemporary transactions and facts to ascertain the subject-matter, and the sense in which the respective parties may have employed and understood the particular expressions in the deed. *Merriam v. U. S.*, 107 U. S. 437, 2 Sup. Ct. 536; *Prentice v. Forwarding Co.*, 58 Fed. 437.

The evidence shows that the grantees had purchased the fee in said lands for the purpose of selling to some company which had sufficient capital to develop and utilize the minerals; that an effort had been made by them to sell, and the sale was not effected on account of the outstanding claims of the grantor and others to mineral interests in said lands; and that these facts were well known to the intelligent, faithful, and highly honorable attorneys in fact of the grantor at the time of the execution of the deed. The grantor claimed to be a tenant in common in the minerals with the grantees, who had purchased a large part of the fee in the soil from persons who derived title from the grantor. The parties, as tenants in common, had in some respects a relation of trust and confidence to each other, and the grantees had a right to expect a full disclosure as to the mineral interest claimed by the grantor, when he knew the object they had in view in making the purchase. *Rothwell v. Dewees*, 2 Black, 613.

The evidence shows that the grantees had employed able counsel, who had examined the books in the office of the register of deeds, and could not ascertain the nature and extent of the title of the grantor to the minerals claimed, and who had, after careful investigation, expressed the opinion that no evidence of title was shown by the registry. The mineral interest claimed by the grantor was undeveloped, and its value was not capable of being ascertained without careful exploration and considerable expenditure. The large amount of money received by the attorneys in fact of the grantor, as a consideration for the deed, tends strongly to show that they intended to convey, and that the grantees expected to receive, all of the mineral interest of the grantor. The grantor claimed to be the owner of a particular estate in the premises, which estate his deed purported to convey by certain metes and bounds, and without any express reservation or exception. Such affirmation of a particular estate must necessarily have influenced the grantees in making purchase, and induced them to believe that they were acquiring all the estate in the lands owned by the grantor. In such cases the rules of law are well settled, and are founded upon the highest principles of morality, justice, and common sense; and they tend to prevent falsehood and fraud, and to secure good faith

and fair dealing, by imposing an estoppel, where, in conscience and honesty, a grantor should not be allowed to claim to the contrary. *Van Rensselaer v. Kearney*, 11 How. 297.

The attorneys in fact of the grantor were highly honorable men, were faithful agents, and were familiar with the rights of their principal. From the nature of the transaction, and judging their conduct by the ordinary principles of common honesty and fair dealing, which might well be expected from men of such high character, we cannot suppose that they intended to reserve from the operation of the deed an undeveloped mineral interest; which, without any expense on the part of the grantor, would be greatly enhanced in value by the subsequent expenditures of the company to which the grantees might sell the property. We are sure, from the evidence as to the large amount of consideration money paid for the property, as to the objects they had in view, and as to the reliance which they placed upon the representations of the reliable agents of the grantor, that the grantees expected to be invested with the entire interest of the grantor. The location, extent, and value of such interest could only be ascertained by expensive exploration and development. Mineral deposits in land undeveloped, held by tenants in common, are not the subject of actual partition in specie, either at law or in equity. The only methods which the grantees could have adopted, to acquire entire title in the minerals in their lands, were to purchase from their cotenants, or have such interest sold under a decree of a court of equity. The grantees desired to develop such property, and have a perfect title, so that they might realize all the benefits of their labor, skill, and expenditure. The habendum in the deed in no way restricts or qualifies the premises, but employs the same description of the subject-matter conveyed. We observe that, in the covenant of warranty, exception was made as to six tracts of land within the boundaries, which had been previously acquired by Avery and White; and we reasonably infer that if the grantor still owned an undisposed-of interest in the minerals, which was not intended to be conveyed, the attorneys in fact would have disclosed such interest by an exception in the deed. They well knew that the material inducement to the contract on the part of the grantees was to obtain a complete transfer of the entire interest of the grantor in order that they might accomplish their purpose which had been previously defeated by the outstanding interest of the grantor. The evidence shows conclusively that the attorneys in fact acted in good faith, and intended to convey, and believed that they did convey, all the mineral interest of their principal. We are strongly inclined to the opinion that the present claim of the plaintiff was an afterthought, not suggested by his agents, but induced by a recent examination of his old deeds, and a supposed discovery that some of his many reserved mineral interests were not embraced within the description of the subject-matter in his deed to the grantees. We are confirmed in this opinion by the fact that he asserted no claim to an unconveyed mineral interest for nearly 20 years after the execution of the deed, although he had knowledge that

the defendant company had made large expenditures in developing the minerals, and were in possession, claiming to hold the premises in severalty.

We have thus far chiefly considered the force and effect of the deed in the light afforded by extrinsic evidence, as the most important object in the construction of all contracts is to ascertain the intention of the parties. But, independent of such evidence, we are of opinion that the deed, on its face, shows that the attorneys in fact of the grantor intended to convey, and did convey, all the grantor's interest in the land. In the first clause of the premises descriptive of the subject-matter, the grantor conveyed all the lands within certain boundaries. This grant conveyed all the interest of the grantor, of every kind and description, as there was no reservation or exception of the minerals, which would pass with the land without such exception. The second cumulative clause in the premises, more particularly describing the subject-matter, is subordinate, and, if repugnant to the first, must be rejected in construction. It cannot be construed as implying an intention to except some other mineral interest from the operation of the deed. "An exception is ever a part of the thing granted," and must be made in apt words, of certain description, so as to keep it from passing by the grant. *Waugh v. Richardson*, 8 Ired. 470. The two clauses in the premises are not repugnant, and can be easily reconciled by construing the second as embracing the entire mineral interest claimed by grantor in the lands mentioned in the first clause. There is a well-settled rule of legal construction that "the express mention of one thing implies the exclusion of another." 2 Minor, Inst. 961. This rule of law is also applicable in construing the covenant of warranty in this deed as an assurance that the grantees shall quietly hold and enjoy the lands granted against "the lawful claim of all and every person whatsoever."

After full consideration of the transaction in the light of surrounding circumstances, and without placing any strained construction upon the language, we think the deed, on its face, clearly shows that the attorneys in fact of the grantor intended to convey, and the grantees expected to be invested with, all the mineral interest of the grantor, and that the negotiation of sale had proceeded upon that understanding between the parties, and the legal effect and operation of the deed was to convey all the mineral interest of the grantor within the metes and bounds mentioned, and now estops him from claiming that all his interest was not thus conveyed.

VAN DUZEE v. UNITED STATES.

(District Court, N. D. Iowa, E. D. January 13, 1894.)

1. CLERKS OF COURT—FEES.

The clerk is entitled to fees for making duplicate certified copies of the orders of court for the payment of jurors and witnesses, and of orders directing the marshal to procure record books needed for the business of the court, but not for affixing the seal to the certificates thereto.

2. SAME.

The clerk is entitled to fees for filing indictments when returned by the grand jury, and for making a record entry of the presentment and return thereof.

3. SAME.

The clerk is entitled to folio fees for making separate record entries of the various steps and proceedings in a criminal case, with the necessary repetitions of caption, etc., and cannot be required to delay the entries until the termination of the case in order to make all the entries under one caption; but when sentence is announced, and in part suspended, at the same time, the entries should be under one caption, and a charge for repetition thereof should not be allowed.

4. SAME.

The clerk is entitled to fees for making reports to the court of the per diem and mileage due to jurors and witnesses.

5. SAME.

The clerk is entitled to fees for furnishing to the marshal two certified copies of the order of the court, directing the marshal to furnish meals to jurors in criminal cases, but not for affixing the seal thereto.

6. SAME.

The clerk is entitled to fees for filing reports made by the district attorney in regard to marshal's, clerk's, attorney's, and commissioner's accounts, and for making entries on the record showing the presentation of the accounts in open court, and the action of the court thereon.

7. SAME.

The clerk is entitled to fees for certificates showing that the duplicate of the marshal's account has been duly filed with the clerk.

8. SAME.

The clerk is entitled to folio fees for making entries showing approval of bail bond, and continuance of trial from day to day, for entering orders of court allowing extra compensation to the district attorney in certain cases, and for making certified copies of these orders, to be attached to the original and duplicate accounts.

At Law. Action by A. J. Van Duzee against the United States to recover for services rendered as clerk of court. Judgment for plaintiff.

A. J. Van Duzee, pro se.

M. D. O'Connell, U. S. Dist. Atty., and De Witt C. Cram, Asst. Dist. Atty.

SHIRAS, District Judge. The plaintiff in this action is the clerk of the United States district and circuit courts in and for the northern district of Iowa, and brings this suit to establish his right to the payment of the sum of \$329.05, which he claims is due him for services rendered as clerk of said courts, for which accounts have been duly rendered to the accounting officers of the proper department at Washington, and payment refused. Attached to the petition is an itemized statement of the services rendered. The undisputed evidence in the case shows that the work represented by the several items in the account contained has been done, and the questions for decision are whether the work done is of the character properly chargeable against the United States, and, if so, whether the amount charged is correct.

1. The first item charged in the account is for making certified duplicate copies of the orders of the court for the payment by the marshal of the sums due jurors, grand and petit, and witnesses,

with a certificate and seal attached thereto. At each term of court, a roll is made out, containing the names of jurors, the days of attendance, the number of miles traveled, and the amounts due each juror, and an order is made thereon by the court directing the marshal to make payment, accordingly, to the jurors. A similar roll and order are made, relative to the witnesses who are entitled to payment for their attendance from the United States. The orders of court thus made are the authority for the payment by the marshal of the fees and mileage due jurors and witnesses. When the marshal subsequently makes out his account to be forwarded to the department at Washington, two certified copies of the order of the court are furnished him by the clerk, one of which is attached to the original account, and the other to the duplicate. Under the settled practice of the court, and in accordance with the requirements of section 855 of the Revised Statutes, the orders made, directing the payment of the jurors and witnesses by the marshal, are entered upon the records of the court, and the folio fees therefor are properly chargeable in favor of the clerk. The order of the court thus made is the voucher upon which the marshal relies for his authority to make the payments, and, of necessity, copies thereof, duly certified, must be furnished the marshal, one of which is made part of the original report sent to Washington, and the other is made part of the duplicate account, which is retained in the clerk's office under the provisions of section 1 of the act of February 22, 1875, (18 Stat. 333.) In the instructions issued by the attorney general to marshals, attorneys, and clerks, and found in the Register of the Department of Justice for 1886, p. 235, it is provided that "the vouchers must be marked 'Original' and 'Duplicate,' and the duplicate must be a duplicate in fact, not a copy." To meet this requirement of these instructions, which are binding alike upon the marshal and the clerk, it is necessary that the clerk should furnish duplicate copies of the orders made by the court, directing payment of the sums due jurors and witnesses, each copy being duly certified by him, and for such services he is entitled to charge the statutory fees. Included in these items is a charge for attaching the seal to the clerk's certificate. In the case of *U. S. v. Van Duzee*, 140 U. S. 169, 11 Sup. Ct. 758, it was ruled that, if the officers of the treasury department chose not to require the authentication of the certificate of the clerk by the seal of the court, they could dispense with the need thereof, and that the clerk could not recover the statutory fee for affixing the same. If a seal is not needed to the certificate of the original copy of the order of the court, it is clearly not needed to the duplicate order; and, under the ruling of the supreme court in the case just cited, the fees charged for affixing the seal to the certificate of these orders, whether original or duplicate, must be disallowed. *U. S. v. Jones*, 147 U. S. 672, 13 Sup. Ct. 437.

2. The next item in the account excepted to is one including charges made for making original and duplicate copies of the orders of the court directing the marshal to procure the record books needed for the business of the court, and used in the clerk's office. When books of this character are needed, application is made to the court

for an order directing the marshal to procure the book; and the orders thus made, and duly recorded, are the authority upon which the marshal relies in procuring the same for the use of the court. The same need exists for furnishing two certified copies of these orders, to be made part of the original and duplicate accounts of the marshal, as in the case of the orders made for the payment of jurors and witnesses, and the clerk is clearly entitled to the statutory fees therefor. A charge is also made for attaching the seal of the court to the certificates; but this comes within the ruling of the supreme court in the case just cited, to wit, *U. S. v. Van Duzee*, 140 U. S. 169, 11 Sup. Ct. 758, and for that reason cannot be allowed.

3. The next exception taken by defendant covers the charges made for filing indictments when returned by the grand jury, and for making a record entry of the presentment and return thereof. The practice of the court is that the grand jury report the indictments found by them to the court, and the clerk receives the same, and marks them "Filed," giving the date. In addition thereto, an entry is made in the records of the court, showing the fact of the return or presentment of the indictment into court by the grand jury, and the clerk charges the statutory fee for filing the indictment, and also the folio fee for making the entry upon the court records. Objection is made to the allowance of both these classes of charges, from which it would appear that the accounting officers deem it unnecessary that indictments should be filed by the clerk, or that any record should be made of the return thereof by the grand jury. A clerk who should fail to identify the indictments coming into his hands by marking them "Filed," and should likewise fail to place upon the record proper evidence of the action of the grand jury in returning the indictments to the court, would clearly be derelict in his duty; and for these services thus rendered in the performance of his duties he is entitled to the usual fee for filing each indictment, and the folio fee for making the record entry.

4. Exception is next taken to the charges included in item 3 of the account sued upon, upon several grounds. This item covers the charges made in a large number of criminal cases for entering upon the records the arraignment and plea of defendant, the record of the trial and verdict, the sentence, and in some cases suspension, in whole or in part, of the sentence. Part of the total sum claimed has been allowed and paid, and the suit is for the balance left unpaid. As I understand the position of the defendant, it is that the several entries made by the clerk in each case should be consolidated, thus saving the writing the title of the case more than once, and avoiding repetitions, which become necessary when the entries are made separately. The theory of the defendant seems to be that the clerk should not make any record entries until a case is closed up, and should then make one general entry, or final entry, covering all the steps taken in the case, from the return of the indictment to the pronouncing of the sentence, inclusive. To do this would revolutionize the entire method of keeping the records of the court. Each day's proceedings had in the court in all matters coming before it are entered as of that day, and the entry is signed

by the judge, and this method would have to be abandoned if the theory now advocated by the government should be adopted. The practice of the court is to have an entry made of each step taken in a case. Thus, when an indictment is presented or returned by the grand jury, it is received by the court, and an entry of such fact, under the proper title, is made upon the record; and, when asked by the district attorney, an order is entered for the issuance of a bench warrant, and the amount of bail required is fixed. When the defendant comes or is brought into court, he is arraigned, or waives formal arraignment, and ordinarily pleads to the indictment, or has time allowed for so doing. Of these proceedings, a proper entry is required to be made. When the case is ordered to trial, which may be on the same or some future day, the record shows this fact, with the calling and swearing the jury, and any other proceedings connected therewith, including the return of the verdict. If the trial lasts more than one day, the record shows the fact. Finally, if the defendant is convicted, the sentence is imposed. These several distinct steps, which are found in the progress of nearly every case, seldom, if ever, occur all on one and the same day. Of necessity, therefore, separate entries must be made of the proceedings had; and this has become the settled and uniform practice of the court, and is followed, even though two of the steps named happen to be taken on one day. The slight additional expense resulting from writing the title of the case twice or more times, instead of once, is not a sufficient reason for requiring the clerk to change the settled rule in making the entries upon the record.

I entirely agree with the views of the counsel for the government that all mere padding of the record entries for the purpose of enlarging the folio fees chargeable for the same should be prevented; but, on the other hand, when the clerk, in making such entries, does no more than to set forth, in an orderly manner, the several steps taken and proceedings had in each case, so that the record entries reflect truly the action of the court, he is entitled to the statutory fee for making such entries. It must be borne in mind that if the record, through too much condensation, omits to recite some material matters, the verdict rendered may be overthrown by an appellate court. A notable instance of this is to be found in the case of *Lewis v. U. S.*, 146 U. S. 370, 13 Sup. Ct. 136. It is clearly of much more importance that the record entries should be full and complete, than that they should be reduced to the lowest limit in point of words written, at the risk of having the whole proceedings held for naught. An examination of the record entries included within the account sued upon fails to show that the same are excessive in recitals or repetitions, and in one particular, only, are they open to criticism in matter of form. When a sentence is pronounced, and the court, at the time, suspends the same in whole or in part, there does not seem to be any good reason or necessity for making a separate entry of the suspension. If, in fact, the order of suspension is not made at the time the sentence is pronounced, then a separate entry is proper; but when the suspension

is, in fact, part of the action of the court, in entering the sentence originally, then it properly forms part of that proceeding, and should be included in the same entry, thus obviating the need for rewriting the title of the case, and the use of introductory words in making the substance of the entry of suspension. A proper reduction must therefore be made in the folio fees to cover the extra words used by reason of these separate entries.

5. Exceptions are also taken to the folio fees charged for making final entries in the several criminal cases named in item 3 of the account; but the questions thereby presented have been settled adversely to the position of the defendant in the case of *U. S. v. Van Duzee*, 140 U. S. 169, 11 Sup. Ct. 758, and, following the holding of the supreme court in that case, the charges are allowed.

6. The sixth item in the account—the same being excepted to—is for making reports to the court of the per diem and mileage due to jurors and witnesses. These reports are needed to enable the court to make the proper orders directing payment to be made by the marshal. It cannot be expected that each juror and witness shall come before the judge, and prove his attendance. Such proof is made before the clerk, and the rule of court requires of the clerk that he shall, at each term, report the list of jurors and witnesses to the court. These reports are made by the clerk under the direction of the court, and, as the fee bill allows 15 cents per folio for making reports, (section 828, Rev. St.,) it is clear that the charges made are allowable.

7. Exceptions are also taken to the charge made for making two certified copies, under seal, of the order of the court directing the marshal to furnish meals to jurors in certain criminal cases. These copies are furnished the marshal as part of the vouchers to be attached to the original and duplicate copies of his account. The fees for making the certified copies are clearly proper, but for attaching the seal must be disallowed.

8. The next class of charges excepted to is the statutory fee for filing reports made by the United States district attorney in regard to the marshal's, clerk's, attorney's, and commissioner's accounts. The rule of this court provides that, when an account of either of the officers named is presented for approval, it must be submitted to the district attorney for his examination, and the rule requires him to make a written report thereon, to be submitted to the court. The rule of the court requires the report to be made and filed, and, as the clerk performs the work of filing, he is entitled to his pay therefor; and the same is true of the charges made for the entries upon the record showing the presentation of the accounts in open court, and the action of the court thereon.

9. Exception is also taken to the charges made for certificates showing that the duplicate of the marshal's account had been duly filed with the clerk. These certificates are forwarded with the original accounts to the accounting officers of the treasury. Without these certificates it could not be known to the accounting officers whether the marshal had met the requirements of the statute by filing with the clerk the duplicate of his account, and it would

seem, therefore, to be clearly the duty of the clerk to certify to the fact when forwarding the original account; and this is required of him by the instructions from the attorney general. See page 265, Register of Department of Justice for 1886. The charge therefor is allowed.

10. Exceptions are also taken to the folio fee charged for entries upon the record showing approval of bail bond, for entries showing the continuance of the trial of cases from day to day, for entering orders of the court allowing the district attorney extra compensation in certain cases, and making certified copies of these orders, to be attached to the original and duplicate accounts of the attorney. These entries were all made in order to preserve, upon the record proper, evidence of the action of the court in these several particulars, and they clearly come within the provision of the fee bill, and the proper statutory fee is therefore allowed for making the same, as well as for making the certificates to accompany the reports of the attorney. The fee charged for attaching the seal must be disallowed.

Of the total sum sued for, there is disallowed, for the reasons stated, the sum of \$14.55, leaving a balance due of \$314.50, for which judgment will be entered in favor of the plaintiff.

CRUIKSHANK v. UNITED STATES.

(Circuit Court of Appeals, Second Circuit. January 12, 1894.)

No. 58.

1. CUSTOMS DUTIES—CLASSIFICATION—"BIRD PEPPERS."

Sierra Leone "chillies" or "bird peppers," whole, but in a dried state, are exempt from duty, as spices not edible, under paragraph 560 of the tariff act of 1890, and are not dutiable as Cayenne pepper unground, under paragraph 326. 54 Fed. 676, reversed.

2. SAME—DEFINITIONS.

"Edible," as used in paragraph 560, is to be taken in its common meaning. 54 Fed. 676, reversed.

Appeal from the Circuit Court of the United States for the Southern District of New York. Reversed.

Comstock & Brown, (Albert Comstock, of counsel,) for appellant.
Edward Mitchell, U. S. Atty., (Thos. Greenwood, Asst. U. S. Atty., of counsel,) for the United States.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

WALLACE, Circuit Judge. This is an appeal by the importer from a decision of the United States circuit court for the southern district of New York, affirming a decision of the board of United States general appraisers to the effect that certain merchandise imported by the appellant into the port of New York was subject to duty. 54 Fed. 676. The appellant imported certain "chillies" or "bird peppers," whole, but in a dried state, a product of Sierra

Leone, and they were classified and subjected to duty by the collector under paragraph 326 of the tariff act of 1890. That paragraph reads as follows:

"Spices, ground or powdered, not specially provided for in this act, four cents per pound; Cayenne pepper, two and one-half cents per pound, unground; sage, three cents per pound."

The importer protested, insisting in his notice that the importations were exempt from duty under paragraph 560 of the free list, which reads as follows:

"Drugs, such as barks, beans, berries, balsams, buds, bulbs and bulbous roots, excrescences such as nut galls, fruits, flowers, dried fibers and dried insects, gums, grains and gum resin, herbs, leaves, lichens, mosses, nuts, roots and stems, spices, vegetables, seeds aromatic and seeds of morbid growth, weeds, and woods used expressly for dyeing; any of the foregoing which are not edible and are in a crude state, and not advanced in value or condition by refining or grinding, or by other process of manufacture, and not specially provided for in this act."

The board of general appraisers affirmed the decision of the collector, and from that decision the importer appealed to the circuit court. The board of appraisers found, as matters of fact, that Cayenne pepper is a preparation from the dried fruit of various species of capsicum, and that the bird peppers or chillies in question were a species of capsicum of the kind largely used in the manufacture of Cayenne pepper, and that they were edible. They decided, as matter of law, that the term "edible" in paragraph 560 applies to spice as well as to the numerous other articles enumerated in that paragraph, and that, as the importations in question were a spice which was edible, the claim of the importers was not well taken. There was no evidence before them tending to show that the importations were edible. Upon the appeal by the importer to the circuit court, new evidence was introduced. The circuit court adopted the conclusions of the board of appraisers.

The evidence in the record shows that the genuine Cayenne peppers are a product of Cayenne, South America; that chillies and bird peppers are used largely by manufacturing druggists for making capsicum plasters and other medicinal preparations, and also by spice dealers for making the article commercially known as "Cayenne pepper," in which the ingredients are capsicum, rice flour, and other mixtures; that they are not known commercially as unground Cayenne pepper; that there is a Cayenne pepper prepared in South Africa, and imported in small quantities into this country, which is not ground. The Encyclopedia Britannica describes Cayenne pepper as follows:

"Cayenne pepper is manufactured from the ripe fruits, which are dried, ground, mixed with wheat flour, and made into cakes with yeast. The cakes are baked hard, until like biscuit, and then ground and sifted. The pepper is sometimes prepared by simply drying the pods, and pounding them fine in a mortar."

The evidence also shows that pepper made from the genuine Cayenne peppers is almost unknown to the trade in this country, and there is no evidence to show that the genuine Cayenne peppers

are ever imported into this country. The evidence taken in the circuit court shows very conclusively that dried chillies or bird peppers are not eatable. They cannot be taken into the mouth without blistering or burning it, and they cannot be masticated without producing strangulation.

The term "unground" pepper does not aptly describe the dried peppers imported by the appellant. It is used in paragraph 326 in contradistinction to "ground or powdered." By paragraph 580 of the same tariff act dried fruits not elsewhere specially provided for are free of duty. The importations in question are undoubtedly spices, as well as drugs, and, although they might properly be regarded as dried fruits, they are not exempt from duty by paragraph 580 because they are more specifically enumerated as spices. But paragraph 580 is of some value as showing the intention of congress to put the general class to which the importations belong upon the free list. The term "unground Cayenne pepper" appropriately describes a partly prepared commercial article which has not been advanced to its final condition by being ground or powdered. The term fits the article mentioned in the Encyclopedia Britannica, and imported into this country from South Africa in small quantities, as shown by the testimony in the record. This view is strengthened by an inspection of previous tariff acts, by which it appears that congress, in laying duties on Cayenne pepper, has uniformly treated it as of two kinds, imposing the higher duty upon the ground, or finally advanced, article. By the act of March 2, 1861, (12 Stat. 183,) the duty was imposed as follows: "On Cayenne pepper, 3 cents per pound; on ground Cayenne pepper, 4 cents per pound." By the act of August 5, 1861, (12 Stat. 292,) the duty was imposed "on Cayenne pepper, 6 cents per pound; on Cayenne pepper, ground, 8 cents per pound." By the act of July 14, 1862, (12 Stat. 547,) duty was imposed on "Cayenne pepper, 12 cents per pound; ground, 15 cents per pound." By the act of July 14, 1870, which was reproduced in the Revised Statutes in 1874, and continued in force until the act of 1890 was passed, no distinction was made between ground and unground Cayenne pepper. Thus, from 1870 until the tariff act of 1890, both the ground and the unground article were dutiable as "Cayenne pepper." The present act revives the earlier classification, and lays a duty on Cayenne pepper by enumerating it as a "spice, ground or powdered," and a lower duty on the unground, by its specific name. It is not open to doubt that importations like those in controversy would not have been subject to duty from 1861 to 1890 as Cayenne pepper, because it is to be assumed that congress used that term in its commercial signification, and intended to impose the duty only on the commercial article of Cayenne pepper in one or both of its two recognized forms.

As the importations have never been known in trade and commerce as "Cayenne pepper, unground," and that term, in its ordinary sense, does not appropriately describe them; and as it is plain that congress had always, previous to the present act, applied the term "unground" to Cayenne pepper to describe a variety of the

commercial article which was not advanced to the ground or powdered state; and as the word "unground," as used in paragraph 326, is to be presumed to mean what it always meant in previous tariff legislation,—we conclude that the importations were not the unground Cayenne pepper which congress has intended to subject to duty. It is not material that they can be converted into the dutiable article by mixing them with other ingredients, and subjecting them to the various processes bestowed upon that article, or even by advancing them a single step in the process of preparation. The law deals with them as they are, and not as they can be made to be.

It remains to consider whether the protest of the importer properly specified the objection to the classification of the merchandise. Paragraph 560 exempts from duty "drugs, such as barks, beans, berries, * * * spices, * * * vegetables, * * * woods used expressly for dyeing, * * * any of the foregoing which are not edible." If such spices as he imported are excluded from paragraph 560 because they are not within the category, "any of the foregoing which are not edible," the objection is fatal. It is not claimed for the appellee that chillies and bird peppers are "edible," in the ordinary meaning of the term. The learned judge who decided the case in the circuit court was of opinion that spices were within the category of edible things, and that congress must have meant to exclude from the exemption all spices edible in the sense in which spices are edible,—as a sauce, a condiment, or a relish. But the evidence which was before the circuit court, although not before the board of general appraisers, shows very clearly that chillies and bird peppers in their dried state, whole, are not edible in any sense. Even when ground, the powder is mixed with other ingredients before it can be used as a condiment, and as thus prepared it is one of the most pungent condiments known.

We cannot suppose that congress intended to admit spices free of duty, and at the same time to exclude from the exemption all spices which are edible in the sense in which every spice is edible. Such legislation would be absurd. If there are any spices which are non-edible, the importations, according to the evidence, belong in that class. There is no necessity, and certainly no propriety, in placing a strained and violent meaning upon the phrase, "any of the foregoing which are not edible." Many of the articles enumerated in the paragraph are those having well-known edible qualities. Thus, there are beans, buds, bulbous roots, fruits, dried fibers, grains, gums, herbs, leaves, nuts, and vegetables, all of which include esculent varieties. Many of the other enumerated articles in the paragraph are not edible in any sense, such as dried insects, gum resin, lichens, mosses, seeds of morbid growth, and woods used expressly for dyes. It is reasonable to suppose that congress used the term "edible" in its ordinary sense, and intended to exclude from the exemption such of the enumerated articles as are edible according to common understanding. It may be that there are spices fit to be eaten as food, and which fall within the excluded

category. However that may be, we must conclude from the evidence in the record that those like the importations are not. It follows that the protest was sufficient.

The decision of the circuit court and of the board of appraisers is reversed.

Appeal of SLATTERY.

(Circuit Court, S. D. Ohio, W. D. December 30, 1893.)

CUSTOMS DUTIES—CLASSIFICATION—MATCH BOXES.

Tin match boxes, containing high-grade matches, and used to protect them from dampness and accidental ignition, and being of the usual quality and shape, and like those in which similar matches are sold abroad, will be considered as designed for the bona fide transportation of the matches, and not dutiable under section 19 of the act of June 10, 1890.

Appeal from Board of General Appraisers' Decision. Reversed.

Chas. H. Grosvenor and John A. Slattery, for appellant.

John W. Herron and Henry Hooper, for appellee.

SAGE, District Judge, (orally.) The appraiser at Cincinnati assessed duty, under section 19 of the act of June 10, 1890, upon certain match boxes, which were claimed by the importers to be only holders, and the usual and necessary coverings for a quantity of matches imported, and not dutiable. This assessment was confirmed by the general appraisers, and the question is now before the court on appeal. It appears from the testimony taken under the appeal that the goods were imported from Bryant & May, Limited, London, by the appellant. Some of the boxes which contained the matches are made of wood or paper, and some of tin. The testimony is that the principal use of the metal boxes is for safety; that, if a match contained in a wooden or paper box should be ignited, the entire box would probably burn, and possibly set fire to anything it might come in contact with, while a tin box would smother a starting conflagration. Instances are given where a part of the matches in tin boxes were burnt, while the remainder were intact in the same boxes. It is further in testimony that tin boxes protect from dampness more effectually than wood or paper boxes, and that there is nothing unusual in the form or quality of the tin boxes in which the matches in question were imported, and that they have no other use than as a covering for the matches. It also appears that such boxes have been used for the covering of matches imported into the United States for many years; one witness specifying that, to his knowledge, they have been so imported and offered for sale for eight years last past.

I find the facts to be in accordance with this testimony, and that the metal boxes used in this instance are not unusual articles or forms, nor were they designed for use otherwise than in the bona fide transportation of such matches to the United States. It is not practicable to transport matches, especially by water, in large

quantities in bulk, because of the great danger of fire. The matches involved in this case are of high grade and quality, and it appears, further, from the testimony, that they are usually sold in England in the same kind of boxes as those in which they were shipped to this country.

Upon the authority of *Oberteuffer v. Robertson*, 116 U. S. 499, 6 Sup. Ct. 462, and *Magone v. Rosenstein*, 142 U. S. 604, 12 Sup. Ct. 391, the finding and order of the general appraisers is reversed, and the appeal sustained.

WIMPFHEIMER et al. v. ERHARDT.

(Circuit Court, S. D. New York. October 6, 1893.)

CUSTOMS DUTIES—CLASSIFICATION—FUR WASTE, ETC.

Articles of merchandise imported in the years 1889 and 1890, and known to trade and commerce, respectively, as "fur waste," "hares' combings," "hares' waste," "hares' dags," and "coney's dags," were not dutiable at the rate of 20 per cent. ad valorem, under the provision for "hatters' fur, not on the skin," contained in paragraph 450 (Tariff Ind., New) of Schedule N of the tariff act of March 3, 1883, (22 Stat. 513,) but were dutiable at the rate of 10 per cent. ad valorem, under the provision for "waste, all not specially enumerated or provided for in this act," contained in paragraph 493 (Tariff Ind., New) of the aforesaid Schedule N, (22 Stat. 514.)

At Law. Action to recover duties paid under protest. Verdict directed for plaintiffs.

Plaintiffs imported in the years 1889 and 1890, from a foreign country into the United States, at the port of New York, certain articles of merchandise, invoiced as "fur waste," "hares' combings," "hares' waste," "hares' dags," and "coney's dags." These articles were classified for duty as "hatters' fur, not on the skin," under the provision for such fur contained in paragraph 450 of Schedule N of the tariff act of March 3, 1883, (22 Stat. 513;) and duty at the rate of 20 per cent. ad valorem, the rate fixed by that provision, was exacted thereon by the collector of that port. Against this classification and this exaction, plaintiffs duly and seasonably protested, claiming that these articles were not "hatters' fur, not on the skin," but were "waste, not specially enumerated or provided for," and were therefore dutiable at the rate of 10 per cent. ad valorem, as such waste, under the provision for "waste, all not specially enumerated or provided for in this act," contained in paragraph 493 of the aforesaid Schedule N, (22 Stat. 514.) Thereafter, plaintiffs made due and seasonable appeals to the secretary of the treasury, and, within 90 days after adverse decisions were made by him thereon, duly brought suit to recover the amount, with interest thereon, of all duty exacted in excess of duties at the rate of 10 per cent. ad valorem. Upon the trial it appeared that skins of coneys and hares, from which one kind of hatters' fur is obtained, as taken from these animals, were first split open and stretched; that these skins, after being split open and stretched, were cleaned of blood, or any other foreign matter that might be upon them; that they were then plucked or pulled of the outer growth on the fur thereon, consisting of coarse hairs; that they were then subjected to a process of brushing, from which process was obtained what was invoiced and commercially known as "fur waste;" that they were then subjected to a process of "carroting,"—a treatment by means of a preparation of quicksilver and acid,—so that the fur thereon might felt; that they were afterwards dried and brushed, and what was then brushed from the skins of hares was invoiced and commercially known as "hares' combings;" that they were then put through a machine that cut the fur off, and cut the pelts

into pieces like vermicelli, sent the fur, with some admixture, into one place, and dropped under the machine the pelt so cut, and the other things produced by this operation; that the fur, with its admixtures, was then subjected to a process of blowing, by which the pure fur was separated from its admixtures; that this pure fur, so obtained, was commercially known as "hatters' fur;" that its admixtures, after such separation, were commercially known, if from coney skins, as "coney's dags," and, if from hares' skins, as "hares' dags," being, respectively, the same kinds of articles as were respectively so invoiced; that from what was dropped under the machine before referred to, in cutting hares' skins, was obtained what was invoiced and commercially known as "hares' waste;" that "fur waste," "hares' combings," "coney's dags," "hares' dags," and "hares' waste" were never, any of them, regarded or known, commercially, as "hatters' fur, not on the skin," or as a variety thereof; and that the only things obtained from coney's and hares' skins that were so regarded or so known were articles hereinbefore described as "hatters' fur."

Charles Curie, (W. Wickham Smith, of counsel,) for plaintiffs.

Edward Mitchell, U. S. Atty., and Thomas Greenwood, Asst. U. S. Atty., for defendant.

LACOMBE, Circuit Judge, (orally.) I direct a verdict in favor of the plaintiffs for the amount, with interest thereon, of all duties exacted in excess of duties at the rate of 10 per cent. ad valorem.

BISTER et al. v. UNITED STATES.

(Circuit Court of Appeals, Second Circuit. January 12, 1894.)

No. 37.

CUSTOMS DUTIES—CLASSIFICATION—GLORIA CLOTH.

Gloria cloth is dutiable at 12 cents per square yard and 50 per cent. ad valorem, as "women's and children's dress goods," or "goods of similar description and character, composed wholly or in part of wool, worsted," etc., under paragraph 395 of the tariff act of 1890, and not at 50 per cent. ad valorem, as a "manufacture of silk, or of which silk is the component material of chief value," under paragraph 414. 54 Fed. 158, affirmed. *Hartman v. Meyer*, 10 Sup. Ct. 751, 135 U. S. 237, distinguished.

Appeal from the Circuit Court of the United States for the Southern District of New York.

Application by Bister & Schmitt for a review of a decision of the board of general appraisers affirming a decision of the collector of the port of New York as to the classification of certain gloria cloth imported by them. The circuit court affirmed the board's decision. 54 Fed. 158. The importers appeal. Affirmed.

Chas. Curie, David I. Mackie, and W. Wickham Smith, for appellants.

Edward Mitchell and Jas. T. Van Rensselaer, for the United States.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

WALLACE, Circuit Judge. The only question we have occasion to decide upon this appeal is whether the gloria cloth imported by the appellants, which is a cloth similar in description and charac-

ter to women's and children's dress goods, and is composed of silk and worsted,—silk being the material of chief value,—was properly classified for duty under the provision of the tariff act of October 1, 1890, which subjects to duty, "women's and children's dress goods * * * and goods of similar description and character, composed wholly or in part of wool, worsted * * * and not specially provided for in this act," or whether the importations should have been classified under another provision of the same tariff act, which subjects to duty "all manufactures of silk, or of which silk is the component material of chief value, not specially provided for in this act."

We are of the opinion that the former is the provision of more specific description, and, if this view is correct, the decision of the board of general appraisers, and that of the circuit court in affirmance of their decision, were correct. We think when the two provisions are read together the latter is to be interpreted as imposing duty upon all manufactures of which silk is the component material of chief value, except those similar to women's or children's dress goods. It seems hardly debatable that if one provision of a tariff act should prescribe a duty on wearing apparel, and another on all manufactures of which silk is the material of chief value, the former would supply the proper classification for an article of wearing apparel made of silk. The descriptive phrase, "goods of similar description and character to women's and children's dress goods," is a yet narrower term of enumeration. It describes a material of which women's and children's wearing apparel is made. The case falls within the general rule that, where a tariff act imposes a duty on an article by a specific name or description, general terms in the act, though embracing it broadly, are not applicable to it. The general must give way to the particular. The case of *Hartranft v. Meyer*, 135 U. S. 237, 10 Sup. Ct. 751, upon which the appellants greatly rely, does not assist them, but is an illustration of the rule stated. The case there was whether certain cloth, composed partly of wool and partly of silk, in which silk was the component of chief value, should have been classified under a provision subjecting to duty all manufactures of wool made wholly or in part of wool not specially enumerated in the act, or under another provision in the same act subjecting to duty all goods not specially provided for in the act, "made of silk, of which silk is the component material of chief value." The court held that the descriptive language in the latter provision was narrower and more limited, and constituted, therefore, the special enumeration, rather than the other.

The decision of the circuit court is affirmed.

UNITED STATES v. SHATTUCK et al.

(Circuit Court of Appeals, Second Circuit. January 12, 1894.)

No. 36.

CUSTOMS DUTIES—CLASSIFICATION—WEBBINGS.

Webbing made of cotton, silk, and India rubber, the cotton predominating in quantity, and the rubber in value, cannot, in the absence of any finding as to its commercial or common designation, be classified as cotton webbing, under Schedule I, par. 354, of the act of 1890, but should be placed under paragraph 460, as a manufacture of which India rubber is the component material of chief value. 54 Fed. 365, affirmed.

Appeal from the Circuit Court of the United States for the Southern District of New York.

Application by Warren S. Shattuck and Gustav Binger for review of a decision of the board of general appraisers affirming the action of the collector of the port of New York in the classification of certain merchandise imported by them. The circuit court reversed the board's decision. 54 Fed. 365. The United States appeal. Affirmed.

Edward Mitchell, U. S. Atty., and James T. Van Rensselaer, Asst. U. S. Atty.

W. Wickham Smith, for appellees.

Before WALLACE and SHIPMAN, Circuit Judges.

SHIPMAN, Circuit Judge. This is an appeal by the United States from a decision of the United States circuit court for the southern district of New York, which reversed a decision of the board of general appraisers in regard to the classification for duty of a portion of the appellees' merchandise. The appellees imported into the port of New York, on November 18, 1890, three kinds of elastic webbing, respectively known in the record as samples "A," "B," and "C," each one being composed of cotton, silk, and India rubber. Duty was assessed thereon at the rate of 60 per cent. ad valorem, under paragraph 412 of the tariff act of October 1, 1890. The important part of the paragraph is as follows:

"Webbings, * * * any of the foregoing which are elastic or non-elastic, * * * made of silk, or of which silk is the component material of chief value, fifty per cent. ad valorem."

Against this classification, the appellees protested, upon the ground that the component material of chief value of the merchandise was India rubber, and that the goods were dutiable under paragraph 460 of the same tariff act, which paragraph, omitting unimportant portions, is as follows:

"Manufactures of India rubber, * * * or of which these substances, or either of them, is the component material of chief value, not specially provided for in this act, thirty per centum ad valorem."

The board of general appraisers found the following facts:

"(1) That the merchandise is elastic webbing, composed of cotton, silk, and India rubber. (2) That all of the goods are manufactured chiefly of cotton.

(3) That in Exhibit A silk is the component material of chief value. (4) That Exhibits B and C have India rubber as the component material of chief value."

As conclusions of law, the board found that Exhibit A was properly classified by virtue of paragraph 412. The importers acquiesced in this decision, and sample A now disappears from the case.

In regard to samples B and C, the board was of opinion that they should have been classified as cotton elastic webbing, and dutiable at 40 per cent. ad valorem, under the provisions of paragraph 354 of the tariff act of October 1, 1890. The important part of this paragraph is as follows:

"Cotton * * * webbing, * * * any of the foregoing which are elastic or non-elastic, forty per cent. ad valorem."

As the appellees had claimed in their protest that the webbing should have been classified under paragraph 460, as manufactures of India rubber, the protest, in the opinion of the board, was not well taken, was therefore overruled, and the action of the collector was unaltered. Upon appeal to the circuit court, the decision of the board was reversed. No additional evidence was offered or was taken for use before that court.

The facts which were found by, or were presented before, the board of general appraisers, were so few in number that a decision in the case must be of very narrow scope. They simply found in regard to samples B and C that they were composed of cotton, silk, and India rubber, that they were manufactured chiefly of cotton; that is, that cotton predominated in quantity, and that India rubber was the component material of chief value. They found nothing in regard either to the commercial designation or the common designation of the article. Whether its name was "silk webbing," or "cotton webbing," or "silk and cotton webbing," and whether it was, as a fact, rather than as a conclusion of law, cotton webbing, did not appear; nor did they find that elastic webbing necessarily included India rubber as a component material. The only other fact which appears in the record, and which is of small importance, is that in sample B the value of the cotton exceeds that of the silk by \$1.02 per hundred pounds, and that in sample C the value of the silk exceeds that of the cotton by 38 cents per hundred pounds.

The mere facts that webbing is made of cotton, silk, and India rubber, the cotton materially predominating in quantity, and the India rubber predominating in value, are insufficient, in view of paragraph 460, and of the obvious fact that "cotton elastic webbing" is a commercial term, to justify the conclusion of law that the article is to be classified as cotton webbing. The commercial designation, or, in its absence, the common designation, could have been ascertained by the testimony of persons familiar with the subject, and, when ascertained, would have made the question of proper classification an easy one. Inasmuch as the facts found by the board are not adequate to justify their conclusions of law, the classification of the particular invoices in this case is to be governed by the provisions of paragraph 460.

The decision of the circuit court is affirmed.

STANDARD VARNISH WORKS v. UNITED STATES.

(Circuit Court of Appeals, Second Circuit. January 12, 1894.)

No. 41.

1. CUSTOMS DUTIES—CLASSIFICATION—CANDLE TAR.

Candle tar, a residuum or by-product in the manufacture of candles, is a manufactured article, and dutiable as such under section 4 of the act of October 1, 1890, and not as waste, under paragraph 472. 53 Fed. 786, affirmed.

2. SAME—"WASTE."

Definition of "waste" in tariff acts.

Appeal from the Circuit Court of the United States for the Southern District of New York.

Application by the Standard Varnish Works for review of a decision of the board of general appraisers affirming the classification by the collector of the port of New York of certain merchandise imported by them. The circuit court affirmed the decision of the board of general appraisers. 53 Fed. 786. The importers appeal. Affirmed.

W. Wickham Smith, for appellant.

Edward Mitchell, U. S. Atty., and Henry C. Platt, Asst. U. S. Atty.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

LACOMBE, Circuit Judge. The board of general appraisers found that the merchandise in question is commercially known by various names, such as candle tar, candle pitch, palm pitch, and candle residuum; that it is produced from tallow, animal grease, and palm oil, by subjecting the same to treatment with superheated steam in closed boilers or retorts, whereby the stearine and the candle tar or pitch are separated, the stearine being carried out of the retort by distillation, and the candle tar or pitch remaining in the boiler or retort; that this candle tar or pitch is a product used in the arts for waterproofing barrels, waterproofing coverings for roofs, and also for increasing the body of varnishes. There is abundant evidence to support these findings of fact. The board affirmed the decision of the collector, who classified the merchandise for duty as a nonenumerated manufactured article not specially provided for, at 20 per cent. ad valorem. The importer contends that it should be classified either at 10 per cent. ad valorem, under paragraph 472, ("Waste, not specially enumerated or provided for;") or as a nonenumerated, unmanufactured article, under section 4 of the same act, (tariff of 1890.)

The merchandise cannot fairly be classified as an unmanufactured article. It is not in itself a raw material; it is not found in nature; and, although something left over in the manufacture of candles, it is no longer either the tallow, or the animal grease, or the palm oil which were subjected to a manufacturing process in order to obtain the stearine for candles. It has been transformed by that very process. It has become something different from what it was

before, in character, in substance, in name, and use. In this respect it differs from the small cubes of marble broken off from the original block in the process of manufacturing slabs of marble, which began as marble and ended as marble, changed in shape, in adaptability for use, perhaps in name, but still the same in character and substance, which were held by this court not to be manufactures of marble in *Re Herter Bros.*, 4 C. C. A. 107, 53 Fed. 913. This substance, as the expert testimony clearly shows, is chemically a new body, a new creation, entirely distinct from what existed before; and, as it has become such by a process of manufacture, it is a manufactured article.

The process of distillation to which the tallow, grease, or oil is subjected is apparently not undertaken with the intention thereby to obtain this new article. What is sought for is the glycerine and fatty acid to be made into candles, but, owing to the imperfection of the process,—the increase of temperature causing burning,—after the glycerine and fatty acid are drawn off, this pitch-like residue remains. The process has thus resulted in three new products, neither of which existed as a separate body before. For the reason that this so-called residuum was not sought for, the manufacturer endeavoring to produce as little of it as possible, the importer contends that it is “waste,” within the meaning of the tariff act. There is no evidence as to the commercial meaning of “waste.” Congress evidently did not use the word as meaning “that which is of no value; worthless remnant; refuse,”—the primary definition given in Webster’s Dictionary,—since it imposed upon it an *ad valorem* duty. The Century Dictionary defines “waste” as “broken, spoiled, useless, or superfluous material; stuff that is left over, or that is unfitted, or cannot readily be utilized for the purpose for which it was intended; overplus; useless or rejected material.” This definition exactly fits spoiled, superfluous, or rejected material, which is of the same kind as the material utilized for the intended purpose. Whether it covers also a by-product of manufacture such as this, which is chemically a different substance from the material subjected to the process, and which can itself be put to use in the arts, is not so clear. Congress, however, has used the word elsewhere in the tariff. Paragraph 134 lays a duty on “wrought and cast scrap iron and scrap steel,” with a proviso that “nothing shall be deemed scrap iron or scrap steel, except waste or refuse iron or steel fit only to be remanufactured.” In that case iron or steel being used to produce some manufacture of iron or steel, the refuse or material left over is still iron or steel. Again, paragraph 388 provides for “slubbing waste, roving waste, ring waste, yarn waste, garnetted waste and all other wastes composed wholly or in part of wool.” Definitions of some of these terms are found in the special report to the treasury department, published in 1888, and referred to in the decision of this court in *Re Higgins*, 5 C. C. A. 104, 55 Fed. 278. Ring waste is “a highly purified article of scoured wool, and is made from wool tops or combed wool; and the couronnes, when not made for export, is the tangled slubbing, or wool top, that through accident becomes disarranged in the process of spinning it into yarn.” “Garnetted waste is the prod-

act of a garnett machine, which tears and ravel out the twist in thread, thus reducing it back to the original purified wool by reason of taking out the twist which is originally given to the wool to make it yarn or thread." "In the process of spinning yarn, wool tops are sometimes called 'slubbing' or 'roving,' in a process midway between wool tops and yarn." It is plain that in all these cases the waste is still wool. Again, paragraph 670 provides for waste rope and waste bagging; but, although unfitted for the purpose for which bagging or rope is intended, the waste is no new creation; it is the same substance as the bagging or the rope which is used for the intended purpose. The cotton waste of paragraph 549, and the silk waste of paragraph 705, are still respectively cotton and silk.

The merchandise in this case is a residuum in the manufacture of candles, as crude coal tar is a residuum in the manufacture of gas. Each is one of the results of a destructive distillation of the original substances,—grease, oil, or tallow in the one case; tar in the other. In fact it appears that at one time free entry was claimed for this candle residuum by reason of the similitude to crude coal tar. But congress evidently did not suppose that crude coal tar was waste, since, in the tariff of 1883, which contained a provision (paragraph 493) similar to that in the tariff of 1890 for waste at 10 per cent. ad valorem, it expressly provided by another paragraph (paragraph 80) for precisely the same duty on "coal tar, crude." We are of opinion, therefore, that the term "waste," as used in the tariff, does not cover the merchandise in suit.

Decision of circuit court affirmed.

UNITED STATES v. CONRAD et al.

(Circuit Court, D. West Virginia. January 11, 1894.)

1. INDICTMENT—AVERMENT OF TIME.

A charge of an offense as committed "on the — day" of a month and year named is not defective where any day of that month was prior to the finding of the indictment and within the period of limitation applicable, and where time is not of the essence of the offense.

2. SAME—DESCRIPTION OF OFFENSE.

An indictment for depositing in a post office a circular concerning a lottery, (Rev. St. § 3894,) setting forth with particularity the circular and its publication, and alleging that it was concerning a lottery, and to promote and aid the same, is not defective for insufficient description of such lottery.

3. CONSTITUTIONAL LAW—PLACE OF TRIAL FOR CRIME—MAILING LOTTERY CIRCULAR.

Violations of Rev. St. § 3894, by depositing or causing to be deposited in the mails circulars concerning a lottery, or by sending such matter or causing it to be sent by mail, are complete without transmission or delivery of such matter, and an indictment therefor can be tried only in the district in which the matter is mailed; and so much of that section, as amended by Act Sept. 19, 1890, as provides for the trial and punishment of those offenses in another district, to which such matter is carried by mail for delivery, is void, as conflicting with section 2, art. 3, and with the sixth amendment to the constitution of the United States.

But the offense of causing the prohibited matter to be delivered by mail, not being complete until such delivery, may be tried and punished in the district in which delivery is so made. *Horner v. U. S.*, 12 Sup. Ct. 522, 143 U. S. 570, explained.

At Law. Indictment against Paul Conrad and others for violation of Rev. St. § 3894, as amended by the act of September 19, 1890. Heard on demurrer to indictment. Demurrer sustained.

George C. Sturgiss, U. S. Atty.

J. D. Rouse and J. B. Jackson, for defendants.

GOFF, Circuit Judge. The defendants are charged with violating the provisions of section 3894 of the Revised Statutes of the United States, as amended by the act of congress approved September 19, 1890, (26 Stat. 465, c. 908,) called the "Anti-Lottery Act," which reads as follows:

"No letter, postal card or circular concerning any lottery, so-called gift concert or other similar enterprise offering prizes dependent upon lot or chance, or concerning schemes devised for the purpose of obtaining money or property under false pretenses, and no list of the drawings at any lottery or similar scheme, and no lottery ticket or part thereof, and no check, draft, bill, money, postal note or money order for the purchase of any ticket, tickets, or part thereof, or of any share or any chance in any such lottery or gift enterprise, shall be carried in the mail or delivered at or through any post office or branch thereof, or by any letter carrier; nor shall any newspaper, circular, pamphlet or publication of any kind containing any advertisement of any lottery or gift enterprise of any kind offering prizes dependent upon lot or chance, or containing any list of prizes awarded at the drawings of any such lottery or gift enterprise, whether said list is of any part or of all of the drawing, be carried in the mail or delivered by any postmaster or letter carrier. Any person who shall knowingly deposit or cause to be deposited, or who shall knowingly send or cause to be sent, anything to be conveyed or delivered by mail in violation of this section, or who shall knowingly cause to be delivered by mail anything herein forbidden to be carried by mail, shall be deemed guilty of a misdemeanor, and on conviction shall be punished by a fine of not more than five hundred dollars or by imprisonment for not more than one year, or by both such fine and imprisonment for each offense. Any person violating any of the provisions of this section may be proceeded against by information or indictment and tried and punished, either in the district at which the unlawful publication was mailed or to which it is carried by mail for delivery according to the direction thereon, or at which it is caused to be delivered by mail to the person to whom it is addressed."

The indictment contains six counts, in which the offenses charged are set forth in different ways. The first count charges:

That the defendants, on the — day of July, A. D. 1891, at the city of New Orleans, in the state of Louisiana, did unlawfully and knowingly deposit and place in the post office of the United States at the city of New Orleans, in the state of Louisiana, with intent that the same should be sent by the postmaster at the city of New Orleans and conveyed by the mail of the United States to the city of Charleston, in the district of West Virginia, a certain circular concerning a lottery, which circular * * * was intended by said defendants to promote and aid the carrying on the business of said lottery, * * * and which was directed to "Lewis Loewenstein, Charleston, W. Va.," in a wrapper duly stamped, and which was carried and conveyed by mail to the post office of the United States at Charleston, in the district of West Virginia, for delivery according to the directions thereon, and was intended by said defendants to be so carried and conveyed by

said mail to Charleston, in the district of West Virginia, for delivery, defendants well knowing said circular to be one concerning a lottery, contrary, etc.

The second count charges:

That defendants, on the — day of July, in the year of our Lord one thousand eight hundred and ninety-one, at the city of New Orleans, in the state of Louisiana, did unlawfully and knowingly cause to be deposited and placed in the mail of the United States, at the post office of the United States at the city of New Orleans, in the state of Louisiana, with intent that the same should be sent and conveyed by mail to the city of Charleston, in the district of West Virginia, a certain circular concerning a lottery, * * * intended to aid in the business of said lottery, * * * which circular was inclosed in an envelope, duly stamped, and directed to Lewis Loewenstein, Charleston, W. Va., and which was carried and conveyed by the mail of the United States, to the post office at Charleston, in the district of West Virginia, for delivery according to the said directions thereon, * * * contrary, etc.

The third count charges:

That defendants, on the — day of July, A. D. 1891, at the city of New Orleans, in the state of Louisiana, did unlawfully and knowingly send, to be conveyed and delivered by the mail of the United States, by depositing in the post office of the United States, at the city of New Orleans, in the state of Louisiana, a certain circular concerning a lottery, and with which circular, in the same inclosure and wrapper, when so deposited, was inclosed a certain envelope and cover, intended to be used to convey by express money to pay for tickets and chance in the drawings of said lottery, and which circular and envelope were intended by defendants to promote and aid in the setting up and carrying on of the business of said lottery, * * * and were inclosed together in a wrapper, and stamped with the United States postage, * * * and directed and addressed as follows: "Lewis Loewenstein, Charleston, W. Va.," and which were carried and conveyed by the mail of the United States to the post office of the United States at Charleston, in the district of West Virginia, for delivery according to the said direction thereon, and were intended by said defendants to be so carried and conveyed by mail to Charleston, in the district of West Virginia, for delivery to said * * *, contrary, etc.

The fourth count sets forth:

That the defendants, on the — day of July, A. D. 1891, at the city of New Orleans, in the state of Louisiana, did unlawfully and knowingly cause to be sent, to be conveyed and delivered by the mail of the United States, by depositing in the post office of the United States at New Orleans, in the state of Louisiana, a certain circular concerning a lottery, * * * intended and designed by defendants to promote and aid in the setting up and carrying on the business of said lottery, * * * and which was inclosed in a wrapper duly stamped, * * * and directed and addressed as follows: "Lewis Loewenstein, Charleston, W. Va.," and which was carried and conveyed by the mail of the United States to the post office at Charleston, in the district of West Virginia, for delivery according to said directions thereon, with intent * * *, contrary, etc.

The fifth count alleges:

That defendants, on the — day of July, in the year of our Lord one thousand eight hundred and ninety-one, did unlawfully and knowingly deposit and place in the mail of the United States, at the post office of the United States at the city of New Orleans, a certain circular, pamphlet, and publication concerning a lottery, * * * which circular, pamphlet, and publication contained and constituted an advertisement of and for a certain lottery, sometimes called the Louisiana State Lottery Company, and sometimes called the Louisiana Lottery Company, and which were intended

and designed to promote and aid in the conducting and carrying on the business of said lottery, * * * and which were then and there inclosed in a wrapper, and directed and addressed as follows, that is to say, "Lewis Loewenstein, Charleston, W. Va.," and stamped * * *, and were, after they were so deposited, carried by said mail to the post office at Charleston in the district of West Virginia, and were intended to be so carried for delivery to said Lewis Loewenstein, to advertise and aid said lottery, * * * contrary, etc.

It is charged in the sixth count:

That defendants, on the — day of July, in the year of our Lord one thousand eight hundred and ninety-one, did unlawfully and knowingly place and cause to be placed in the mail of the United States at New Orleans a certain circular, pamphlet, and publication concerning a lottery, * * * sometimes called the Louisiana State Lottery Company, * * * which were intended to promote and aid the business of said lottery, * * * and which were inclosed in a wrapper, duly stamped, and directed to Lewis Loewenstein, Charleston, W. Va., and which were, after the same was so placed and deposited, carried by said mail to the post office at Charleston, in the district of West Virginia, and were intended to be so carried by said mail for delivery to said Lewis Loewenstein, * * * contrary, etc.

In each count the circular, pamphlet, and publication referred to is set out in full, but the description of the same and the recitals I have given are sufficient, I think, for all purposes connected with the questions now to be disposed of. The defendants demur to the indictment and to each count thereof. It is insisted that the indictment is defective, because that no day certain is alleged in any of the counts on which the offenses charged were committed; that the allegations that "defendants did, on the — day of July, in the year of our Lord one thousand eight hundred and ninety-one," etc., are equivalent to no dates being given. In this case I do not think so, as time is not of the essence of the offense charged. Any day in July, A. D. 1891, was prior to the finding of the indictment, and within the period of the statute of limitations applicable to the section said to have been violated. The old rule of the common law on this point, as announced in the cases cited in argument, has been greatly modified by the decisions of our courts, as well as by special statutes for that purpose. The averment of time is a formal one, and it is not required that the offense shall be proven to have been committed at the time charged in the indictment, except in cases where time itself is an indispensable ingredient in the offense. The fact that a particular day in the month of July, A. D. 1891, is not alleged is not to the prejudice of the defendants.

It is also claimed that the indictment is bad because the lottery that defendants are charged with aiding and promoting is not described with sufficient detail and clearness. It is argued that the description is so general that defendants are unable to prepare their defense, and that they would not be able, in case of conviction, to plead the judgment of this court as a bar to a subsequent prosecution for the same offense. In this indictment the crime charged consists in unlawfully depositing and placing in a post office a circular concerning a lottery, and this circular is in each count set forth in *haec verba*. The particularity required by the authorities relied on by counsel for defendants applies in this instance to the

character of the circular mailed, to the post office where mailed, to the person to whom it was sent, and the office to which it was directed. With even greater minuteness than was necessary have the circular and publication been set forth, and in two of the counts has the lottery alluded to been designated by name, while in all of them it is particularly alleged that the circular described was concerning a lottery, and was to promote and aid the same. In my opinion the defendants are sufficiently well advised by the indictment of the nature and cause of the accusation made against them, and are able to make their defense with all reasonable certainty and knowledge. 2 Story, Const. § 1785; U. S. v. Cruikshank, 92 U. S. 542; U. S. v. Simmonds, 96 U. S. 360.

In support of the demurrer it is claimed that this court has no jurisdiction of the offense alleged in the indictment for the reason that it appears from the allegations thereof that the crimes charged, if committed, were begun and completed in the eastern district of Louisiana, and that defendants have the constitutional right to be tried for the same in that district. The district attorney claims that the United States can prosecute the defendants either in the eastern district of Louisiana, where the unlawful publication was mailed, or in the district of West Virginia, to which it was carried by mail for delivery according to the direction thereon. It will be necessary to ascertain what offenses have been created by the section of the Revised Statutes on which this indictment is founded, before we can dispose of this question. In the case of U. S. v. Horner, 44 Fed. 677, Judge Brown of the district court for the southern district of New York, in speaking of said section, said:

"Three somewhat different offenses are created by the section above quoted: (1) Knowingly depositing or causing to be deposited such forbidden matter in the mails; (2) sending such matter or causing it to be sent by mail; (3) knowingly causing such matter to be delivered by mail."

This construction has received the approval of the supreme court of the United States in *Horner v. U. S.*, 143 U. S. 207, 12 Sup. Ct. 407. The first, second, fifth, and sixth counts of the indictment now under consideration charge the offense as depositing or causing to be deposited, and placing and causing to be placed the forbidden matter mentioned, in the mails, under the first classification alluded to. The third and fourth counts charge the sending of such matter and the causing it to be sent by mail, under the second of said distribution of offenses. It thus appears that there is no count under the third group,—that of knowingly causing such matter to be delivered by mail. It is not claimed, nor is it alleged in any of the counts, that any of the prohibited matter or circulars deposited and placed, and caused to be deposited and sent by the defendants, at and from the post office at New Orleans was ever delivered to the person to whom it was addressed in the district of West Virginia. The offenses coming under the first and second groups, as I have mentioned them, do not require for their completion that the forbidden matter deposited in the mails, intended for transmission therein to the person to whom directed should be in fact transmitted or delivered. In order to con-

vict the party accused of those offenses it is only necessary to prove that he knowingly deposited or caused to be deposited in the mails, or knowingly sent or caused to be sent, anything to be conveyed or delivered by mail in violation of said section; and thus it seems that the offenses charged in this indictment were committed, if at all, in the eastern district of Louisiana. It is not alleged in any count that the prohibited matter was deposited or caused to be deposited by defendants in the district of West Virginia, or that any of it was delivered to the person to whom it was addressed in said district. If it were so charged, then, in my opinion, the indictment would be good, and the defendants could be tried thereon in this district.

The district attorney insists that defendants can be prosecuted in this district, as well as in the eastern district of Louisiana, under the last paragraph of section 3894, Rev. St. U. S., as amended, which provides that any person so violating said section may be proceeded against either in the district at which the unlawful publication was mailed or to which it is carried by mail for delivery according to the direction thereon, or at which it is caused to be delivered by mail to the person to whom it is addressed. I do not find it to be an offense, separate from that existing because of the depositing of the prohibited matter, to cause such matter to be carried by mail for delivery according to the direction thereon; and consequently there can be no punishment inflicted for causing it to be so carried, if it is not delivered, other than as provided for the depositing. Can the defendants be prosecuted in the district of West Virginia for offenses within the first and second classifications before mentioned, for which they can, beyond question, be proceeded against in the eastern district of Louisiana, not only because of the provisions of section 3894, but because the offenses were committed there? If the charge was that the defendants knowingly caused the circular and publication described to be delivered by mail to the party to whom it was directed, in West Virginia, could they be prosecuted for such delivery in Louisiana? In such case, would not the allegations of the indictment as to the depositing and causing to be sent be considered as descriptive of the thing delivered, as showing that it was in the mail, from which it was delivered, and would not the offense consist in the delivery in the district of West Virginia?

I do not think that the supreme court of the United States held in the case of *Horner v. U. S.*, 143 U. S. 207, 12 Sup. Ct. 407, as the district attorney claims that it did. In that case the indictment was found by a grand jury of the district court of the United States for the southern district of Illinois, and a bench warrant issued founded thereon for the arrest of Horner. The district judge for the southern district of New York issued a warrant to the marshal of that district to remove Horner to the southern district of Illinois, to be tried in said district upon such counts of the indictment pending in said district as the said Horner could be legally tried upon. The judge, in his opinion, (44 Fed. 677,) based his action on the ground that the fifth count of the indictment charged an offense which was only completed upon the delivery of the matter sent by mail to the person to whom it was directed; that such offense con-

sisted in knowingly causing the prohibited matter to be delivered by mail; and that, although under the fifth count the act began in New York by deposit in the mail, the offense of causing the delivery by mail could not be consummated except by delivery to the person and at the place intended. In other words, he held that Horner could be removed from the southern district of New York to the southern district of Illinois for trial on an indictment found in said last-named district, charging the delivery of the prohibited matter in that district to the person to whom it was directed. He treated the allegations of the indictment relative to the mailing of the circular in New York as statements showing how it came to be in the mail. The first, second, third, and fourth counts of that indictment charged the offense as being that the defendant did unlawfully and knowingly deposit and cause to be deposited a circular relating to a lottery, in the post office at New York, in the state of New York, addressed to a certain person in Illinois, which said circular was then and there carried by mail for delivery to said party in said state of Illinois, according to the direction thereon. These counts of that indictment, it will be noticed, describe the offense proper substantially as it is described in the counts of the indictment I now consider. The judge did not rule as to said four counts, not finding it necessary, as under the fifth count, which he held to be good, he was compelled to issue his warrant for removal. I think the intimation is quite broad that but for the fifth count he would have declined to issue the warrant. The supreme court affirmed the ruling of the district judge, holding that "the distinct and separate crime charged in the fifth count of the indictment was committed in the southern district of Illinois, and is triable there." The said fifth count charged the delivery of the prohibited mail matter to the party to whom it was directed in the southern district of Illinois.

Nor do I understand the case of *In re Palliser*, 136 U. S. 257, 10 Sup. Ct. 1034, as does the district attorney. The United States marshal for the southern district of New York, by virtue of a warrant issued by a United States commissioner of that district, held in his custody one Charles Palliser, who obtained from the circuit court of the United States for that district a writ of habeas corpus. From the return to the writ it appears that Palliser had been arrested in the southern district of New York, and after a hearing by the commissioner, under section 1014 of the Revised Statutes, had been committed for trial in the district of Connecticut, where the offense was alleged to have been committed. The crime charged was that he unlawfully and willfully did tender to a postmaster in Connecticut a certain contract, with intent to induce him to do certain acts in violation of his duty as such postmaster. The tender was made in a letter mailed by Palliser at New York, directed to and received by the postmaster in Connecticut. It was claimed on the hearing of the habeas corpus that the district court of the United States for the district of Connecticut, in which the indictment had been returned and was then pending, had no jurisdiction over the case, as the offense was completed when the letter was mailed in New York, and that the accused had a right to be tried in the southern district

of New York, where the offense was committed. The writ of habeas corpus was dismissed, and an appeal was taken to the supreme court of the United States. That court affirmed the order of dismissal. It will be noted that the offense charged against Palliser was not the unlawful mailing of prohibited matter, but was, in effect, that of attempting to bribe a postmaster in the discharge of his official duty, and the supreme court said:

"It might admit of doubt whether any offense against the laws of the United States was committed until the offer or tender was known to the postmaster, and might have influenced his mind. But there can be no doubt at all that, if any offense was committed in New York, the offense continued to be committed when the letter reached the postmaster in Connecticut; and that, if no offense was committed in New York, an offense was committed in Connecticut; and that in either aspect the district court of the United States for the district of Connecticut had jurisdiction of the charge against the petitioner. Whether he might have been indicted in New York is a question not presented by this appeal."

As I understand this opinion of the supreme court in the Palliser Case, it sustains the conclusion I have reached,—that the offenses charged against the defendants in the present case cannot be tried in the district of West Virginia, but must be prosecuted in the eastern district of Louisiana, where it appears from the allegations set forth in the indictment that they were committed. If we compare the facts as shown in the cases I have cited with the facts as they are alleged to exist in the indictment now under consideration, the differences which distinguish them will be plain.

Holding, as I do, that the offenses charged against these defendants were commenced and completed in the eastern district of Louisiana, if at all, it follows that section 731 of the Revised Statutes has no application to this case, for it is only applicable "when any offense against the United States is begun in one judicial district and completed in another."

I come now to consider that clause of section 3894, as amended, which provides that:

"Any person violating any of the provisions of this section may be proceeded against by information or indictment and tried and punished, either in the district at which the unlawful publication was mailed or to which it is carried by mail for delivery according to the direction thereon, or at which it is caused to be delivered by mail to the person to whom it is addressed."

It will be observed that this clause does not create any new or additional offenses, but that it simply provides the mode of procedure, and the place of trial and punishment, for any person violating any of the provisions of said section. The offenses created by it, I have already described. The clause I have just quoted must be construed in connection with a clause of section 2 of article 3 of the constitution of the United States, which reads as follows:

"The trial of all crimes, except in cases of impeachment, shall be by jury and such trial shall be held in the state where the said crime shall have been committed."

Also must it be considered in connection with the sixth amendment to the constitution of the United States, reading as follows:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense."

This amendment, as well as the original clause which it supplements and enlarges, in view of the rights designed to be protected, is to be liberally construed. Giving full effect to these constitutional provisions, as I must do, and regarding all legislation that conflicts therewith as null and void, as it is my duty to do, I must decline to enforce that clause of said section 3894, as amended, that permits a person accused of crime to be prosecuted and tried for the offense of which he is charged, in a court held in a state and district other than the state and district in which the crime was committed.

The congress has by said section created certain offenses in connection with the mailing and delivery through the mail of certain prohibited matter, as it constitutionally could do; and such offenses are in some cases commenced and completed in the same district. In such cases the party accused is entitled to a trial in the district where the offense was so commenced and completed; or, in other words, where the crime was committed. I therefore hold that so much of the last clause of said section as provides that a person violating the provisions of such section may be proceeded against, tried, and punished in a district to which such matter is carried by mail for delivery—the offense having been, before such matter is so carried, committed in another district—is not law, is unconstitutional and void. That part of said clause authorizing the prosecution in the district at which the mail matter is caused to be delivered by mail to the person to whom it is addressed is operative, because it is made an offense to so cause such delivery; an offense that is not completed until the unlawful publication is delivered to the person to whom it is addressed, even though such delivery is made in a district other than the one in which the publication was mailed. The constitution provides for such cases when it permits the trial to be had at the district where the crime shall have been committed.

The district attorney insists that the questions involved in the demurrer to the indictment I now consider have been ruled upon by the supreme court of the United States, and against the contention of the defendants, referring to *Horner v. U. S.*, 143 U. S. 570, 12 Sup. Ct. 522. It is true that the supreme court in that case said: "The question of the constitutionality of section 3894, as amended, is disposed of by the decision of this court in *Re Rapier*, which holds that it is constitutional," (143 U. S. 110, 12 Sup. Ct. 374;) but I do not understand that the supreme court has passed on the clause of said section involved in this case. So far as said section was applicable to the cases so decided by the supreme court, it was held by that court to be constitutional. A glance at the *Horner Case* will be instructive at this point. A United States commissioner issued

his warrant for the arrest of Horner on complaint on oath made by a post-office inspector, charging that Horner on the 29th of December, 1890, had unlawfully deposited and caused to be deposited in the post office at New York City, in the state of New York, and in the southern district of New York, a certain circular to be conveyed and delivered by mail, which, in the contents thereof, as set forth in the complaint, concerned a lottery, and which was then and there addressed to Joseph Ehrman, 70 Dearborn street, Chicago, Ill., and was inclosed in an envelope, with the postage thereon prepaid, and carried by mail. The commissioner, after examination, committed Horner to the custody of the marshal in default of bail, to await the action of the grand jury. Afterwards Horner presented his petition to the circuit court of the United States for the southern district of New York, and that court ordered that the writ of habeas corpus issue. The writ issued, and was served, return duly made, counsel were heard, and the court dismissed the writ, remanding Horner to the custody of the marshal. An appeal was then taken to the supreme court of the United States. Questions not germane to the present case, relative to the jurisdiction of the supreme court and to the character of the circular described in the warrant, were on the hearing of the appeal considered and decided. The supreme court affirmed the order of the circuit court dismissing the writ of habeas corpus, saying that "the offense, if any, was committed within the southern district of New York," and that "the question of the constitutionality of section 3894, as amended, is disposed of by the decision of this court in *Re Rapier*, 143 U. S. 110, 12 Sup. Ct. 374, which holds that it is constitutional." It thus appears that Horner was proceeded against in the district where the circular was mailed, and in which the court held that the offense, if any, was committed. There is now no question as to the constitutionality of the provisions of said section relating to such a case. We turn now to *In re Rapier*, 143 U. S. 110, 12 Sup. Ct. 374, referred to by the supreme court in the Horner Case. It was an application for discharge by writ of habeas corpus from arrest for alleged violations of said section 3894, as amended, and the question for determination related to the constitutionality of said legislation. The writ was denied, the court holding that the said statute was a constitutional exercise of the power conferred upon congress by article 1, § 8, of the constitution, to establish post offices and post roads, and does not abridge "the freedom of speech or of the press," within the meaning of amendment 1 to the constitution; that the power vested in congress to establish post offices and post roads embraces the regulation of the entire postal system of the country, and that under it congress may designate what may be carried in the mail and what excluded; that in excluding various articles from the mails the object of congress is, not to interfere with the freedom of the press, or with any other rights of the people, but to refuse the facilities for the distribution of matter deemed injurious by congress to the public morals; that the transportation in any other way of matter excluded from the mails is not forbidden. The question raised in this case, and elaborately and ably discussed by

counsel, and decided by the supreme court, was as to the constitutionality of the legislation generally known as the "Anti-Lottery Act," as to whether or not it was in conflict with the provisions of amendment 1 to the constitution of the United States. The following extract from the opinion of the court, which was delivered by the chief justice, indicates, far better than I can describe the questions involved and disposed of, the trend and scope of the decision:

"We cannot regard the right to operate a lottery as a fundamental right infringed by the legislation in question; nor are we able to see that congress can be held in its enactment to have abridged the freedom of the press. The circulation of newspapers is not prohibited, but the government declines itself to become an agent in the circulation of printed matter which it regards as injurious to the people. The freedom of communication is not abridged, within the intent and meaning of the constitutional provision, unless congress is absolutely destitute of any discretion as to what shall or shall not be carried in the mails, and compelled arbitrarily to assist in the dissemination of matters condemned by its judgment through the governmental agencies which it controls. That power may be abused furnishes no ground for a denial of its existence, if government is to be maintained at all."

The question raised by the demurrer which I now sustain was not presented in any of the cases cited, and has not, as I understand it, been decided by the supreme court. The indictment is quashed, and the defendants are discharged.

MACK v. LEVY et al.

(Circuit Court, S. D. New York. January 15, 1894.)

1. PATENTS—ANTICIPATION—PRIOR USE.

Any reasonable doubts as to the time at which an alleged anticipating device was constructed should be resolved in favor of the patent.

2. SAME—INFRINGEMENT SUITS—ESTOPPEL—CONTEMPT PROCEEDINGS.

A decision, in contempt proceedings, that a certain device is not an infringement, is not an estoppel in a subsequent suit between the same parties for infringement by the manufacture or use of the same device.

3. SAME—ANTICIPATION—OPERA-GLASS HOLDERS.

The Mack patent, No. 268,112, for an opera-glass holder, *held* not anticipated.

In Equity. Suit by William Mack against Levy, Dreyfus & Co. for infringement of a patent. Decree for complainant.

H. Albertus West, for orator.

James A. Hudson and Edmund Wetmore, for defendants.

WHEELER, District Judge. This suit is brought upon patent No. 268,112, dated November 28, 1882, and granted to the orator for an opera-glass holder, on an application dated April 29, 1882. The patent was before this court, held by Judge Shipman, in a suit between these same parties, in which the patent was sustained, but limited in scope by a supposed prior construction of one Stendicke, (Mack v. Levy, 43 Fed. 69;) and, again, on contempt proceedings in that case, when what is now alleged to be an infringement was alleged and not held to be, (Mack v. Levy, 49 Fed. 857;) and before this

court, held by Judge Coxe, when, on new evidence, the construction of Stendicke was discredited, and the patent sustained with a broad scope, which would include this infringement, (Mack v. Manufacturing Co., 52 Fed. 819;) and, again, on motion with affidavits to open that case, and let in proofs of an alleged prior construction by one Shoots, which was discredited, and the motion denied. The holder produced by Shoots, and one produced by one Cushing, as made by him early in 1881, have been set up now as anticipations; and either would, if established, apparently so narrow the scope of the patent as to obviate this infringement. The production of the holder of Shoots is somewhat involved by the evidence with the political campaign of either 1880 or 1884, and this evidence tends so strongly towards 1884 as to raise a very reasonable doubt whether this holder was made before the orator's invention in 1882.

The holder produced by Cushing is testified by him to have been made by him, ready for a cover to the handle, which a harness maker put on, and to have been presented to his then future wife before her birthday in 1881, and to whom he was married December 26, 1881; to have been used by both in theaters, and kept by her afterwards, and, after 1886 or 1887, in a blue plush bag, with her opera glasses, until she died, in 1890. The harness maker testifies to covering the handle with leather at that time. The wife's sister, in an affidavit, testified to seeing it in the plush bag in 1888, and on inquiry, before the taking of her deposition, gave that as the date of her earliest knowledge of it. In her deposition she testifies to seeing it in the blue plush bag in the summer of 1882, and to seeing it and using it with her sister frequently in 1888. These are the only witnesses who testify to having seen it before it was produced to be put in evidence. It is of brass, made of two tubes, one smaller than and sliding into the other, which is the handle, with a collar between on the larger, holding them together, and a clutch at the end of the smaller to take hold of an opera glass. On a disk forming the outer end of the handle are engraved the given name of the wife, between the date of her birth, May 2, and the year 1881, which he testifies he put there before giving the holder to her; and the leather has been replaced by kid glued on, covering the handle closely from the disk to the collar. As the wife's sister does not testify to seeing it out of the plush bag before 1888, her testimony, however honest in purpose it may be, is not at all convincing that it existed so early as 1882. The harness maker, who is a justice of the peace, being asked when Cushing was married, answered: "Well, from recollection, he was married in 1881." Being asked what he meant by that, he answered, "From recollection, by recalling it by talking with him at the time I gave my affidavit;" and, being asked what transpired between him, Cushing, and another before that, answered, "Nothing any more than Mr. Cushing asked me if I recollected about covering a certain holder, and, by conversation with him, I recall it when he described it." These frank statements show that, although he is doubtless correct about having done such a thing for Cushing, as to time and description which are very material here, he depends largely upon Cushing.

The engraving on the disk looks as old as is claimed, and the wear upon the ornamentation about it looks equally old or older. They strongly support the claim of age, so far as their identity with the instrument is established. They seem older than the other parts. The covering of the handle is testified by experts to be much newer than it is said by Cushing to be, while others testify that this cannot be told. To the eye it does seem comparatively new. The disk appears to be soldered to the tube forming the handle with soft solder, and the joint between the tube and collar at the other end and all other joints to be brazed. These things tend to discredit the continuous identity of this holder. Such an instrument, so publicly used as this is said to have been, would be likely to draw attention, and that no more are produced who ever saw it is singular. Upon much consideration of the whole, doubts which seem quite reasonable also arise as to whether this holder existed before the orator's invention. That such doubts are to be resolved in favor of the patent is too well settled to be, and is not here, controverted. With these things out of the way as anticipations, this case is the same as that decided by Judge Coxe, and not the same as that decided by Judge Shipman.

The decision by Judge Shipman on the proceedings for contempt, being in a suit between these same parties, is relied upon as conclusive against this alleged infringement; otherwise, no suggestion is understood to be urged that the decision by Judge Coxe should not be followed. Neither the Stendicke device, as an anticipation, nor the decree made by Judge Shipman, limiting the scope of the patent upon it as an estoppel, is brought by the defendants into this case. The proceedings for contempt were in their nature criminal, and not a part of the suit; and the decision upon them would be upon the question of guilt or innocence, and not a part of the decree. The question of infringement, although involved, obviously was not intended to be, and would not be, thereby concluded. *Cromwell v. County of Sac*, 94 U. S. 351.

Let a decree be entered for the orator.

DOUGHERTY v. DOYLE et al.

(Circuit Court, N. D. New York. January 22, 1894.)

PATENTS—LIMITATION OF CLAIM—MINCE-PIE COMPOUNDS.

The Allen patent, No. 268,972, for a dry mince-pie compound, composed essentially of cooked meat, dried fruit, sugar, and spices, "compounded dry," if not void for want of invention, is restricted to a compound in the preparation of which no free liquid is used, and does not cover a compound in which 140 pounds of boiled cider has been added to each 1,000 or 1,200 pounds of the dry ingredients.

In Equity. Suit by Thomas E. Dougherty against Michael Doyle and Albert S. Bigelow for infringement of a patent. Bill dismissed.

Hey, Wilkinson & Parsons, (Hey, Ephraim Banning and Jas. I. Kay, of counsel,) for complainant.

Osiah Sullivan, for defendants.

WALLACE, Circuit Judge. Infringement is alleged in this suit of letters patent No. 268,972, granted to Henry Julian Allen, dated December 12, 1882, for preserved compound for mince pies. The defenses are want of patentable novelty and noninfringement. In the general statement in the specification the object and nature of the invention is set forth by the patentee as follows:

"Mince-pie compounds have heretofore been prepared in the wet state, with free water present in the shape of wine, cider, or other liquid, and put up in cans, jars, and barrels, which condition of the compound involves a liability to ferment, decay, or mold, and in which state the compound is not easily handled in definite quantities. My invention, while employing no substantially new ingredients, is founded upon the combination of old ingredients, which are combined, both chemically and mechanically, under peculiar conditions that enable me to produce a practically dry compound that may be put up as a dry solid in separate packages, which remain stable, and keep sweet and pure, under all ordinary influences."

The specification describes the ingredients of the compound to be cooked meats, sugar, desiccated apples or other fruit, and spices. In preparing it, the beef or other cooked meat, and the dried apples or other dried fruits, are chopped or ground to a suitable fineness; sugar, spices, and salt are added; and the ingredients are thoroughly rubbed or mixed together dry, until a stable compound is formed. The compound is then ready to be put up in suitable packages for use, sale, and transportation. The specification points out that when the ingredients are compounded dry the sugar absorbs the moisture from the cooked meats, and forms a syrup, which is at once taken up by the dried fruits and spices, and effectually permeates and coats the various ingredients. After giving the proportional quantities of the ingredients, and stating that these proportions may be varied as the taste of the operator or buyer may dictate, the specification says:

"A small quantity of wine, brandy, or other liquor may be added to the compound while in course of preparation, or afterwards, if desired. This, however, is quickly absorbed by the dry products, and creates no sensible moisture in the composition."

The specification concludes by the following disclaimer:

"I am aware of the fact that the ingredients named by me are not new in mince-pie compounds when compounded in a wet state, and I am also aware that desiccated compounds of meats and cereals have been prepared to form pemmican, dried soups, etc., and I do not claim such."

The claim is as follows:

"As an improved article of manufacture, a dry mince-pie compound, composed essentially of cooked meat, dried apples or other fruit, sugar, and spices, compounded dry, whereby the meat is desiccated and preserved without being carbonized, and a dry, stable composition formed, substantially as herein shown and described."

The patentee was not the first to make a commercial mince-pie compound. Such an article had been made and sold in large quantities by grocers and other dealers. Nor was he the first to make a compound of new ingredients. As he states in the disclaimer, the ingredients were old when compounded in a wet state. In the old compounds fresh apples were used, and also cider, wine, or other

liquids; consequently free water was present in the compound. The new thing described in the specification as made by him is a dry or solid compound, instead of the moist and more or less liquid compound previously made by the housewife and the grocer. The free moisture is carefully excluded from the new compound by using no liquids or fresh fruits, and mixing the ingredients together in a substantially dry state. In this respect, and in this only, does the patented compound differ from the old ones.

It is open to doubt whether there is any patentable novelty in the compound of the patent. It is undoubtedly true that Allen was the first to conceive the practicability of making a compound which could be put up in convenient packages for sale, would keep for an indefinite length of time, and could be readily prepared for family use by the admixture of water. The great convenience of such a preparation commended itself quickly to the public, and led to the introduction of a condensed mince meat which has achieved an extraordinary commercial success. But the patent cannot be sustained unless there was invention in devising the compound; it cannot rest upon the mere thought, however felicitous, that the compound, when made, would be acceptable and popular. Mince-pie compounds are of such varying liquidity that it seems very questionable whether any inventive faculty can be involved in making them more or less liquid, and it would seem that any changes in the proportions or quantities of the ingredients necessary to make the compound more or less liquid or solid would be within the ordinary skill of the grocer or cook. It is shown to have been customary in making the grocer's compounds to graduate the quantity of liquid according to the dryness of the fruit, less being used with the cider apple and more with drier apples. It would seem an obvious thing to reduce the quantity of the liquid ingredients, or to use drier fruits instead of juicier ones, if it were desired to make a less liquid compound, and to increase the liquid or use the juicier fruits if a more liquid compound were desired. Allen did but little more than this in using no free liquid, and using only dried fruit with the meat and spices. Nevertheless, his dry compound may be regarded as something more than the old preparations with a different degree of liquidity. It is a new commercial article. In view of its utility and value, and the presumption arising from the grant of the patent, any doubt as to patentable novelty ought to be resolved in favor of the patentee.

But the narrowness of the invention, as well as the description in the patent, require the claim to be narrowly construed. It cannot be construed to cover any compound which is substantially dry without invalidating it as a patent for a mere improvement in degree. When is the compound sufficiently free from moisture to be "compounded dry" within the meaning of the claim? It is described as "a practically dry compound, that may be put up as a dry solid." It is made by a process of preparation which, when complete, forms "a stable compound." It is one which is so dry that when liquid seasoning is used no "sensible moisture" is created. The patentee evidently supposed that all the moisture in the com-

pound would be that derived from the juices of the cooked meat, which, as he states in the specification, passes into the sugar, and converts it into a syrup of meat, which is absorbed by the dried fruits. The most satisfactory criterion afforded by the description to determine when the compound is sufficiently free from moisture to answer the terms of the claim is found in the fact that no free liquid is used in preparing it, and the only moisture present is what is produced by the juices of the cooked meats and dried fruits.

It seems very clear that the condensed mince meat made by the defendants is not compounded dry, within the meaning of the claim. It is made by adding to the ingredients described in the patent 140 pounds of boiled cider to each 1,000 or 1,200 pounds of the compound. This is an addition in volume of about 12 or 14 gallons of liquid, and is more than the other ingredients will absorb. When packed, it is a sensibly moist product, which will wet paper, and destroy paper boxes, and for this reason it is wrapped in a waxed paper, to prevent the moisture from injuring the outer package.

The bill is dismissed, with costs.

THE ETHEL.

HODGKINS v. WELSH et al.

(District Court, E. D. Pennsylvania. January 19, 1894.)

No. 74 of 1893.

SHIPPING—SHORTAGE OF CARGO—EVIDENCE.

In determining whether there is a shortage of cargo consisting of bags of sugar, both the consignee's output count and the intake count as shown by the bill of lading are controlled, when the deficiency alleged is only three bags, by proof that the hatches were sealed after the sugar was in, and opened only by the port wardens on the vessel's arrival, and that there was no opportunity for loss or abstraction.

In Admiralty. Libel by Frank M. Hodgkins, master of the bark Ethel, against S. & J. Welsh, to recover a balance of freight, which respondents assume to withhold because of shortage of cargo. Libel sustained.

Curtis Tilton, for libellant.

Richard C. McMurtoil, for respondents.

BUTLER, District Judge. The only question involved is one of fact. The respondents seek to have the value of three bags of sugar, (a part of the cargo,) \$41.40, deducted from the freight, on the ground that the delivery was short to this extent. The bill of lading acknowledges the receipt of 6,443 bags, and the respondent's output tally shows only 6,440 bags. If there was nothing more the claim would be allowed. While the ship is liable only for the cargo received the bill of lading has the force of a written receipt, and binds her until disproved. To discredit it and the respondent's output tally the libellant invites our attention to a dispute which existed respecting the intake count, and to a discrep-

ancy in the several output counts, and to the manner in which the respondents' output count was made. That there is danger of mistake in counting where so many items or packages are involved, even under the most favorable circumstances, is apparent. Under the circumstances attending the respondent's count the danger is greatly increased. Loading the scales while they were being unloaded, and estimating each load at six bags, might well lead to mistake. Extraordinary care would be required to avoid some commingling of the loads. If the case rested here it would not be free from doubt. The libelant has gone further, however, and produced evidence that he delivered the entire cargo taken in. If the evidence is sufficient to establish the fact it settles the controversy. I think it is sufficient. The master's testimony covers the entire ground—shows that the hatches were sealed up after the sugar was taken in, and were not opened until the port wardens unsealed them after the vessel was docked and the respondents called to receive their sugar—that no port was touched from the time she sailed until her arrival here, and that there was therefore no opportunity for the loss or abstraction of any part of the cargo. I regard this testimony as more reliable than either of the counts made, and therefore accept it as conclusive.

The libel is therefore sustained.

THE ETHEL

HODGKINS v. WELSH et al.

(District Court, E. D. Pennsylvania. January 26, 1894.)

No. 74 of 1893.

ADMIRALTY—COSTS—PROCTOR'S FEE—SUMMARY PROCEEDINGS.

In summary proceedings, where the amount is less than \$50, and libelant's proctor takes the benefit of the rule of court dispensing with libelant's stipulation for costs, no proctor's fee can be taxed in his favor, except by special allowance by the court, on a showing of special circumstances; and the allowance will not be made merely because he had the testimony taken before a commissioner, instead of before the court, as he might have done.

In Admiralty. Libel by Frank M. Hodgkins, master of the bark Ethel, against S. & J. Welsh, to recover a balance of freight. The libel was heretofore sustained, (59 Fed. 473,) and the cause is now heard on motion for allowance of costs. Motion dismissed.

Curtis Tilton, for libelant.

Richard C. McMurtoil, for respondent.

BUTLER, District Judge. This was a summary proceeding, the amount being under \$50. The libelant's proctor so regarded it, and took the benefit of rule 72 which dispenses with the libelant's stipulation for costs. No proctor's costs were therefore taxable without special allowance by the court. Such costs were

claimed on taxation before the clerk and disallowed. The proctor "now moves the court to allow the *usual costs* to libellant and libellant's proctor." The "*usual*" costs in summary cases were allowed and taxed by the clerk. What I suppose the motion is intended to effect is a special allowance of proctor's costs under the rule above stated. To justify the court in doing this, something should appear in the case to distinguish it from ordinary summary proceedings. I do not find anything to so distinguish it. It was the libellant's privilege to have the testimony heard in court, instead of having it taken before a commissioner, but he elected to pursue the latter course. Whether this was more burdensome than hearing in court would have been, I do not know, nor is it important.

The motion must be dismissed.

THE UMBRIA.

CUNARD STEAMSHIP CO., Limited, v. COATES. SAME v. DOLLARD.

(Circuit Court of Appeals, Second Circuit. December 13, 1892.)

Nos. 49, 51.

1. INTEREST—AFFIRMANCE OF DECREE.

When a decree for libellant, which included interest, is affirmed, he, when appellee, is entitled to interest on the whole decree, unless special circumstances induce the court to disallow it. *Deems v. Canal Line*, 14 Blatchf. 474, disapproved. *The Blenheim*, 18 Fed. 47, followed.

2. ADMIRALTY—APPEAL—COSTS.

On a libel against one vessel for damages to the cargo of another by collision and a decree against her, if the decree is reversed on appeal by claimant on the ground that both vessels were in fault, appellant is entitled to costs.

Motions to modify order for mandate. Denied.

For report of the decision on the appeals, see 59 Fed. 489.

PER CURIAM. In these cases we conclude that, upon an affirmation by this court on an appeal from a decree of the district court in favor of the libellant, the libellant, when appellee, is entitled to interest on the whole decree, in the absence of special circumstances to induce the court to disallow interest. We adopt the rule followed in *The Blenheim*, 18 Fed. 47, and disapprove that followed in *Deems v. Canal Line*, 14 Blatchf. 474, believing the doctrine of *The Blenheim* to be founded on better reason.

As to costs, the appellant was put to the necessity of an appeal to secure a proper modification of the decree. If the libellants had made the *Iberia* a party, and insisted upon a decree against her as well as the *Umbria*, such as they would have been entitled to according to *The Alabama and Game Cock*, 92 U. S. 695, they could urge with reason that they should not be charged with the costs of the *Umbria's* appeal. Not having done so, there is no good reason why the appellant shall be required to bear the costs of a necessary appeal.

The motions to modify the order for a mandate are denied, except as to the clerical error in the *Dollard case*.

THE EXPRESS.**THE N. B. STARBUCK.****THE CHARM.****NEW YORK & CUBA MAIL STEAMSHIP CO. v. THE EXPRESS, THE
N. B. STARBUCK, and THE CHARM.**

(Circuit Court of Appeals, Second Circuit. December 13, 1892.)

No. 38.

INTEREST—AFFIRMANCE OF DECREE.

A party who appeals from a decree in his favor in a collision case is not entitled to interest on the original recovery pending the appeal.

Motion to Amend Mandate. Denied.

For report of the decision on the appeal, see 3 C. C. A. 342, 52 Fed. 890.

PER CURIAM. The party who appeals from a decree in his favor in a cause of collision is not entitled to interest on the original recovery pending the appeal. Interest, in such cases, is given for delay in satisfying a decree. The party who appeals puts it out of the power of the opposite party to pay the decree. The Rebecca Clyde, 12 Blatchf. 403; Hemmenway v. Fisher, 20 How. 260; The Blenheim, 18 Fed. 47.

The motion to amend the mandate is denied.

The HAYTIAN REPUBLIC.**UNITED STATES v. The HAYTIAN REPUBLIC.**

(Circuit Court of Appeals, Ninth Circuit. December 18, 1893.)

No. 149.

1. ADMIRALTY PRACTICE—LIBEL OF FORFEITURE—SECOND SEIZURE.

A vessel which is seized under a libel of forfeiture for violating the revenue laws, and is released on bond, is not subject to seizure in a different district under a libel alleging other violations committed during the same period. The Langdon Cheves, 2 Mason, 59, distinguished. 57 Fed. 508, affirmed.

2. SAME—RELEASE—BOND—VALIDITY.

The release bond of a vessel is not rendered invalid by the mere omission from the condition clause of the specified sum to be paid in case of default, when the bond contains a distinct obligation to pay the appraised value. 57 Fed. 508, affirmed.

Appeal from the District Court of the United States for the District of Oregon.

In Admiralty. Libel of forfeiture against the steamship Haytian Republic (the Northwest Loan & Trust Company, claimant) for violation of the revenue laws. Exceptions to the libel were sustained. 57 Fed. 508. The United States appeal. Affirmed.

John M. Gearin (Daniel R. Murphy, U. S. Atty., on the brief,) for the United States.

Andros & Frank, for appellees.

Before McKENNA and GILBERT, Circuit Judges, and HANFORD, District Judge.

GILBERT, Circuit Judge. On the 6th day of June, 1893, the steamship Haytian Republic was seized for forfeiture by the United States in the district court of the United States for the district of Washington for alleged violations of the revenue laws of the United States, by smuggling and clandestinely introducing prepared opium, and for violation of the laws relating to the importation of Chinese laborers, committed between the 28th day of September, 1892, and the 28th day of May, 1893. The vessel was thereupon claimed by her master, and an appraisal was had, upon the order of the court, at the petition of the claimant, and upon the 9th day of June, 1893, the vessel was released upon the claimant's bond for her value as appraised, and she thereupon proceeded upon her business. Upon the 3d day of July, 1893, at the port of Portland, Or., the vessel was again seized by the United States, and a libel of information was filed by the United States attorney for forfeiture for acts set forth in the libel, and other acts appearing. The acts charged in the libel were of two classes: First, acts of a similar nature to those for which she was seized in the district of Washington, and occurring prior to the date of her seizure there; second, acts in violation of the Chinese exclusion laws, committed subsequent to her release from the former seizure. The claimant answered, denying the charges of violation of the Chinese exclusion acts, but filed exceptions to the other counts of the libel, setting up, in defense thereof, the former seizure, and the pendency of the proceedings for forfeiture in the district court for the district of Washington.

All of the exceptions were sustained by the court. Trial upon the issues raised by the answer resulted in a decree for the claimant. From the decree, the United States brings this appeal, assigning as error the decision of the district court in sustaining the exceptions to portions of the libel. It is the appellant's contention that the pendency of the prior proceeding is no bar to the prosecution of the present suit, for the reasons—First, that the causes of suit are not the same, since the acts charged in the libel in the district court of Oregon, while covering the same period as those charged in the libel in the district court of Washington, are nevertheless distinct and separate therefrom; and, second, that the former proceeding so pleaded is pending in a court of a different jurisdiction from the present proceeding, and could not, therefore, be pleaded in bar of the latter, even if the two causes of suit were the same. The decision of these questions brings under consideration the nature of the proceeding whereby the United States have seized this vessel for condemnation and forfeiture. The suit for forfeiture is a proceeding in rem. It can only be brought in the district court of the United States. The court of the district in which the seizure is had acquires exclusive jurisdiction of the property seized. The release of the vessel upon the bond for value does not change the nature of the proceeding. The bond so given takes the place of the vessel, and the court retains jurisdiction over the subject-matter of the suit

to the same extent, and with the same effect, as if the vessel still remained in custody of the court. The stipulation for value is given in cases where suit is brought, not to enforce a partial lien or charge against the vessel, but to recover the property itself, or to sell the same, as in the present case. The bond in such a case is a pledge or substitute for the property, "as regards all claims that may be made against it by the promoter of the suit." *U. S. v. Ames*, 99 U. S. 36. There can be no doubt that the United States, the promoter of the suit in the district of Washington, could have charged against the vessel all of the offenses against the revenue and immigration laws that are included in the libel filed in the district of Oregon. Those offenses, if not known to the libellant at the time of the seizure and filing the libel, could have been added by new counts to the libel at any time before the final decree. *Admiralty Rule 24*; *The Marinna Flora*, 11 Wheat. 38. No authority is cited in which the question now before the court has been precisely decided. It was held in the court below that the jurisdiction acquired by the court first making the seizure is exclusive. It would seem, from the nature of the proceeding, that this must be so. If the vessel remained in custody of the court first seizing the same, all litigation affecting it, and all remedies of the United States for prior violation of its revenue, immigration, or navigation laws, would be necessarily drawn into that court. The right and remedies of the United States ought not to be enlarged from the fact that the vessel has been released upon claim made and bond given, so long as the United States have the bond for value upon which to satisfy its demands. In the case of *U. S. v. Ames*, 99 U. S. 42, the court said, of such a bond:

"It became the substitute for the property, and the remedy of the libellants, in case they prevailed in the suit in rem for condemnation, was transferred from the property to the bond or stipulation accepted by the court as the substitute for the property seized."

There is authority for holding that in case of misrepresentation or fraud in obtaining the release of the vessel seized, or where the order of release was improvidently given, without proper knowledge of the real value of the vessel, or without proper appraisement thereof, the vessel so released may be recalled before final decree in the court in which the seizure was had. *The Virgo*, 13 Blatchf. 255; *The Union*, 4 Blatchf. 90; *The Wanata*, 95 U. S. 611. But there is no authority for holding that, in the absence of such special ground for reviewing the order of release, the United States may in the same court, or in any other court, in any way pursue or seize the vessel after she is so released, except for acts thereafter committed. A second seizure would clearly be oppressive and burdensome, and would be, as we hold, a departure from the general rules of procedure that obtain in proceedings in rem. The presence of the res in the court first seizing the same draws to that court all litigation affecting it.

The doctrine of the case of *The Langdon Cheeves*, 2 Mason, 59, cited by the appellant, is not perceived to be in conflict with this view, or applicable to this case. The question there before the

court was whether upon seizure, and release to the owner upon his bond, a vessel became discharged of the liens for seamen's wages. The court held that after such release the vessel remained, in the hands of her owner, liable for all liens legally attaching to her. It may be conceded, in the case before the court, that the Haytian Republic, when released in the district of Washington, was not thereby discharged of existing liens created by operation of law or by the act of her owners.

It is contended that the exceptions should have been overruled, for the reason that the record filed in support of the same discloses the fact that no valid or legal bond was filed in the district court of Washington upon the release of the vessel therein. The defect in the bond consists in the omission from the clause containing the condition of the obligation of the specified sum that shall be paid by the obligors in case of default. There is in the bond, however, a distinct obligation upon the part of the persons signing the same to pay a sum equal to the appraised value of the vessel, and we see no reason why a decree may not be taken against the stipulators for that amount. If the bond were fatally defective in form, as claimed, it would seem that that fact would not render the proceedings in the district court of Washington void, but would afford that court a reason for recalling the vessel, or subjecting her to a second seizure in the same court, as indicated in the authorities cited above.

The decree is affirmed.

THE FRANCE.

NATIONAL STEAMSHIP CO., Limited, v. McDONALD.

(Circuit Court of Appeals, Second Circuit. January 12, 1894.)

No. 34.

SHIPPING—NEGLIGENCE—DEFECTIVE FITTINGS.

The mere fact of the breaking of the handle of an ash bag, which is being hoisted full from the hold, does not show that the bag was insufficient, when it appears that it was a new one, in which no defect had been noticed by the storekeeper or those using it; that it had been filled and emptied several times; that the hook was attached to only one handle, which was slipped through the other; and that the break occurred at the instant of a violent jerk occasioned by the slipping of the chain from the drum of the winch. 53 Fed. 843, reversed.

Appeal from the District Court of the United States for the Southern District of New York.

In Admiralty. Libel by William McDonald against the steamship France, (the National Steamship Company, Limited, claimant,) to recover damages for personal injuries. Decree for libellant. 53 Fed. 843. Claimant appeals. Reversed.

John Chetwood, for appellant.

J. A. Hyland, for appellee.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

WALLACE, Circuit Judge. The libellant, a fireman in the service of the steamship, was severely injured while assisting in the removal of ashes from the vessel. The steamship, at the time, was lying alongside her dock in the port of New York, and the ashes were being removed from her stokehole in canvas bags, which were filled in the stokehole, and then hoisted by a chain and winch to the main deck, whence they were carried by hand to carts stationed on the dock, and their contents discharged. The libellant and two other men were assigned the duty of filling the bags and hooking them to the chain. One of the bags, after it had been filled, weighing about 120 pounds, and while it was being hoisted by the winch, fell a distance of about 25 feet, and struck the libellant. It was found that the rope handle by which the bag had been attached to the hook had parted.

The question for decision is whether the steamship was in fault for providing an unsafe appliance for the work which the libellant was required to do. The district court condemned the steamship upon the theory that the bag was not sufficiently strong for safe use. While there is evidence in the record which tends to show that the accident was caused by the negligence of some of the fellow servants of the libellant, there is none upon which negligence can be imputed to the steamship, aside from that which relates to the sufficiency of the bag.

An employer does not undertake absolutely with his employes for the sufficiency or safety of the appliances furnished for their work. He does undertake to use all reasonable care and prudence to provide them with appliances reasonably safe and suitable. His obligation towards them is satisfied by the exercise of a reasonable diligence in this behalf. Before he can be made responsible for an injury to an employe inflicted by an appliance adequate and suitable, ordinarily, for the work to be performed with it, there must be satisfactory evidence that it was defective at the time, and that he knew, or ought to have known, of the defect. The decision in the court below proceeded upon the ground that negligence was to be presumed from the circumstances of the accident. In his opinion the learned judge said:

"The evidence does not show anything out of the usual course that should cause the handle of the ash bag to break while it was hoisting up. Its weak and insufficient condition must be inferred from its breaking under such circumstances. I cannot regard the general testimony that the bag was sound and sufficient as overcoming that fact."

The presumption of negligence is often raised by the circumstances of an accident, and it may be a legitimate presumption that an appliance which gives out while it is being used for its proper purpose, in a careful manner, is defective or unfit. How far that presumption may go, in an action by an employe against an employer, to shift the burden of proof from the former to the latter, must depend upon the circumstances of the particular case. The mere fact that the appliance is shown to have been defective is not enough to do so; it must appear that the defect was an obvious one, or such as to be discoverable by the exercise of reasonable care. In

the present case we think the circumstances of the accident do not show that the bag gave way because it was not reasonably adequate for the occasion, but they show that it gave way because a violent and unnecessary strain was put upon it. The bag was a comparatively new one, made expressly for an ash bag, and of the kind customarily used as it was being used when the accident took place. It had been bought in London on the previous voyage of the steamship and was being used interchangeably with several other similar, but older, bags, which were apparently sufficiently strong. It had been filled and emptied several times, as had the others, immediately before it fell. The storekeeper, who had the custody of the ash bags, had not observed any defect in it. Neither had any of the others of those in the employ of the steamship whose duty it was to supply, or repair, or use the ash bags. The bag had two handles, and, on the occasion in question, was fastened to the chain by passing one handle through the other, and hooking that handle to the chain. There was no reason why the hook should not have been passed through both handles. The evidence is that this was frequently, if not generally, done. Hooked as it was, the whole strain fell upon one handle, instead of being distributed between both. While the bag was being hoisted, the chain slipped off the drum of the winch, jerking the bag violently, and the handle gave way. In view of its apparently sound condition before the accident, we cannot assume that it would have given way if it had been fastened to the hook so that the strain would have come upon both handles instead of one, or even that it would have given way fastened as it was, except for the slipping of the chain. The evidence does not show how the chain happened to slip, and we are left wholly to conjecture whether those in charge of the hoisting apparatus were negligent. If they were, as they were fellow servants of the libellant, their negligence cannot afford him a ground of recovery against the steamship. We are satisfied that there was no negligence on the part of the steamship, and that the accident to the libellant was not a culpable one, or, if it was a culpable one, was caused by carelessness which cannot be attributed to the vessel.

The decree is reversed, with instructions to the district court to dismiss the libel, with costs.

The AGNES MANNING.

BRISTOL CITY LIME CO. v. The AGNES MANNING.

(District Court, E. D. New York. January 11, 1894.)

SALVAGE—DERELICT.

Fifty per cent. of the value of a vessel, and expenses, was allowed as salvage, when it appeared that the vessel, when picked up by the libellant's steamer, was derelict, having been abandoned a week, and was leaking, with 10 or 11 feet of water in her hold; that a previous unsuccessful attempt at towing had been made by another steamer; and that libellant's steamer had brought her into port in safety, after 6 days' towing.

In Admiralty. Libel for salvage. Decree for libelant.

Wheeler, Cortis & Godkin, for plaintiff.

Benedict & Benedict, for defendant.

BENEDICT, District Judge. This is an action brought in behalf of the owners, master, and crew of the steamship *Exeter City* to recover salvage compensation for services rendered the schooner *Agnes Manning*. In March, 1893, the steamship *Exeter City*, a merchant steamer bound to New York, when about 420 miles east of Sandy Hook, fell in with the schooner *Agnes Manning*, abandoned. The *Manning* was laden with a full cargo of coal, had been abandoned for about a week, was leaking, and when boarded had 10 or 11 feet of water in her hold. Previous to the abandonment, an effort had been made to tow the schooner by the steamship *Nestoria*. The effort, however, was given up after two hawsers had been broken. Thereupon the crew of the *Manning* left their vessel, and went on board of the *Nestoria*, which proceeded on her voyage. The *Exeter City*, about a week after, made fast to the *Manning*, put men on board of her, and, after six days' towing, brought her into the port of New York in safety. The appraised value of the *Manning* is \$27,000, and her cargo \$2,000. The service was performed at an expense to the owners of the *Exeter City* of \$850. The remarks of this court made in deciding the case of *The Anna*, 6 Ben. 166, Fed. Cas. No. 398, more than 20 years ago, where it is said: "For the taking in charge and saving of a wreck so situated the reward should be such as to insure at all times the rendering of any amount of labor, the incurring of any risk, and the deviation by any vessel from any voyage, in order to supply the wreck with a crew, and make her presence safe," may be repeated here.

The libelants are entitled to a liberal salvage compensation for the services rendered. The only question is what would be a liberal compensation. It is claimed on behalf of the libelants that the amount awarded should very much exceed the average amount heretofore given in cases of derelict, it being now apparent that the rewards given are not sufficient to induce vessels to incur the hazard of towing a wreck, so that commerce is impaired by the number of floating wrecks left abandoned, and the government itself has felt it its duty to send national vessels out in order to destroy these obstructions to navigation. This consideration is not without weight in determining the amount of salvage in a case like this. In my opinion, 50 per cent. of the value of the property saved will be a liberal reward, deducting first the sum of \$850, expended by the salvors, which sum is to be first paid to them.

THE CAYUGA.

LEHIGH VAL. TRANSP. CO. v. MILLER et al.

(Circuit Court of Appeals, Sixth Circuit. December 4, 1893.)

No. 99.

1. PAROL EVIDENCE—RECEIPTS—RELEASE AND DISCHARGE.

A writing which, besides being a receipt, contains stipulations of release and discharge from all claims growing out of a collision except one, cannot be disputed or controlled by parol evidence. *Association v. Wickham*, 12 Sup. Ct. 84, 141 U. S. 564, distinguished.

2. RELEASE AND DISCHARGE—CONSIDERATION—VALIDITY.

Where one consents to pay in full a bill the correctness of which he in good faith disputes, only on condition that certain other demands against him shall be released, such payment constitutes a good consideration for the release.

3. COLLISION—DAMAGES—LOSS OF USE—TOWAGE.

Where a barge in tow of a consort belonging to the same owners, which can tow her with little extra expense, is injured by the fault of a strange vessel, so as to lose her trip, the value of her use as an item of damages should not be diminished according to the arbitrary rule which allows one-third of the gross earnings for towage, but only by the actual expense the towage would have caused.

4. ADMIRALTY—APPEALS—COMMISSIONER'S REPORT—EXCEPTIONS.

Alleged errors in a commissioner's report will not be considered unless they were clearly excepted to, so as to bring them to the notice of the court below.

5. SAME—REVERSAL OF ERRONEOUS FINDING.

A finding of a commissioner on a question of fact will be reversed when clearly erroneous.

Appeal from the District Court of the United States for the Eastern District of Michigan.

In Admiralty. Libel by John A. Miller and others against the steamer Cayuga (the Lehigh Valley Transportation Company, claimants) for collision. Decree for libelants. Claimants appeal. Modified and affirmed.

Statement by SEVERENS, District Judge:

On the 28th day of April, 1890, the propeller D. M. Wilson, with her consort, the barge Manitowoc, both being then owned and employed by the libelants, was proceeding on a voyage from Kelly's island to Duluth under charter for a cargo of wheat to be carried from the latter place to Kingston, and when they were in the vicinity of Port Huron the Manitowoc was run into by the steamer Cayuga, a vessel belonging to the Lehigh Valley Transportation Company, the above-named appellants, and was seriously damaged. In consequence of her injuries, the Manitowoc was obliged to go into dock at Detroit for repairs, where she was detained for that purpose for the period of 18 days, and then returned to Lorain, her ultimate destination. The result was that she lost her trip. The Wilson, after getting her consort into port, proceeded to Duluth, took on a cargo, which she carried to Kingston, and then came back to Lorain, where she joined the Manitowoc, it being according to the original purpose that the two vessels should come to that port after discharging their cargo of wheat at Kingston. The arrival of the Manitowoc at Lorain was on the 18th day of May. The arrival of the Wilson at Kingston was on the 14th. The crew of the former vessel quit on her return to Detroit disabled.

The liability of the Cayuga for the consequences of the collision seems not to have been much disputed. At all events, the parties set about a settlement of the damages upon the assumption of such liability. A large item in the bill presented by the libelants to the manager of the Cayuga was that

of \$2,380.20 for repairs upon the Manitowoc at Detroit. Another was for the loss of her earnings during the time she was delayed. There were other items of damage claimed, the particulars of which will be mentioned further on. The manager of the Cayuga, soon after the collision, agreed to pay for the repairs, and sent the dock superintendent to look after them. When they were completed, the bill was made out and sent to the libelants, by whom it was paid. The claimants contend that, on this bill being presented to the manager of the Cayuga, with the other items above mentioned, he disputed its correctness, and contended that it was too large, and covered repairs not made necessary by the collision, but agreed to pay the bill as rendered if that would be treated as a settlement of all claims arising from the collision, except for the loss of the use of the vessel during the time she was unfitted for service.

The libelants contend that there was no real question of the correctness of the bill, or of the claimants' liability to pay it. It was, in fact, paid, and the following receipt and release was drawn up, signed, acknowledged, and delivered to the claimants:

"For and in consideration of the sum of \$2,080.20 to us in hand paid by the Lehigh Valley Transportation Company by the hand of W. P. Henry, general manager of said company, for and on account of the steamer Cayuga, and her master and owners, being for repairs on the barge Manitowoc by reason of the collision with the said steamer Cayuga in the Detroit or St. Clair river during the month of April, 1890, the receipt whereof is hereby acknowledged and confessed, we, the owners of the barge Manitowoc, hereby release and forever discharge the said steamer Cayuga, her master and owners, and the Lehigh Valley Transportation Company, of and from all claims, actions, demands, or causes of action of whatsoever name, kind, or nature, by reason of injuries sustained by said barge Manitowoc by reason of a collision in Detroit or St. Clair river between the said barge Manitowoc and the said steamer Cayuga, this being in full settlement of all claims made by us for injuries to said barge Manitowoc; but it is understood that the claim made by the owners of the barge Manitowoc for the loss of the use of the said barge Manitowoc is left open.

"In witness whereof we have hereunto set our hands and seals this 21st day of June, 1890.

[Signed]

"John A. Miller, Managing Owner Barge Manitowoc. [L. S.]"

Attached to this was a certificate of acknowledgment signed by a notary public at Buffalo.

The parties failing to agree upon the other grounds of liability, Miller and his associates filed their libel in the court below to recover the unpaid damages. The claimants answered, denying fault on the part of the Cayuga, and also insisting upon the settlement and receipt of all claims except for the use of the Manitowoc during the time she was disabled, which settlement they alleged was made to buy peace and save litigation. Proofs were taken, and a decree was passed in favor of the libelants, finding that the collision was occasioned wholly by the Cayuga's fault, and a reference was ordered to a commissioner to take proofs upon and report the damages. The items of damage found and reported by the commissioner were as follows:

(a) Loss of profits which would have accrued to libelants under their charter, the sum of thirteen hundred and eight dollars and forty-eight cents.....	\$1,308 48
(b) Damages to Manitowoc and expenses in consequence of collision, three hundred and eighty-one dollars.....	381 00
(c) Demurrage, three hundred and sixty-two dollars and fifty cents	362 50

Making the total amount of.....\$2,051 98

Upon this, interest is computed from May 20, 1890, the date of completion of repairs, to date of this report, at six per cent., one year, ten months, and two days..... 229 11

\$2,281 09

It is conceded that there was a clerical error in the first item, and that \$12.26 should be deducted, thus leaving the whole sum to be diminished by that sum, with interest. The claimants gave the receipt above mentioned in evidence before the commissioner, and testimony was offered on both sides concerning the circumstances attending its execution. The commissioner simply reported the evidence, with a copy of the instrument, and submitted to the court the question of the proper disposition of that part of the case. The claimants filed exceptions upon matters hereafter referred to in the opinion. The court, upon correcting the small error above mentioned, confirmed the report, and rendered a final decree for \$2,338.86, and the claimants bring the case here on appeal upon the question of damages only.

Moores & Goff, for appellants.

H. C. Wisner, for appellees.

Before BROWN, Circuit Justice, TAFT, Circuit Judge, and SEVERENS, District Judge.

SEVERENS, District Judge, (after stating the facts.) 1. The commissioner omitted to find any conclusion of law or fact involved in the proof before him, in regard to the effect of the instrument in writing executed in behalf of the libelants on June 21, 1890, conceiving the proper course to be to report the proof, and leave the determination thereon to be made by the court; and, while there is no express adjudication by the court in regard to the construction and effect which ought to be given to it, it is manifest from the decree that the court must have held that the only effect which could properly be given to that instrument was to conclude the libelants with respect to the cost of repairs incurred by the Manitowoc in consequence of the collision.

In this we think the court erred. It is, no doubt, well-settled law that so much of such an instrument as is in the nature of an acknowledgment of receipt, being the mere statement of a fact, and not containing terms of agreement, may, as a general rule, be explained and contradicted by parol evidence. 1 Greenl. Ev. § 305; 2 Whart. Ev. § 1064; Weed v. Snow, 3 McLean, 265. But this instrument contained more than a mere receipt. It stated that, in consideration thereof, the owners of the Manitowoc released and forever discharged the Cayuga and her owners from all claims whatsoever on account of the injury resulting from the collision, except the claim made by the owners for the loss of the use of the barge Manitowoc. It was a release, under seal, of all claims resulting from the collision except the one saved, namely, that for the value of the use of the vessel during the time she was disabled. This agreement for release was in the nature of a contract, and could no more be disputed or controlled by parol evidence than any other instrument in writing witnessing an agreement of parties. 2 Whart. Ev. § 1063; Wood v. Young, 5 Wend. 620; Stearns v. Tappin, 5 Duer, 294; Pratt v. Castle, 91 Mich. 484, 52 N. W. 52; Cummings v. Baars, 36 Minn. 353, 31 N. W. 449; Sherburne v. Goodwin, 44 N. H. 276.

A release is held to include all demands embraced by its terms, whether particularly contemplated or not; and direct parol evidence

that a certain claim was not in the minds of the parties is not admissible. *Deland v. Manufacturing Co.*, 7 Pick. 244; *Hyde v. Baldwin*, 17 Pick. 303; *Sherburne v. Goodwin*, 44 N. H. 271. The surrounding facts and circumstances may, as in other cases, be shown in order to apply the language of the instrument to its proper subject-matter, and prevent its application to a matter not involved in the transaction. *Littledale, J.*, in *Simons v. Johnson*, 3 Barn. & Adol. 175; 1 Greenl. Ev. §§ 286, 288.

In the present case the claims were all germane to the transaction; and being so, and being also included in the very terms of the instrument, they cannot be excluded by proof of contemporaneous parol declarations, much less by general evidence of what either party understood. We have not overlooked the case of *Association v. Wickham*, 141 U. S. 564, 12 Sup. Ct. 84, where the effect of a receipt and release somewhat similar to the instrument in the present case was considered. But there the release was construed to have reference to the provisions in the policy for terminating it at any time, and the policy had not yet expired. Besides, it was held that there was no consideration for the release, if that were construed as a surrender of the claim upon which that suit was brought. No doubt, if there were any mistake in the agreement, it might be reformed upon proper proceedings for that purpose; but, so far as appears, no complaint that this instrument was not what was intended was ever made or suggested until its effect was brought into controversy in the present case.

But it is urged that there was no consideration for the release of the now disputed claims; and it may be that this was the ground on which the court below proceeded. We are satisfied, from the evidence of both the parties, that the item presented in the bills by the libelants, and on which payment was demanded, for the cost of repairs upon the *Manitowoc*, was disputed, not on the ground that the claimants were not liable at all, but because it was excessive; and the evidence fails to show that there was any bad faith in taking that position. It was denied that it was reasonable, and payment was for some time withheld, until finally the parties got together, and made an agreement upon the whole subject. An attorney was employed, and the writing in question was prepared and executed after much attention to its terms. The evidence is quite convincing that the manager of the *Cayuga* would not have paid the amount of the item demanded as the cost of repairs but for the stipulation that it should be received in final satisfaction for all claims growing out of the collision except the one left open. The employment of a lawyer, the prolonged discussion of the subject, and, above all, the express exclusion of one claim, lend strong corroboration to the testimony in proof that the payment of the money and the taking of the release were the result of concession and a compromise. And this would be a sufficient consideration for the release of other claims than the cost of repairs. 1 Pars. Cont. 363, 364; *U. S. v. Child*, 12 Wall. 232; *Boffinger v. Tuyes*, 120 U. S. 198, 7 Sup. Ct. 529. If the transaction were what the libelants now contend it was, the natural course would have been to have simply

given a receipt for the payment of that item of their claims. It follows that the items making up the claim for damages on account of injuries to the Manitowoc, and which are aggregated in the commissioner's report at \$381, should have been disallowed.

2. The matter left open is to ascertain what was the value of the loss of the use of the vessel. We think this must be determined, from a consideration of the circumstances; to mean the loss which the owners of the injured vessel actually sustained. The vessel was being towed by the Wilson, which they owned. The Wilson was competent to have taken the Manitowoc through the trip with small additional expense and loss of time. We cannot see any just reason why there should be deducted, for towage, one-third of the gross earnings of the barge in estimating the value of her lost time, because, as appears, there is, by usage, such an allowance when the service of towage is rendered by a stranger. The rule itself is an arbitrary one, and is not shown to be universally followed. The detention of the Wilson by the towing of the Manitowoc, if she had gone along, was taken into account by the commissioner, and the claimants got the benefit of the allowance.

The actual loss of the use of the barge to the owners was the value to them of the gross earnings she would have made from her voyage if it had not been interrupted, less the expense which they would have incurred in the accomplishment of it; and, as the means existed for a definite estimate, we think there was no error in not resorting to a mere arbitrary standard, and the assignment of error thereon is not sustained.

3. One of the exceptions to the commissioner's report was that he refused to allow a deduction of \$89 from the gross earnings of the interrupted voyage for the cost of the board and wages of the four seamen while the barge was being repaired at Detroit. The commissioner allowed \$227.52 for the board and wages of the officers and crew for the period of 18 days, which he found was the length of time the round trip to Kingston would have taken, and this was adopted by the court. It is now alleged as error that the court did not allow \$263.77 for the wages and board of officers and crew,—that is to say, for three days more than were actually allowed. The argument in the brief is that, inasmuch as the seamen quit when the barge arrived at Detroit, the expense of their board and wages for 18 days at \$5.80 per day—in all, \$104.40—was saved to the libelants, and therefore that sum should be deducted. From what it should be deducted in the interest of the claimants is not stated, and does not readily appear; but it is a sufficient answer to say that the assignment of error does not follow the exception taken to the report. The party complaining was bound with reasonable distinctness to allege his exception, and bring it to the attention of the court. Failing in that, he cannot assign for error other kindred matter which might have been proper subject of exception.

Similar observations apply to the claim made in the argument that \$60.36 should have been added to the deductions from gross earnings on account of the towage charges back through the Welland

canal, which would have been incurred. The only exception made to the report in this respect was that it did not allow for full expenses for towing through the Welland canal in transporting the cargo. The only assignment of error that can be supposed to have any relation to this subject is a general one that the court erred in holding that the net earnings of the barge on the trip would have been the sum of \$1,296.22. It is questionable whether this assignment is sufficiently specific to raise the point now urged. But, if that objection were waived, it remains that there was no exception to the report which challenged the attention of the court, and demanded its judgment upon the question.

4. A further inquiry which is properly presented is whether the commissioner was right in holding that the libelants were entitled to recover the sum of \$562.50 for four days' "demurrage" (as it is called) to the Manitowoc over and above the time required by her to make the interrupted trip. Libelants, in their brief, admit that this was a mistake of two days which should be corrected in favor of the claimants, and upon the argument it was further admitted that another day should be deducted.

We should not feel justified in disturbing the finding of the commissioner upon a question of fact not free from doubt. By the forty-fourth Rule of the General Rules in Admiralty, the like powers are conferred upon commissioners acting on references as are usually exercised by masters in chancery in the equity courts. There are the same reasons for giving to their conclusions the same force and effect. The rule in regard to the report of the master was stated by the supreme court in *Tilghman v. Proctor*, 125 U. S. 136, 8 Sup. Ct. 894, to be that his conclusions would not be disturbed unless it should be apparent that there was clear mistake in the process by which the conclusions were reached. And see *Callaghan v. Myers*, 128 U. S. 617, 9 Sup. Ct. 177; *Kimberly v. Arns*, 129 U. S. 512, 9 Sup. Ct. 355. But we think it clear that the commissioner fell into an error on this subject, and that nothing should have been allowed. It was shown, without contradiction, that the Manitowoc arrived at Lorain on the 18th day of May, and that the Wilson reached Kingston on the 14th. The evidence showed, and the commissioner found, that the latter vessel would not have arrived at Kingston until two and one-half days later than she did if she had taken the barge along on the whole trip. This would leave only one day and a half to unload at Kingston and get back to Lorain, which, upon the evidence, would have been an impossibility. This disposes of all the errors assigned. We conclude that the net earnings should stand as fixed by the commissioner, less the sum of \$12.26 for error, which was corrected by the court below, leaving, after correction, \$1,296.22.

The other claims of the libelants are disallowed. Interest at 6 per cent. is allowed on the above sum from May 20, 1890, to the date of the decree to be entered on the mandate. The cause will be remanded to the district court, with directions to modify its former decree in conformity with this opinion. The libelants will recover costs in the court below, and the appellants will recover costs here.

THE UMBRIA.

CUNARD STEAMSHIP CO., Limited, v. NORDDEUTSCHE INS. CO. et al. SAME v. BRITISH & FOREIGN MARINE INS. CO., Limited. SAME v. SWITZERLAND MARINE INS. CO. SAME v. COATES. SAME v. ARNOLD et al. SAME v. DOLLARD. SAME v. LA HEMISPHERE INS. CO.

(Circuit Court of Appeals, Second Circuit. October 25, 1892.)

Nos. 46, 47, 48, 49, 50, 51, 52.

1. COLLISION—DAMAGES—LOSS OF CARGO.

For a total loss of cargo, its value at the place of shipment, or its cost, including expenses, charges, insurance, and interest, should be allowed.

2. SAME—DAMAGE TO CARGO.

If a cargo is recovered from a sunken vessel, the difference between the market value of the goods if uninjured and their value in their damaged condition should be allowed. That the owners obtained a rebate of duty on the goods because of their damaged condition is immaterial.

3. ADMIRALTY—APPEAL—COSTS.

On a libel against one vessel for damages to the cargo of another by collision and a decree against her, if the decree is reversed on appeal by claimant therefrom, on the ground that both vessels were in fault, appellant is entitled to costs.

4. SAME.

Libelants in such case are entitled to a decree against the owner of the vessel sunk, to the same extent as though they had appealed, but without costs of the appellate court.

Appeals from the District Court of the United States for the Eastern District of New York.

In Admiralty. Libels by the Norddeutsche Insurance Company and others, by the British & Foreign Marine Insurance Company, Limited, by the Switzerland Marine Insurance Company, by James S. Coates, and by Benjamin R. Arnold and others, against the steamship Umbria, the Cunard Steamship Company, Limited, claimant; also by Samuel H. Dollard and by La Hemisphere Insurance Company against said Cunard Steamship Company and another,—for damages to the cargo of the steamship Iberia, sunk by collision with the Umbria. Decrees for libelants. 40 Fed. 893. The Cunard Steamship Company appeals. Reversed.

For report of the decision on appeal from the decree of the district court on the libel by the owner of the Iberia against the Umbria for the same collision, see 3 C. C. A. 534, 53 Fed. 288.

Frank D. Sturges and Frederic R. Coudert, for appellant.

Robert D. Benedict, Wilhelmus Mynderse, Clifford A. Hand, and John McDonald, for appellees.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

PER CURIAM. These are suits by the several libelants, some against the steamship Umbria and the owner of the steamship Iberia, and one against the owners of the two vessels, to recover damages to cargo on board the Iberia, which was lost or injured by the sinking of that vessel by a collision with the Umbria. By the

decrees of the district court the *Iberia* was adjudged not to be in fault for the collision, and the libel against her owner was dismissed, and the *Umbria* was adjudged to be solely in fault, and damages were awarded against her or her owner for the whole loss of the several libelants. The owner of the *Umbria* appealed to this court. None of the libelants appealed. The assignments of error by the appellant raise the questions whether the *Umbria* was free from fault for the collision, whether the *Iberia* was in fault, and whether excessive recoveries were awarded to the respective libelants.

Our decision in the case of *Cyprien Fabre* against the *Cunard Steamship Company*, in which we held both vessels in fault for the collision, must control the present causes; the evidence in each of them as to the circumstances of the collision being the same as in that case. The decrees must, therefore, be reversed, in order to charge the owner of the *Iberia* with his share of the damages.

We have examined the various exceptions to the report of the commissioner upon the question of damages, which were overruled by the district court, and as to which error is assigned, and find no error in the decrees. In some of the causes the cargo was a total loss, none of it having been recovered from the sunken vessel. In such cases, the correct rule of damages is to allow the value of the cargo at its place of shipment, or its cost, including expenses and charges and insurance and interest. See *The Aleppo*, 7 Ben. 120. The commissioner correctly included among the expenses all the items which he allowed. In some of the causes cargo was recovered from the sunken vessel, and sold at the city of New York, after various expenses were incurred in putting it into a proper condition for sale. In such cases the correct rule of damages is to allow the difference between the market value of the goods if uninjured and the value in their damaged condition. That rule was observed. It is entirely immaterial whether the owners obtained a rebate of duty on the goods because of their damaged condition, or whether they paid the whole or a part or none of the duty. This question was considered in the case of *The Eroë*, 17 Blatchf. 16. Inasmuch as the several decrees must be reversed, and a decree in each case made in conformity with the principles announced in *The Alabama* and *Game Cock*, 92 U. S. 695, the appellant is entitled to recover the costs of this appeal. Although none of the libelants appealed, they are nevertheless entitled to a decree against the owner of the *Iberia* to the same extent as though they had appealed, but without costs of this court. *The Galileo*, 29 Fed. 538.

The decrees are reversed, and the causes remanded to the district court, with instructions to decree in conformity with this opinion.

THE ALLER and THE AMERICA.

SOULE v. THE ALLER and THE AMERICA.

(District Court, S. D. New York. December 27, 1893.)

COLLISION—ANCHORAGE GROUND—RAISING ANCHOR—BAD LOOKOUT—SIGNALS IMMATERIAL.

The steamship A. collided in New York harbor with a bark lying on anchorage ground, and at the time engaged, with the aid of a tug, in getting up her anchor. At the time of collision the anchor had not left the ground. There was confusion as to the whistles given by the A.; she asserting that she gave several signals of one blast, indicating that she would go astern of the bark; the bark and tug both understanding the signals as of two blasts. *Held*, that the A. was solely in fault for the collision, having taken upon herself all risks in going unnecessarily on anchorage ground, and for not properly observing the maneuvers of the bark, and avoiding her, and that the tug was not in fault; her signals of two blasts not having influenced the actions of the A., and the tug not being under any obligation to try to drag the bark out of the way of the steamship.

In Admiralty. Libel by Enos C. Soule and others against the steamship Aller and the steam tug America for collision. Decree against the Aller, and dismissing the libel as to the America.

Wing, Shoudy & Putnam, for libelants.

Shipman, Larocque & Choate, for the Aller.

Wilcox, Adams & Green, for the America.

BROWN, District Judge. Between 9 and 10 o'clock in the morning of April 4, 1893, as the North German Lloyd steamship Aller was proceeding out to sea, she came in collision, when between Governor's and Bedloe's islands, with the libellant's bark, Enos Soule, causing damages, for which the above libel was filed.

The tide was flood. The bark had previously been at anchor. The tug America, not long before the collision, had come on the bark's port side, to take her in tow. For the purpose of assisting in raising her anchor and getting her under way, the tug had turned the bark around through the southward and eastward, so as to head up stream; and she then ran up sufficiently to have the anchor chain perpendicular, so that it might the more easily be heaved aboard by the windlass. In winding the bark around, the anchor had been dragged somewhat to the southward and eastward. While heaving in the anchor, the bark was kept in position against the flood tide, by a little backing of the tug, so as to keep the bark steady over the anchor chain. At the time of collision, the anchor was still upon the ground, though broken out. The stem of the Aller struck the bark on the latter's starboard side, about three feet from the stem, upon an angle crossing towards the port side of the bark by about a couple of points. The bark was so damaged that she had to be beached at once.

The testimony in the case is voluminous; in parts, very conflicting; and on some points the testimony of the same witnesses is not consistent. The main facts below stated, however, seem to me so well

established by a great preponderance of testimony, that I am constrained to find the *Aller* solely in fault:

1. The bark, at the time of the collision, and before, was, as I find, well within the prescribed limits of the anchorage ground of that region. She was not under way, but was engaged in heaving in her anchor. She was heading somewhere from northeast to north-northeast; and from the time when the *Aller* was a half mile or more away, and gave her first signal, the bark made no advance, nor any other change of position that contributed to the collision; but, on the contrary, just before the collision, she was moved somewhat to the southward through full speed reversal by the tug.

2. The *Aller*, at the time of her first signal, was either directly ahead, or a little on the port bow, of the bark; she then had the latter on her own starboard bow, and was crossing the bark's bow by an angle of at least one and a half points, heading down the usual channel, to the east of the anchorage ground. Had she kept that course, she would have passed to the eastward of the bark by a broad margin; and there were no other vessels in the way, and no obstructions to prevent her from going that way.

3. When the *Aller* had crossed the bow of the bark, and was heading down the usual channel, she ported her wheel without necessity, in an attempt to go to the westward of the bark; and while making this attempt, collided with her, as above stated, though the bark, by retreating somewhat, had aided the *Aller's* endeavor.

Upon the above facts, clearly the *Aller* was to blame. The only probable explanation of her course is, that the pilot, when he changed his course, and undertook to go to starboard under a port wheel, supposed that the bark was fully under way, and moving to the northeastward. The fact was otherwise, as might have been perceived, upon proper attention to her. None of the persons upon the *Aller*, however, noticed that the bark was getting up her anchor, or that she was not under headway. But it seems to me it might easily have been perceived. This should at least have been suspected from her position, and would have been confirmed by observation that she was on anchorage ground, was making no progress, and had her anchor chain still overboard. The *Aller's* witnesses, however, contend that the bark was not upon anchorage ground. Upon the great weight of testimony, however, I can have no doubt as to the fact that she was on anchorage ground; and that the *Aller*, therefore, had no right to go over that ground, except at her own risk, nor without sufficient attention to distinguish whether the bark was moving, or merely getting under way. In going upon anchorage ground, she took those risks. *Steamship Co. v. Calderwood*, 19 How. 241, 246.

There is an irreconcilable conflict as to the whistles given by the *Aller*. Her witnesses contend that her signals were of one blast, indicating that she would go to the westward. The larger number of witnesses from the *America* and the bark, as well as others disinterested, affirm that the *Aller's* signals were of two blasts. It is certain that all on the tug and bark understood the *Aller's* whistles

to be of two blasts. It is suggested on the part of the Aller that those two blasts came from the tug Levering, and not from the Aller. Considering the respective positions of the three boats, it does not seem to me probable that such a mistake should have been made. I do not find it material, however, to determine the fact on this point, because there is no doubt, from the testimony of the pilot of the Aller, that he understood the tug's answering signal to be of two blasts; and if his signal was of one blast only, then the tug's answer was a contrary signal when the vessels were nearly half a mile apart,—certainly more than a third of a mile. As the Aller at that time was not going over 10 or 12 knots, she would have had no difficulty in stopping before the collision by reversing at once. She did not reverse until considerably later.

For the Aller, it is further claimed that the tug should be held in fault, because her captain admits that if the Aller had given a signal "of one whistle when a mile away" he could have avoided the collision by going ahead with his tow; and that, therefore, he should have done so. As the primary fault, however, was on the Aller, and as the tug really did nothing to contribute to the collision, and was not under way, the latter cannot be held in fault for omitting to take more affirmative measures to avoid collision than she took, except upon clear and satisfactory evidence sufficient to cast upon her a legal duty to take such measures. *The City of New York*, 147 U. S. 72, 85, 13 Sup. Ct. 211. The evidence here is insufficient for that purpose. There is too much doubt whether the signals of the Aller were not of two blasts, instead of one. It is certain, as I have said, that the captain of the tug, and all the others, understood them as of two. But besides this, I am of the opinion that the tug and bark, not being under way, and being engaged in heaving the anchor, and being stationary by land, were under no obligation to start up and drag their anchor in order to get out of the way of the Aller; but, on the contrary, it was wholly the duty of the Aller to keep out of the way of the tug and bark, and no duty devolved on the bark and tug to maneuver to avoid collision until the danger of it, by the Aller's inability to avoid her, became apparent. The signals of two blasts which the tug gave, did not contribute to the collision, because they did not in the least influence the action of the Aller. Had the Aller, on the contrary, acted in conformity with them by going to the eastward, no collision would have happened; and as soon as it was perceived that the Aller was turning to the westward, involving danger, the tug reversed her engines full speed, and did all that was within her power to avoid the accident.

Decree for the libellant against the Aller, and dismissing the libel as against the America, with costs.

THE KATE BUTTERONI,
NORTON et al. v. DONALDSON et al.

(Circuit Court of Appeals, Second Circuit, January 12, 1894.)

No. 52.

COLLISION—FOG—INATTENTION TO SIGNALS—EXCESSIVE SPEED.

A vessel which hears a fog signal at three miles distance with such distinctness as to enable her to correctly locate an approaching vessel as being about a point on her starboard hand is chargeable with notice of subsequent signals which indicate a change of course so as to cross her bows; and if, through inattention, she fails to hear them, but continues at full speed, until a near signal indicates a situation so critical that it is too late to reverse with safety, she is chargeable with fault contributing to the collision.

Appeal from the District Court of the United States for the Northern District of New York.

In Admiralty. Libel by John Donaldson and others against the steamer Kate Butteroni, Charles E. Norton and others, claimants, for collision. There was a decree below for divided damages. Claimants appeal. Affirmed.

Harvey D. Goulder, for appellants.

Clinton, Clark & Ingram, (George Clinton, of counsel,) for appellees.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

WALLACE, Circuit Judge. This is an appeal by the owners of the steamer Kate Butteroni from a decree of the district court for the northern district of New York, dividing the damages (\$13,736.80) resulting from a collision between that vessel and the steam propeller Cuba, and adjudging both vessels in fault. In deciding the cause the district judge did not render any opinion. The owners of the Cuba have not appealed.

The collision took place on Lake Huron, June 16, 1890, about 10:30 A. M., in a fog, which had set in about an hour and a half before. The Butteroni was proceeding down the lake, with two sailing vessels in tow on a hawser, one behind the other. She was on a course S. E. by S. $\frac{1}{2}$ S., and was going at a speed of about five miles an hour, which was her full speed, incumbered as she was. The Cuba was proceeding up the lake on a course N. by W. half W., without cargo, and going at a speed of eleven miles an hour. Although the fog was so thick that vessels could not discover one another within a distance of three or four hundred feet, the collision was wholly inexcusable. There was no wind, there was ample sea room; each vessel, when she discovered the other to be approaching, was on the regular course, substantially, of vessels navigating that part of the lake; each was properly manned and equipped; and each, while she was approaching the other, was properly sounding fog signals, in accordance with the regulation which requires such signals to be sounded at intervals of not more

than one minute. When the vessels were three miles apart each heard the fog signals of the other, and heard them so distinctly that those on board each vessel assumed to be able to locate their bearing accurately; and from this time until the collision took place each should have heard the fog signals of the other at the regular intervals, and any other signals which either might choose to give. Under such circumstances, if they had been proceeding at moderate speed, and been vigilant in observing signals, there should have been no difficulty on the part of either in locating the bearings of the other as they drew near together, and taking proper measures to avoid collision.

The facts of the collision, other than those which have been mentioned, are involved in the conflict of testimony usual in this class of cases, and we shall content ourselves with stating our conclusions in respect to them without attempting to detail or analyze the evidence.

When the vessels first heard one another's fog signals each had the other a very little—probably less than a point—on the starboard bow. The Butteroni correctly located the bearing of the Cuba by the latter's fog signals, but the Cuba located the bearing of the Butteroni as right ahead, or between that and half a point on her port bow. The vessels maintained their previous courses for a time, and then the Cuba altered her course half a point to starboard, and gave the Butteroni a signal indicating her intention to pass the latter port to port. Not getting any response from the Butteroni to this signal, the Cuba, after hearing the fog signals of the Butteroni two or three times, and judging from them that the vessels were on converging courses, gave the Butteroni another signal to pass port to port, and altered her course one point further to starboard, and slackened her speed. Getting no response to this signal, and discovering from subsequent fog signals of the Butteroni that the vessels were still drawing across each other's bows, the Cuba gave the Butteroni another signal to pass port to port. This last signal was immediately answered by a like signal from the Butteroni, which indicated that the vessels were in a situation where risk of collision was imminent, and thereupon the Cuba immediately reversed her engines and hard-ported her helm. Her headway had not been stopped when the vessels came together. After the Butteroni first heard the Cuba's fog signals, she proceeded without change of course or speed until the last passing signal of the Cuba was given and answered. At that time the vessels were not more than a quarter of a mile apart. Immediately upon answering the Cuba's signal, the Butteroni hard-ported her helm, but she kept on at full speed until the vessels struck. The port bow of the Butteroni struck the bluff of the port bow of the Cuba.

No appeal having been taken by the owners of the Cuba from the decree adjudging her guilty of fault, the only question we have to decide is whether the Butteroni was also guilty of contributory fault. It is doubtless true that during the earlier period of the approach

of the two vessels the signals from the Cuba indicated to the Butteroni that the Cuba was apparently taking a course by which she would pass safely on the Butteroni's starboard hand. But the subsequent signals from the Cuba—both fog signals and signals for passing port to port—should have admonished the Butteroni that the Cuba had changed her course, and was drawing across the course of the Butteroni. If the Butteroni did not hear those signals, especially the signals for passing, it must have been owing to the want of vigilant attention on the part of those in charge of her navigation. They had heard the earlier ones distinctly, and had located their bearing with accuracy. During the interval between the first and second passing signals, as well as between the second and third, the Cuba repeated her fog signals regularly. The prolonged blasts of the passing signals ought to have been heard even though, when they were being sounded, the Butteroni was sounding her fog signals. We are constrained to believe that after the Butteroni found that the bearing of the fog signals of the Cuba had steadily broadened on her starboard bow, those in charge of her navigation assumed that the Cuba would pass well on the Butteroni's starboard hand, and relaxed their observation of the Cuba. It is possible she mistook the fog signals of the Alcona, a steam vessel approaching her on a parallel course, but well to the starboard, for those of the Cuba. If, owing to inattention, the Butteroni omitted to hear the signals of the Cuba, she cannot escape responsibility for the consequences; she is responsible to the same extent as though she had heard them. Chargeable with notice that the Cuba was drawing across her bows, it was certainly her duty to slacken speed as soon as risk of collision was involved, if it was not her duty to stop and back. She did not do so, but kept on at full speed until the near signal of the Cuba indicated the situation to be so critical that it was too late for her to reverse with safety. It is impossible to find upon the facts of the case that this fault did not contribute to the collision. As this fault was a violation of one of the statutory rules intended to prevent collision, it is presumed that it did contribute to the collision; and the burden rests upon the Butteroni of showing not merely that her fault might not have been one of the causes, or that it probably was not, but that it could not have been. *The Pennsylvania*, 19 Wall. 125. As we are clearly of the opinion that the Butteroni was in fault for the reasons already given, we deem it unnecessary to consider whether she committed any other faults which contributed to the collision.

The decree of the district court is affirmed, with the costs to the appellees of this appeal, and the cause remitted to the district court to decree accordingly.

BURGUNDER v. BROWNE et al.

(Circuit Court, D. Washington, S. D. December 11, 1893.)

1. REMOVAL—TIME OF FILING PETITION IN FEDERAL COURT.

It is sufficient excuse for not filing the petition in the federal court on the day regularly set for the beginning of the first term after the petition and bond were filed in the state court, being November 5th, that defendant's attorney inquired of the clerk when the term would begin, and was told that the first day would be December 5th; it appearing that, owing to the absence of the judge, no court was held until that date.

2. SAME—SEPARABLE CONTROVERSY.

Where a part of the relief asked is that certain promissory notes, not yet due, which are alleged to have been given by certain of the defendants in consideration of an alleged fraudulent conveyance, and transferred by the payee to the other defendants as collateral security for alleged indebtedness, be surrendered up by the latter, and returned to the makers, such makers have no separable controversy from the holders of the notes; nor has one holder a separable controversy from the other holders, all being jointly interested in the notes as collateral security.

In Equity. Bill by B. Burgunder, receiver of the McConnell-Chambers Company, to subject assets of the corporation alleged to have been conveyed to defendant R. S. Browne and others. Heard on motion of plaintiff to remand to the state court. Granted.

Cox, Teal & Minor, for complainant.

Phillip Tillinghast, for defendants.

GILBERT, Circuit Judge. This cause was removed to this court from the superior court of the state of Washington for Whitman county upon the separate petitions of Browne and Maguire, defendants, citizens of Idaho, and the Vermont Loan & Trust Company, a corporation created under the laws of Dakota, upon the ground that, as to each of said petitioning defendants, the plaintiff's cause of suit was a separable controversy. Motion is now made to remand upon two grounds: First, that the transcript was not filed in this court in apt time. Second, that the controversy is not separate or separable as to either of said defendants.

The suit is brought by B. Burgunder, a citizen of Washington, the receiver of the McConnell-Chambers Company, an insolvent corporation, to subject to the payment of debts of said corporation certain property which is alleged to have been transferred to the defendants. The bill of complaint alleges: That the insolvent corporation, for the purpose of defrauding its creditors, fraudulently transferred to said Browne & Maguire, for a consideration of \$50,841.68, a stock of merchandise, the true value of which was \$67,189.37, and that in payment therefor the said corporation received from the said defendants a debt of W. J. McConnell, one of the members of said corporation, amounting to \$8,500, but which was of no value whatever; certain shares of stock in another corporation, taken at \$1,600, but actually of no value; a certain stock of hardware, taken at \$7,500, but worth no more than \$3,000; the assumption by said defendants of certain outstanding liabilities

of the insolvent corporation upon coupons, amounting to \$5,145.75; the remainder in the promissory notes of said defendants, payable in one and two years from date. That the stock of hardware has been mortgaged to certain other defendants to secure an alleged indebtedness of \$5,000 due from said insolvent, and the said promissory notes have been transferred and delivered to the Vermont Loan & Trust Company, the Pullman State Bank, a corporation of the state of Washington, and to R. M. Sherman and J. W. Corbett, whose citizenship is not stated, as security for an alleged debt due them from said insolvent, the amount of which debt is elsewhere in the bill declared to be unknown to the complainant.

The prayer of the bill is for a general accounting by the various defendants to whom the assets of the corporation have been transferred, and that the transfer to Browne & Maguire be set aside, and that the property sold to them by the insolvent be surrendered to the complainant, upon the delivery by the complainant to the said defendants of the said promissory note of McConnell for \$8,500, and their own notes, when delivered up by the parties to whom the same were transferred by the insolvent, and that, in case said notes cannot be so delivered up, the said defendants Browne & Maguire be allowed credit for the same upon the said sale, and that the Vermont Loan & Trust Company, and the other defendants to whom said notes and other choses in action have been transferred, be decreed to surrender the same to the receiver, and that the assets and property of said corporation be reduced to money, and an account taken of its indebtedness to all of the defendants, and that the moneys realized be paid pro rata upon the debts of said corporation.

It is claimed that the cause should be remanded because the transcript was not filed on the first day of the present term of this court. The first term of this court after the petition and bond for removal were filed in the state court was regularly set for the 5th day of November; but, owing to the absence of the judge, no court was held until the 5th day of December, at which date the transcript was filed. It satisfactorily appears by the affidavit of the attorney representing the defendants that he made inquiry of the clerk as to the time when the term would begin, and was informed that the first day of the term would be the 5th day of December. This excuse is sufficient, under the authority of *Railroad Co. v. Koontz*, 104 U. S. 5; *Hall v. Brooks*, 14 Fed. 113; and the motion to remand upon that ground must be denied.

The conditions under which a cause may be removed to the federal courts upon the ground that, as to the parties removing the same, a separable controversy exists, are defined in the case of *Fraser v. Jennison*, 106 U. S. 191, 1 Sup. Ct. 171, in which Mr. Chief Justice Waite said:

"There must exist in the suit a separate and distinct cause of action, on which a separate and distinct suit might properly have been brought, and complete relief afforded as to such cause of action, with all the parties on one side of that controversy citizens of different states from those on the other."

Applying the doctrine of that decision to this case, it will be seen that the cause of suit, either as to Browne & Maguire or the Vermont Loan & Trust Company, is not separable. In the case of the Vermont Loan & Trust Company, it is alleged that that corporation, together with several other defendants, has received the promissory notes which were given by Browne & Maguire, together with numerous other assets of the insolvent corporation, as security for the debt which the corporation owed them. The Vermont Loan & Trust Company is jointly interested in these securities with the other parties to whom they are transferred, and the rights of the Vermont Loan & Trust Company cannot be determined without the presence of the others.

In the case of Browne & Maguire, it is shown that the promissory notes which they gave as part of the purchase price of the property received by them, which notes amounted to more than \$28,000, and are not yet due, are part of the securities transferred to the Vermont Loan & Trust Company and to the other defendants. A portion of the relief prayed for is that these notes be delivered up by the parties to whom they are transferred, and that they be surrendered back to Browne & Maguire. The Vermont Loan & Trust Company, and the others interested with it in these securities, must necessarily be brought into a suit which has this object in view. It is urged that the Vermont Loan & Trust Company and the other defendants holding the securities have no interest in the controversy between the complainant and Browne & Maguire, because it is alleged in the bill that the transfer of securities to them was fraudulent, and that they have no real interest in the same; and reference is made to the case of *Barney v. Latham*, 103 U. S. 205, which holds that the presence of a formal defendant against whom no relief is sought will not defeat the right of the real party defendant to the removal of the suit, and to the case of *Construction Co. v. Simon*, 53 Fed. 1, where it was held that a party occupying the position of a stakeholder or garnishee was not a necessary party to the controversy. In this case, however, it does not appear that the persons to whom the securities were transferred are formal parties, or that they hold a position analogous to that of a stakeholder or garnishee. It does not appear from the bill that these parties admit that they have no real interest in the notes. On the other hand, it is averred in the bill that the securities were transferred to the parties holding the same, to secure an indebtedness, but that the amount of the indebtedness is not known. Nothing appears in the bill from which the court may infer that the right of these defendants to the securities they hold will not be asserted and prosecuted in this suit. The motion to remand is allowed.

FABRE v. CUNARD STEAMSHIP CO., Limited.

(Circuit Court of Appeals, Second Circuit. October 31, 1892.)

No. 45.

CIRCUIT COURTS OF APPEALS—CERTIFYING QUESTIONS TO SUPREME COURT.

Certification cannot be granted where no new or difficult questions of law are presented, and the mixed issues of law and fact could be reviewed satisfactorily only on examination of the entire record.

Appeal from the District Court of the United States for the Eastern District of New York.

Motions by appellee for reargument, or for certification of certain questions to the supreme court of the United States for instructions, and by appellant for reargument. Motion of appellee denied, and decree modified on appellant's motion.

For report of the decision on the appeal, see 3 C. C. A. 534, 53 Fed. 288.

The questions upon which appellee asked a reargument or a certification to the supreme court were as follows:

First. Whether the amendment to the collision rules, proposed by the international marine conference of 1889, which is contained in the last clause of article 16, as proposed by that conference, (International Marine Conference 1889, vol. 3, pp. 56, 63,) is a declaration of the law as it previously existed, or is a new rule proposed which has not yet become law.

Second. Whether it is the law that when a steam vessel, navigating at her lowest rate of speed in a fog, hears the whistle of another steamer forward on either bow, it is her duty to "proceed circumspectly," or whether it is her duty to stop in all cases.

Third. Whether it is the duty of the navigator of a steamship, under such circumstances, to act in accordance with good seamanship, or whether there is any other rule or duty for him, and, if so, what?

Fourth. Whether a court can lawfully decide that the navigator of a steam vessel has acted otherwise than with good seamanship in pursuing a course of action which would have avoided collision, if an assumption as to the conduct of an approaching vessel (which assumption he had the right to make, and upon which assumption he acted) had not proved, in fact, to be erroneous, by reason of wrongful and reckless navigation of such other vessel.

Fifth. Whether, on the facts found in the opinion of the court, viz. that the Umbria was navigating wrongfully in a fog at a speed of 19½ knots an hour, that she came in view of the Iberia at a distance of about 900 feet, bearing about five points on the Iberia's port hand, and that she struck the Iberia so near the stern that, if the Umbria had been navigating at a moderate speed, there would have been no collision, it must not be held, as matter of law, that the cause of the collision was the wrongful speed of the Umbria, and that the fact that the Iberia had not, previous to the Umbria's coming in sight, stopped, was not contributory to a collision.

Sixth. Whether the master of the Iberia, hearing the Umbria's whistle two points on his port bow, and porting two points, and hearing thereafter four or five whistles from the Umbria at an interval of not more than a minute apart, so changing their bearing to port that, when the Umbria was seen, she bore about five points on the port hand, and assuming, as he had a right to do, that the Umbria was going at a moderate rate of speed, and would therefore pass under his stern, (which the Umbria would have done if she had been going at a moderate rate of speed,) and having already passed two steamers in safety in the same manner, was required by any rule of law or of good seamanship to pursue, not the same course, but a different one, after he heard the Umbria's whistle, from that which he had pursued with safety before.

Seventh. Whether the rule of damages is, as stated in the opinion of the court, "limiting the recovery to the value and the interest from the time of loss, unless there is a loss of freight which would otherwise have been earned upon the particular voyage in which the vessel is lost;" or whether the following should not be added: "or upon a contract, the performance of which had been entered upon at the time of the loss."

The question upon which appellant asked a reargument was as follows:

As to whether or not the appellant's exception to the allowance of the claims of seamen, amounting to two thousand eight hundred and five francs and twenty-five centimes, should not be sustained, and said claims be disallowed on the ground that said claims were not proved, and for such other relief as the appellant may be entitled to receive.

Frank D. Sturges, for appellant.

Robert D. Benedict, for appellee.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

PER CURIAM. However desirable it might be that a review of this case be had in the supreme court, in view of the fact that the four judges who heard it at circuit and in this court are divided in opinion, we cannot see that it is a proper case for the certification to that court of specific questions or propositions of law. No new or difficult questions of that character are presented, and the mixed issues of law and fact could only be reviewed satisfactorily upon an examination of the entire record.

The amount allowed by the commissioner, and approved by the district court, (\$2,805. 25c.) for lost effects of seamen of the Iberia, should be reduced in the amount of \$2,365. 25c. by reason of insufficiency of proof. As to the residue, (\$540.), though there is the same lack of evidence, we do not find a proper exception to the allowance.

EDISON ELECTRIC-LIGHT CO. v. UNITED STATES ELECTRIC-LIGHTING CO.

(Circuit Court of Appeals, Second Circuit. October 22, 1892.)

No. 35.

APPEAL—PROCEEDING BELOW AFTER AFFIRMANCE—SUSPENSION OF INJUNCTION.

The affirmance, in a circuit court of appeals, of a preliminary order or interlocutory decree granting an injunction, does not deprive the circuit court of its inherent power temporarily to suspend such injunction.

Appeal from the Circuit Court of the United States for the Southern District of New York.

Motion to amend mandate on affirmance of interlocutory decree granting an injunction. Denied.

For report of the decision on appeal from the decree, see 3 C. C. A. 83, 52 Fed. 300.

Edmund Wetmore, for the motion.

Clarence A. Seward, opposed.

Before LACOMBE and SHIPMAN, Circuit Judges.

PER CURIAM. The motion to amend the form of mandate in this case by inserting a clause to the effect that the same is "without prejudice" to an application to the circuit court for a further suspension of the injunction is denied. The affirmance in this court of a preliminary order or an interlocutory decree granting an injunction does not operate to deprive the circuit court of the power, inherent in it, temporarily to suspend such injunction, upon sufficient cause shown, after proper notice, whenever the ends of justice call for the exercise of such power.

HORST et al. v. MERKLEY et al.

(Circuit Court, N. D. California. January 17, 1894.)

No. 11,605.

CIRCUIT COURTS—JURISDICTIONAL AMOUNT—REAL CONTROVERSY.

When it appears from the plaintiff's own testimony that one of the causes of action pleaded never had any existence, and the remaining matters are not of sufficient value to support the jurisdiction, the case must be dismissed.

At Law. Action by Paul R. G. Horst and others against R. J. Merkley and others. Dismissed for want of jurisdiction.

Boyd, Fifield & Hoburg, for plaintiffs.

Robert T. Devlin, for defendants.

GILBERT, Circuit Judge. The plaintiffs bring an action against the defendants for the recovery of moneys advanced, and for damages sustained by reason of the breach of a contract. On the trial the question arises whether or not the matter in dispute is sufficient to bring the case within the jurisdiction of the court. It is alleged in the complaint that the plaintiffs and the defendants entered into a contract whereby the latter were to sell and deliver to the former 24,000 pounds of hops growing upon certain premises, the same to be delivered between August 15 and October 1, 1891, for which the plaintiffs were to pay defendants 17 cents per pound; that under said contract the plaintiffs made advances of money to the defendants, and the defendants delivered to plaintiffs on August 21, 1891, 10,046 pounds of the hops, leaving a balance due the plaintiffs on said advances in the sum of \$775.73; and that the defendants refused to deliver the remainder of the said hops under the contract, to the plaintiffs' damage in the sum of \$1,500; and for both said sums demand is made for judgment. The defendants admit the claim for advances, but deny that they failed to perform the contract, and deny the plaintiffs' claim for damages, and for counterclaim demand damages of \$1,000 against the plaintiffs, alleging that the plaintiffs refused to receive the hops under the contract.

The only evidence offered on the trial concerning the breach of contract alleged in the complaint was that of one of the plaintiffs. He testified that in the latter part of February, 1892, some four or

five months subsequent to the date at which the hops were to have been delivered under the contract, the price of hops rose to such a figure that the excess of the market price at that time over the price contracted for, on the undelivered hops, would have amounted to the gross sum of \$1,500. He admitted, however, that at the time when the hops were to have been delivered, and for some time thereafter, the market price of hops, such as those contracted for, was considerably below the contract price, and that during September and October, 1891, he could readily have bought hops equal in quality and value to those contracted for at 14 or 15 cents per pound. The evidence in the case shows, moreover, that the plaintiffs, at and before the time fixed for the delivery, were contriving to avoid their obligation to receive the remainder of the hops, and that they finally refused to accept the same, alleging as their reasons therefor that no written notice of the time of delivery had been given them, as required by the terms of the contract, and that the delivery, when made, was made after business hours on the last day of the period limited in the contract. At the close of the evidence the plaintiffs waived their claim of damages.

From the plaintiffs' own testimony, it is evident that there was not only no damage to them from the failure—if failure there were—of the defendants to comply with the contract, but that they derived a benefit therefrom. The plaintiffs' claim of damages is therefore clearly fictitious. This is not a case of failure of proof, or of the waiver of a portion of a demand which had been really in dispute. It is a case where the plaintiffs' statement of the facts—the facts upon which the claim of damages was formulated in the complaint—conclusively proves that the cause of action never existed. It is the duty of the court, of its own motion, to dismiss a case, whenever it shall be made to appear that the facts upon which its jurisdiction depends do not exist. Had the facts which the plaintiff now testifies to been specially declared upon, in the complaint, a demurrer to the complaint for want of jurisdiction would have been sustained. Instead of appearing upon the pleadings, the facts are disclosed upon the trial, through the plaintiffs' own admission in open court. The result is necessarily the same.

In an action of tort, it is true the plaintiff may allege his damage in such sum as he may deem proper, and the jurisdiction will be sustained, notwithstanding the fact that a jury may assess the damages at a sum far below the jurisdictional amount. *Gordon v. Longest*, 16 Pet. 97; *Hynes v. Briggs*, 41 Fed. 468. But if it appear from the plaintiff's own testimony, or that of his witnesses, that a verdict for damages in \$2,000 would be so clearly excessive as to require the court to set it aside, the case will be dismissed for want of jurisdiction. *Maxwell v. Railroad Co.*, 34 Fed. 286; *Lee v. Watson*, 1 Wall. 337; *Hilton v. Dickinson*, 108 U. S. 174, 2 Sup. Ct. 424; *Bowman v. Railway Co.*, 115 U. S. 611, 6 Sup. Ct. 192. In *Hilton v. Dickinson*, *supra*, it was said by the court:

"It is undoubtedly true that, until it is in some way shown by the record that the sum demanded is not the sum in dispute, that sum will govern, in all questions of jurisdiction; but it is equally true that, when it is shown

that the sum demanded is not the real matter in dispute, the sum shown, and not the sum demanded, will prevail."

In this case the plaintiffs' demand for \$775.73 advances is admitted by the defendants, and the only matter in dispute is the defendants' counterclaim of \$1,000. The cause must therefore be dismissed for want of jurisdiction.

DE CHAMBRUN v. SCHERMERHORN.

(Circuit Court, S. D. New York. January 11, 1894.)

1. TRUSTS—AGREEMENT ABSOLUTE IN TERMS—EVIDENCE.

By a contract between parties in confidential relations, similar to, if not technically, those of attorney and client, one of them, interested in certain litigations, agreed, in consideration of services rendered therein by the other, to pay him a certain sum, which was made a lien on the promisor's interest in the litigation. His interest therein did not exceed the sum named, and the services mentioned were apparently compensated by previous payments and a monthly salary. That the promisor had an interest in the contract was indicated by the subsequent relations of the parties and statements by the other party, who also admitted, after the promisor's death, that he, if alive, would have testified to a trust in his own favor; and there was evidence that he believed in the existence of such a trust. *Held*, that this established a trust as to the balance after payment of the value of the services rendered.

2. SAME—FRAUD AS TO THIRD PARTIES—EQUITY.

In view of the relations between the parties, equitable relief should not be refused in such case because the contract was given to prevent third parties from reaching the fund by means of inequitable contracts previously given to them, for which inadequate consideration had been rendered.

3. RES JUDICATA.

A decree of a state court is not a bar to a suit in a federal court on a question which, although it might possibly have been litigated in the state court if properly pleaded, was in fact neither pleaded nor litigated.

In Equity. Suit by Pierre De Chambrun, as administrator of Charles A. De Chambrun, against George J. Schermerhorn, to establish and enforce a trust. Decree for complainant.

Everett P. Wheeler and Wyllys Hodges, for complainant.

Louis Marshall, George C. Lay, and Arthur H. Masten, for defendant.

COXE, District Judge. The complainant asks for a decree declaring that a contract, in the nature of a mortgage, for \$30,000 made by his intestate, Charles A. De Chambrun, and delivered to the defendant, was in fact made for the benefit of De Chambrun and was held in trust for him by the defendant. This contract grew out of the so-called "Jumel litigation," and was one of several given by De Chambrun to parties who assisted the heirs of Stephen Jumel to recover their property. It is as follows:

"It is hereby stipulated and agreed by and between Charles Adolphe de Chambrun, as attorney in fact of the heirs at law and next of kin of Stephen Jumel, deceased, late of the city of New York, and George J. Schermerhorn, attorney at law, of the city of New York, that in consideration of the services rendered by said Schermerhorn, at the request of said Chambrun, and in behalf of said heirs at law and next of kin of said Stephen Jumel, in litigations involving the title to premises in the city of New York, at one time owned by

said Stephen Jumel, said Chambrun agrees to pay said Schermerhorn the sum of thirty thousand dollars (\$30,000,) and such sum of \$30,000 is hereby made a lien upon any money or property which said Chambrun may receive for said heirs at law and next of kin as aforesaid. It is further agreed that this agreement shall bind the heirs, executors, administrators, successors and assigns of the respective parties hereto. In witness whereof, the above-named parties have hereunto set their names and seals at the city of New York, this 28th day of August, 1880.

"Charles Adolphe de Chambrun. [L. S.]

"Geo. J. Schermerhorn. [L. S.]"

Many of the facts applicable to this controversy will be found reported in the case of *De Chambrun v. Campbell*, 54 Fed. 231, and it is unnecessary to state them again. Three questions arise on this record. First. Was the agreement just quoted given to the defendant in trust? Second. If given in trust, was the object to defraud other claimants upon the Jumel fund, and, if so, can one who was particeps fraudis enforce such a trust against his accomplice? Third. Is the decree of the state court, adjudging that the contract in question belongs to the defendant, a bar to this action? I have reached the conclusion that De Chambrun had an interest in the contract of 1880. Some of the reasons for this conclusion, briefly stated, are as follows:

First. It is conceded that the relations between De Chambrun and the defendant were of the most intimate and confidential character. They occupied the same law office and if their relations, technically, were not those of attorney and client they were in all respects very similar and demanded similar duties and obligations. The proof indicates that the defendant was treated more like a relative, a confidential clerk, or a private secretary than as a mere legal adviser. It appears from the correspondence that De Chambrun's most secret thoughts were freely communicated to the defendant and that the most implicit trust was imposed in him. The defendant fully recognized his obligation to protect De Chambrun's interests. "It is my intention," he writes, "to follow through to the end all my dealings with you in the most manly and honorable manner I am capable of." If a trust were to be created it is certain that the defendant is the one man who would have been selected to receive it. These relations of trust and confidence should be kept steadily in view in considering the question of fact. When they exist the slightest evidence is sometimes sufficient to overthrow an instrument valid upon its face, if, indeed, the burden is not upon the holder of the instrument to prove the bona fides of the transaction. 3 Greenl. Ev. § 253; *Whitehead v. Kennedy*, 69 N. Y. 466; *Zeigler v. Hughes*, 55 Ill. 288, 295; *Rogers v. Land Co.*, 134 N. Y. 197, 214, 32 N. E. 27; *Pom. Eq. Jur.* § 951. In *Brown v. Bulkley*, 14 N. J. Eq. 451, 458, the chancellor holds that all securities taken by a solicitor are presumptively void and the onus is on him to show them fair and upon sufficient consideration. They will be allowed to stand only for the actual indebtedness as found by the court. The rule laid down by Judge Sharswood is quoted with approval. "When the relation of solicitor and client exists and a security is taken by the solicitor from his client, the pre-

sumption is that the transaction is unfair, and the onus of proving its fairness is upon the solicitor."

Second. The character of the instrument itself should be considered. Unlike most of the other contracts it was an absolute agreement to pay \$30,000. *Chester v. Jumel*, 125 N. Y. 237, 253, 26 N. E. 297. It was a mortgage. It was not contingent, for a settlement had already taken place which made it good almost beyond a doubt. On the 25th of October, 1876, De Chambrun made an agreement with the defendant by which he promised to pay him the sum of \$10,500 for services performed within the next 90 days. The agreement of August, 1880, must have been given, therefore, assuming it to be absolute, for services rendered by the defendant during three years and seven months. Between the dates of the two contracts, however, another agreement was made by which De Chambrun promised to pay the defendant \$100 a month for his services. Under it the defendant received \$3,175 before and \$2,100 after the August agreement. That a further absolute agreement to pay \$30,000 should be given at this time and in such circumstances is, at least, strange. The reason for it offered by the defendant is unsatisfactory.

Third. The consideration was inadequate. That the defendant rendered faithful and valuable services in the *Jumel* litigation is beyond dispute, but, upon the proof now presented to the court, it cannot be said that they were worth the sum of \$79,000 which he has received. It may be that on an accounting the defendant will be able to show that his services were worth much more than now appears to be their value, but on this record it seems that they were entirely clerical in character and such as could be performed by a competent and intelligent law clerk. It is not pretended that he took part in the trial or arguments in court or did any of the work for which large fees have been usually awarded to members of the legal profession.

Fourth. The correspondence and documentary evidence, though devoid of any direct admission of a trust, seem to bear out the theory that there was a joint interest in the contract. Until the final rupture the defendant constantly speaks of his own and De Chambrun's interests as if they were to stand or fall together. In the proposed agreements of August, 1884, February, 1886, and even as late as the agreement of April 12, 1888, this community of interest is recognized. It is certain that up to the very latest stage of the litigation the parties never contemplated the result which followed. It is conceded on all hands that "the whole burden of the work fell upon De Chambrun and his new associates. The enormous work performed by them can hardly be explained or understood without a personal examination of the papers. * * * That the work as thus carried on was due to the indomitable energy and pluck of De Chambrun. That anything has been realized is due to him and his associates whom he inspired with his own spirit." In 1883 De Chambrun had assigned away considerably more than his interest in the *Jumel* property and yet a settlement of the litigation which cut him off entirely would undoubtedly have been

opposed by the defendant as grossly unfair. If he (De Chambrun) had no interest in the contract of 1880 he had no interest at all. A settlement which, on the one hand, not only deprived De Chambrun of all compensation for his long and arduous services, but left him in debt some \$33,000 for disbursements spent in the common cause, and, on the other, awarded nearly \$80,000 to his confidential friend and adviser, would at that time, probably have seemed as inequitable to the defendant as it does now to disinterested men. That all parties desired to avoid such a result is clearly established by the correspondence. Is it not probable, therefore, that they acted and contracted in the light of a result certain to follow unless they took measures to prevent it?

Fifth. It is most unfortunate that De Chambrun died before his testimony was taken. It is, however, admitted in the defendant's brief that he would have sworn to the existence of a trust had he lived throughout the suit. Although this admission is in exact accordance with the truth and with the allegations of the complaint it is by no means a substitute for the testimony itself. If De Chambrun had testified to the trust and had sustained himself on cross-examination it would have gone a long way to convince the court of the rectitude of his position. On the other hand, if he had been broken by the cross-examination and had failed to give a reasonable explanation of the inconsistencies so often apparent in his conduct it would have had a contrary effect. This most important, and, probably, decisive testimony has not been given, and, in its room, so far as De Chambrun is concerned, is the fact that he believed in the existence of the trust and, had he lived, he would have sworn to it on the witness stand. From the very nature of the issue—whether or not a secret oral trust existed—it will be seen at a glance that direct evidence is well-nigh impossible. The complainant has, however, produced two witnesses whose testimony tends strongly to sustain the theory of a trust. It shows that just prior to the August agreement the defendant's mind was occupied with plans to prevent De Chambrun from losing what was his due, that he devoted considerable study to the subject of trusts and soon after the date of the August contract when asked about the matter declared that "it was all fixed." Several years afterwards, in 1886, he repeatedly stated that De Chambrun and he "were jointly interested in those contracts." It is sought to contradict the testimony of one of these witnesses, Mr. Norris, by proving that he made statements to Mr. Beach, a former law partner, inconsistent with his statements under oath. Beach says that Norris told him, in April, 1888, that De Chambrun had met him in Washington shortly before, and asked him if he had any knowledge of Schermerhorn's holding the contracts in trust and he had told De Chambrun that he had no such knowledge. Norris denies that he had this conversation. If it did take place it tends, unquestionably, to discredit the testimony of Norris, but it also establishes the fact that De Chambrun, in the early part of 1888, believed in the trust, was preparing to assert it and was even willing to go into what might at that time be almost thought to be the hostile camp, in order to obtain the necessary

proof. A state of things hardly compatible with the theory that the claim is a product of De Chambrun's imagination.

It is thought, therefore, that, bearing in mind the relations between the parties and the presumptions which follow such relations, enough has been shown to establish De Chambrun's interest in the contract of 1880.

It is alleged in the complaint that the object of the trust was to evade certain inequitable contracts previously given to others and it is urged by the defendant that De Chambrun being a party to this wrong can have no standing in a court of equity. The force of this allegation cannot be avoided although the necessity for inserting it is not quite apparent. It would seem that De Chambrun's intention was not to defraud others, but to prevent those who held unfair contracts, for which inadequate consideration had been rendered, from defrauding him and his associates. Assuming, however, that the well-known rule is applicable that equity will not relieve a party to a fraudulent transaction from the consequences of his own misconduct, it is thought that the facts bring this cause within the exception to the rule enunciated in *Ford v. Harrington*, 16 N. Y. 285, "that, as against an attorney and counselor, the law will set aside an agreement made with his client, by which property is placed in his hands to keep it out of the reach of the creditors of the client."

Are the decrees in the *Chester* and *Tauziede* Cases *res judicata* of the issue now presented? In the *Campbell* Case this question was answered in the affirmative for the reason that precisely the same propositions there raised were passed upon and decided by the state courts. It is not pretended that the question whether or not a secret oral trust existed was presented to the state courts. Such a question was not incident to or essentially connected with the subject-matter of the litigation in the state courts, and it did not come within the legitimate purview of those actions. That De Chambrun's conduct in the state courts was inconsistent with his present contention may as well be conceded, but it did not amount to an estoppel as matter of law. The very nature of the question precluded it from being discussed in those actions. It was for the interest of neither to have it bruited, it was for the interest of both to have it kept a secret. What motive De Chambrun could have had in publishing the trust to the world at that time it is difficult to perceive. A decree in complainant's favor here will not antagonize the judgments of the state courts for it must proceed upon the theory that those judgments are correct. Although it is possible that the question of trust might, if properly pleaded, have been litigated in the state courts, the fact that it was neither pleaded nor litigated is sufficient to prevent the application of the doctrine of *res judicata*, within the rule of the federal courts. *Cromwell v. County of Sac*, 94 U. S. 351.

The record shows that De Chambrun was a procrastinating, egocentric and most irritating character. He was impulsive, improvident and irascible, but generous, confiding and hopeful,—a true optimist, a typical Frenchman. He frequently did strange things, so

strange, in fact, that one looks in vain for a motive. His course was at times contradictory and inexplicable upon any theory of self-interest. He was often his own worst enemy and involved himself in so many contradictory positions and visionary schemes that it is no wonder his character is attacked and his integrity impugned. And yet, with it all, I cannot believe that De Chambrun was at heart a dishonest man. His acts are to be interpreted in the light of his peculiar temperament and so viewed are capable of a more charitable construction than is placed upon them by the defendant. After studying the proofs with more than ordinary care I cannot avoid the conclusion that De Chambrun has not been fairly treated. Entertaining no doubt as to this proposition the court naturally is disposed to cut through merely formal objections and brush away technicalities which obstruct the path to equity. The defendant should be fully and liberally rewarded for the valuable services he has rendered, but when this is done he has no reason to complain if the balance, should there be one, goes to the family of the man whose labors were the most deserving of them all.

The complainant is entitled to a decree for any balance found due, after paying the defendant in full for his services, and for an accounting to determine the value of such services, with costs.

BOUND v. SOUTH CAROLINA RY. CO. et al. BARNES et al. v. BOUND et al. WALKER v. SAME. COGHLAN v. SAME. SMITH et al. v. SAME.

(Circuit Court, D. South Carolina. January 19, 1894.)

RAILROAD MORTGAGES—FORECLOSURE—COUNSEL FEES.

Where an individual bondholder brings a foreclosure suit, alleging laches on the part of his trustees, and making them, and all prior lienholders, parties, and the latter, by cross bills, also pray foreclosure of their own liens, so that, as a result of the litigation, the property is decreed to be sold free of all liens, the trustees of the various mortgages must be considered as acting in the interest of their own bondholders alone, and the counsel fees of the various parties will not be charged upon the fund as a whole, but upon that part of the proceeds appropriated to the payment of the mortgages respectively, except that, where part of the bondholders under one mortgage dissent from the action of their trustees in declaring the mortgage due for default in interest, and contest the matter in the foreclosure proceedings, such dissentients must pay their own counsel fees.

In Equity. Bill by Frederick W. Bound against the South Carolina Railway Company and others for a receiver, foreclosure, etc. See 43 Fed. 404; 46 Fed. 315; 47 Fed. 30; 50 Fed. 312, 853; 51 Fed. 58; 55 Fed. 186; 58 Fed. 473. Heard on application for the payment of counsel fees.

McCrady & Bacot, for trustees first mortgage.

Samuel Lord, for trustees first consolidated mortgage.

Wheeler H. Peckham and George W. McCormack, for first mortgage bondholders.

Smythe & Lee, for second mortgage bondholders.
Langdon Cheves, for trustees second mortgage.
J. P. K. Bryan, for complainant F. W. Bound.

SIMONTON, Circuit Judge. A final order of sale under foreclosure having been entered in these cases, a question is presented with respect to the compensation of the counsel in the cause. Must this compensation, or any part of it, be borne by the general fund?

What is now known as the South Carolina Railway Company was once called the Charleston, Louisville & Cincinnati Railroad Company. The name was afterwards changed to that of the South Carolina Railroad Company. By a decree of foreclosure and sale in this court, a second mortgage of the South Carolina Railroad Company was foreclosed, and, upon the sale, the South Carolina Railway Company was organized, and became possessed of all the property, subject, however, to all liens prior to the second mortgage. The South Carolina Railway Company executed three mortgages,—the first, known as the "First Consolidated Mortgage," executed to Barnes and Sloan, trustees; a second, known as the "Second Consolidated Mortgage," executed to Barnes and Higginson, trustees; and a third mortgage, executed to Stout and Higginson, trustees, to secure certain income bonds.

At the beginning of this litigation there were the following liens on this property, in the following order:

First. Bonds of the Charleston, Louisville & Cincinnati Railroad Company, guarantied by the state of South Carolina, and secured by a statutory lien. These were all held by Henry Thomas Coghlan, who had reduced his demand to judgment, and had obtained leave to issue execution. This has been paid during the progress of this suit, and is now satisfied.

Second. Bonds secured by the first mortgage of the South Carolina Railroad Company, executed to H. P. Walker, Henry Gourdin, and James Calder as trustees. Of these trustees, Calder alone survives.

Third. Bonds secured by the first consolidated mortgage, held by Barnes and Sloan, trustees.

Fourth. Bonds secured by the second consolidated mortgage, held by Barnes and Higginson, trustees.

Fifth. Mortgage securing the income bonds.

This litigation began by a bill filed by F. W. Bound, in behalf of himself and all other second mortgage bondholders, seeking foreclosure of the second mortgage, and sale thereunder. To this bill the trustees of the second mortgage, Coghlan, the trustees of the first mortgage of the South Carolina Railroad Company, the trustees of the first consolidated mortgage, and the trustees of the income bond mortgage were made parties defendant, and the debtor corporation. All of the defendants appeared and answered. Thereafter the trustees of the first mortgage of the South Carolina Railroad company, on leave, filed their cross bill, praying foreclosure and sale under their mortgage. The trustees of the first consolidated mortgage, having first exercised a power under the deed,

and declared all the bonds past due, on leave, filed their cross bill, praying foreclosure and sale under their mortgage. Certain bondholders of this class, dissatisfied with the action of the trustees, asked and obtained leave to intervene in their own behalf, filed their cross bill, and, with other relief, prayed a sale subject to the lien of their mortgage. H. T. Coghlan also filed a cross bill; but no further mention need be made of his cross bill, for reasons stated. Soon after Bound's bill was filed, the trustees of the second mortgage, denying the existence of any of the reasons given by Bound for seeking, in person, to protect his rights and those of other second mortgage bondholders, sought to oust him from the control of the cause. This, however, was not pressed to a decision. The record discloses nothing on this head.

The prayer for foreclosure in the Bound bill, and the rights of second mortgage bondholders under their mortgage, never were denied or contested in the cause. The main question, hotly and stubbornly litigated, was whether the property should be sold free of all liens, or whether the foreclosure should be confined to the second mortgage. The final decree is for a sale free of all liens.

The trustees of the first mortgage of the South Carolina Railroad Company, the trustees of the first consolidated mortgage, the trustees of the second consolidated mortgage, the trustees of the income bond mortgage, and Mr. Peckham, representing the dissenting bondholders under the first consolidated mortgage, as well as F. W. Bound, claim that they should be reimbursed, for counsel fees expended or incurred, out of the general fund prior to any of the liens thereon,—that is to say, that their costs, as between solicitor and client, be paid with the costs as between party and party, and on the same footing. *In re Paschal*, 10 Wall. 494.

No question can arise in a case giving greater embarrassment to a judge personally than the question of counsel fees. Perhaps no question is as far as this from distinct utterance and final disposition on the part of the supreme court. There can be no doubt that trustees, and all others technically or actually occupying a representative character, are entitled to be reimbursed for all charges properly incurred in the discharge of the duties devolving upon them out of the fund over which they have charge, and in which their constituents have an interest. *Dodge v. Tulleys*, 144 U. S. 457, 12 Sup. Ct. 728. That is not the question here. The question is, must the holders of other liens contribute to reimbursing the trustees and holders of liens other than their own for services in this case? And, as it is perfectly manifest that the proceeds of sale in this case will not satisfy in full all the demands upon them, the practical question is, shall the holders of the junior liens bear the burden of the litigation,—must they pay the fees of the counsel of the prior lienors, who were not employed by or controlled by them? Each of these counsel represented the interest which retained him, and we may admit, for the purposes of this question, that in advancing that interest he may have contributed to the common weal.

The general rule is well stated by the supreme court of South Carolina in *Hand v. Railroad Co.*, 21 S. C. 179:

"No one can legally claim compensation for voluntary services to another, however beneficial they may be, nor for incidental benefits and advantages to one, flowing to him on account of services rendered to another by whom he may have been employed. Before legal charge can be sustained, there must be a contract of employment, either expressly made, or superinduced by the law upon the facts."

As an illustration of the contract which the law implies, or, as expressed in that opinion, a contract "superinduced by the law upon the facts," is that under which trustees are reimbursed for expenses paid or incurred in protecting, preserving, or securing a common trust fund. They represent all their own *cestuis que trustent*. *Trustees v. Greenough*, 105 U. S. 536; *Cowdrey v. Railroad Co.*, 93 U. S. 354. Where many parties have a common interest, and one of them undertakes the expense and burden of the litigation, in whose successful termination all must share, he is protected in the expenses incurred in his creditors' bill. All those who benefit by his service, and who stood by and saw him render it, must contribute. *Railroad Co. v. Pettus*, 113 U. S. 125, 5 Sup. Ct. 387; *Hobbs v. McLean*, 117 U. S. 582, 6 Sup. Ct. 870. It is put upon a broad equity in *Trustees v. Greenough*, *supra*. It would be inequitable for one alone to bear the burden, and for the others to escape, although they partake of the fruits. But in this case, also, the actor occupies a representative character, and his work is successful because this is recognized.

Did these claimants, or any of them, undertake litigation for the common good, and achieve results in which all share the advantage? In the case at bar the whole property was well known and visible, fully described by deeds on record, subject to liens well known, varying greatly in rank, undisputed. The holders of the second mortgage held their lien with full notice of prior liens. They filed their bill, and began their litigation, with the sole prayer and purpose of obtaining an order for the foreclosure and sale of the interest they held. This was all they were entitled to, and, were their prayer granted, they would be out of court. They were not bound to make the prior incumbrancers parties. *Jerome v. McCarter*, 94 U. S. 735, 736. They did so, however, in order, probably, to fix the actual amount of the prior liens,—an excellent practice. Having thus brought them in for their own purpose, the fund must, of course, bear the taxed costs. But they were not brought in for the purpose of selling the whole fee. This was not asked, and, had it been, in the prayer, no order to that effect could have been passed without the concurrence of prior lienholders. Their road to a final decree on their bill was clear and open. When, however, the prior lienholders came in, they forthwith sought affirmative relief for themselves, and filed their cross bills to obtain foreclosure and sale under their liens. This may have been—without doubt it was—for the advantage of those lienholders who asked it. Incidentally, it may have been for the benefit of the junior liens. But this incidental benefit was not the provoking motive. These prior lien-

holders had no privity or common interest with the junior liens. In no sense can they be said to represent the junior liens. No contract can be superinduced by the law upon the facts existing here. This will appear more clearly when we consider that the most stubborn litigation was between the first consolidated mortgage trustees and the dissatisfied bondholders concerning the action of the former in declaring the bonds past due. In this litigation the second mortgage bondholders had no interest whatever. It would seem, therefore, that the claim of these various trustees and of the dissatisfied bondholders is not sustained by an equity. As has been said, the proceeds of the sale about to take place cannot be expected to pay the liens on the property, swelled, as they are, by large arrears of interest. Were the claims of these trustees and bondholders sustained, the sums they demand will increase the prior liens on the property, and the whole burden will fall on the junior liens; almost with absolute certainty on that class which began this litigation, and prevented the waste of the common fund,—a paradox in equity.

The trustees of the second mortgage claim that their action was for the common benefit; that each lienholder, recognizing the propriety of their proceedings, came in and used them as the means of advancing and protecting their special interest. Had the proceedings been instituted by them, or had they, in the progress of the suit, been placed in control of them, the position now taken would have great strength. But the ground upon which F. W. Bound based his individual action in bringing the bill in his own behalf, and that of other bondholders in like plight with him, was the laches of these trustees. This was denied by the trustees. But the record discloses no successful effort on the part of the trustees, after they had come into the case, to take the control or leadership therein. On the contrary, the cause has all along been promoted by Bound and his solicitors, and this court has recognized this in a substantial way. *Bound v. Railway Co.*, 43 Fed. 404.

It is ordered: That the trustees of the first mortgage be reimbursed and protected in such counsel fees as they may have paid, or have become responsible for, out of so much of the proceeds of sale as may be appropriated to the payment of the bonds secured by this mortgage, special compensation being provided out of the sterling bonds for services in fixing the rate at which they are to be paid in American money.

That the trustees of the first consolidated mortgage be reimbursed and protected, in such counsel fees as they may have paid or have incurred, out of the proceeds of sale appropriated to pay all the bonds secured by the mortgage not held by the dissenting bondholders, whose names are on the record in the petition expressing their dissent.

That these dissenting bondholders satisfy their own attorneys and solicitors.

And the trustees of the second mortgage will in like manner be reimbursed, for counsel fees paid or incurred by them, out of the

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proceeds of sale applicable to their bonds secured by this mortgage.

All the taxed costs of this case, as between party and party, to be paid out of the fund.

CONTINENTAL TRUST CO. OF NEW YORK v. TOLEDO, ST. L. & K.
C. R. CO.

(Circuit Court, N. D. Ohio, W. D. January 26, 1894.)

No. 1,205.

1. RECEIVERS—CONTROL BY COURT—COMPLAINTS OF EMPLOYEES—PROCEDURE.

Employees of a receiver alleging grievances against him may be heard by the court upon making proper application therefor, and if it is of opinion that the allegations demand further investigation it will order the receiver to answer the same, and from these pleadings will determine whether the issue is one requiring a formal investigation by the taking of evidence.

2. SAME—DISCRETION—ADMINISTRATIVE DETAILS.

When the court appoints a receiver to carry on a business, it necessarily commits to his discretion the management of all administrative details relating thereto, and will not interfere therewith unless an abuse of discretion is made to appear.

3. SAME—COMPLAINTS OF EMPLOYEES—REMEDY.

Upon complaint by the employees of a railroad receiver in respect to a reduction of their wages, the court will not interfere to reverse the receiver's administration by settling the details of the complaints, involving, as this would, an extensive investigation of administrative details, but if an abuse of discretion is made manifest, will select a new receiver, to whom such matters may more satisfactorily be intrusted.

In Equity. Railroad foreclosure suit. On petition of certain employees complaining of a reduction of wages by the receiver, and asking relief in respect thereto. Refused, and petition dismissed.

Statement by RICKS, District Judge:

An application has been filed in this case by counsel, who represent a committee of three conductors, three engineers, two brakemen, two firemen, and one telegrapher, now in the employ of the receiver, in which they ask the court to order the receiver to set aside the schedule of wages promulgated by him to take effect November 1, 1893, and offering to produce testimony to show that there was no necessity on the part of the receiver for reducing the wages named in that schedule.

The petition avers, briefly, that at the time of the appointment of the receiver they were working under a schedule of wages which was satisfactory to the petitioners and the men whom they represent. That on June 23, 1893, a schedule was made by the superintendent for the receiver, and a committee acting for the petitioners, which contained the following provision: "No part of this agreement will be abrogated by either party without 30 days' notice, and then only after consultation of all interested." That the schedule existing prior to the appointment of the receiver contained a similar provision, which was not observed. That wages were arbitrarily reduced from the schedule of June, 1893, without notice, and on plea of the receiver of a great decrease in the earnings of the road. The petitioners claim that if the earnings had decreased, and the expenses were too high, a reduction should be made in all departments alike; that men who received from \$150 to \$1,000 per month, and lived in luxuriant quarters, should be reduced in the same proportion as those who labor, and are exposed to privations and dangers. The petition further contains a statement as to the wages of engineers and other employees, to show that they are not receiving sufficient to maintain their families in a respectable manner.

The petition thereupon proceeds to suggest several ways in which the expenses might be greatly reduced, the force of men lessened in various departments, and how wages might be apportioned so as to make the reduction contemplated by the schedule of November, 1893, unnecessary.

Upon the filing of this application, by leave of court, the receiver was requested to file his answer thereto, which he did on the 1st of January, 1894. In that answer the receiver avers that, as president and general manager, before his appointment as receiver, the salaries of his employees were increased at different times; that long prior to his appointment as receiver the business of the road would have justified a substantial reduction of wages, but, hoping for an increase of the earnings in the spring and summer of 1893, as president of the road, he was unwilling to do so. Owing to this leniency and unwillingness to reduce the wages, a debt was created, which the company was unable to pay. In June, 1893, while the crop outlook was so promising, and when a revival of business seemed assured, the receiver made a schedule, which was not, in fact, a general reduction of wages; but the earnings of the months of July, August, and September did not fulfill the promise of June. Between the 1st of July, 1893, and the 23d of December, 1893, the earnings of the road decreased \$365,194.51 over the corresponding period for 1892. This amounted to a decrease of over 30 per cent., or at the rate of \$2,000 per day. Soon after June, 1893, a general reduction in expenses was made in every department. The reduction of wages was the last step taken to meet the still increasing deficiency. This reduction in wages was general, though not uniform. The percentage varied, because "economy has been secured by dispensing with the services of certain employes, reducing payment for a given work, increasing the amount of work of different employes without corresponding increase in compensation, and by varying the percentage of reduction in proportion to the compensation paid, those receiving the lowest wages being reduced the least."

The answer further avers that the total number of employes under the receiver amounted to about 1,300, about 900 of whom accepted the reduction, and about 400 of whom objected. As a rule, the answer avers, the reduction of the 900 who accepted is greater than that of the 400 who objected.

The answer further avers that railroads of greater earning capacity, extending through the same region, are paying substantially less wages. "That the average daily wages of conductors, brakemen, engineers, and firemen fixed by the receiver's schedule of November 1, 1893, and which the petitioners seek to have abrogated by the orders of this court, are higher than the average daily wages paid under schedules of 20 other railroads in the same territory through which the railroad operated by your receiver runs, such railroads being roads entering St. Louis or Toledo, or railroads crossed by the line operated by your receiver. The average wages fixed by your receiver's schedule aforesaid for the classes of employes above named are higher than the average wages paid like employes by the Pennsylvania Railroad Company, the Lake Shore & Michigan Southern Railway Company, the Michigan Central Railroad Company, the Lake Erie & Western Railroad Company, the Cleveland, Cincinnati, Chicago & St. Louis (Big Four) Railroad Company, and others in the same general territory."

The receiver denies that the schedule of June, 1893, was abrogated without notice to the committee, but avers that they had full notice of the proposal to reduce, and that negotiations followed such notice.

The answer further avers that the committee has not proposed, in such form as to be open to negotiations, any schedule which would be acceptable to them. They suggested an arbitrary percentage reduction, but reductions had already been made in other departments, and such a reduction operates inequitably towards those receiving the lowest wages.

The answer further avers that the committee suggested that a specified amount should be deducted from the wages of specified individuals, and continue for a limited period. For the reason that the decrease in earnings was continuing, and for the further reason that no such reduction had been made in any other department than those represented by the committee, the receiver says he was of the opinion that such reduction would, under the terms and conditions suggested, be inequitable.

The answer, referring to the wages of engineers as stated in the petition, claims that said wages are not correctly represented; that the result was reached "by dividing the aggregate amount paid the entire number who worked any part of a month by the whole number so employed, whereas, for the purpose of a just ascertainment of the amount of the average wages of such classes of employes paid during any month, the aggregate amount so paid should be divided by the whole number working an entire month. During the months specified in said application many of such employes were idle for greater or less time, either of their own accord, or because of an insufficient amount of work to keep them constantly engaged. Should the average monthly wages be ascertained by the per month computation, as aforesaid, the same would be found to be greatly in excess of the amounts given in petitioners' application."

In reply to the averments of the petition that the wages received "amount to almost expulsion from the service, or the acceptance of a condition of pauperism," and under which they say they cannot make "an honorable and comfortable living," the receiver answers and says that the November pay roll shows that 26 engineers drew between \$100 and \$160 for the month; that 17 conductors drew from \$100 to \$115 for the month; that 43 firemen drew from \$50 to \$90 for the month; and that 73 brakemen drew from \$50 to \$80 for the month.

The receiver "respectfully suggests, in view of the condition and earnings of the property under his control, and particularly in view of the general depression now prevailing, whether it can be fairly said that the petitioners are reduced to 'a condition of pauperism,' or deprived of the means of earning 'an honorable living.'"

The answer further admits that certain individuals of the classes of employes claimed to be represented by the petitioners received less than the amounts above stated, but the receiver avers that was not due to the rate of wages fixed by the schedule, but was due to the fact that, owing to the insufficiency of business, or from some other cause, such employes were at work less than full time during the month.

The receiver further avers that the wages received by trainmen are also considerably reduced by reason of the fact that a needlessly large number, claiming to be a committee, have for many weeks been living in idleness, or engaged in stirring up discontent among their fellow employes, misrepresenting the actual condition of affairs, and attempting to manage and control the business which this honorable court has seen fit to intrust to the management of its receiver.

The receiver further avers that "a committee of thirteen in number, although claiming to be in the employ of your receiver, remained in practical idleness for more than two months, pretending to be in the business of regulating the business, wages, and terms of employment of their fellow workmen. But your receiver informs the court that the negotiations to which the personal attention of the committee was devoted might easily have been completed within a few days, or at most within a week, and that such negotiations were in fact terminated by the appeal of said petitioners to the circuit court of the United States for the district of Indiana about two months since. Your receiver is informed that the members of said committee claimed to have been sustained by financial contributions of fellow employes, and that their wages and expenses are paid from such contributions; and your receiver is informed that the wages and expenses of said committee for the time aforesaid, when they were not engaged in the work of your receiver, but were practically idle, amounted approximately to upwards of \$4,000. Your receiver is informed that substantially that amount has at different times been assessed upon and in part collected from the employes claiming to be represented by said committee."

In reference to that part of the petition suggesting a decrease in employes in certain departments of the road, the receiver says that he has in his employ "three road masters, each having charge of a division of about one hundred and fifty miles, and each of whom is paid \$100 a month. He also has in his employ a general road master, who, in addition to having charge of the division road masters, also performs the duties of assistant engineer, and is

the only civil engineer on the road employed as such." The receiver denies that any reduction in his assistants, as the petitioners suggest in their petition, is possible or consistent with the safe operation of the road.

To this answer of the receiver, the petitioners, on or about the 15th of January, filed their reply, in which they deny:

First. Every material allegation contained in the answer which is inconsistent with, or contradictory to, the petition.

Second. And, further replying, they claim that "prior to the making of the schedule mentioned in the petition and answer, they were working for less than the standard wages of the standard roads of the country; that the wages given them in the schedule of June 23d may not have been intended by the receiver to be a reduction of the wages of the employes generally, but it did cut the wages of these petitioners to an aggregate of over \$21,000 per annum on overtime alone, and of over \$6,000 for idle time compelled by said schedule to be given in the yards; that is to say, that men were required to be on hand to move the train at a given time, but not allowed for time lost between the time of their arrival in the yard and the time of leaving,—and this alone cuts the wages of employes over \$6,000.

"Third. They deny that the reduction is general, but is unjust, and discriminates especially against these petitioners.

"Fourth. They deny that they represent but 425 out of 1,300 men, but aver that there are 525 men affected by this proposed abrogation, and all are herein represented; and that these petitioners are the only persons named in the schedule, and in fact the only persons with whom a contract is in force, and which written contract they ask to be respected; and they deny that the reduction, if any, in the employes who do not belong to organized labor is greater than the reduction to petitioners.

"Fifth. They deny that the pay fixed by the proposed or by the existing schedule is greater than that furnished and the pay thereunder made by the roads in said answer named, but they aver that if the schedule was given them, and the payment made as by said roads made to their employes, it would show the following to be the status of affairs."

Then follows a comparison of the wages paid upon several roads, from which, according to the petitioners' statement, their pay is less than the pay of employes on the roads named.

"Sixth. They deny that such reduction is essential to the efficient and successful operation of the property in charge of the receiver, but aver that saving could be made greatly in excess of the amount sought to be taken from them by the proposed schedule, if, in the road and other departments, equal and equitable economy were practiced, as shown by the following statement of officers, and the cost thereof."

Then follows a statement showing where and how the saving could be effected without affecting the safety of the service to the public or reducing the capacity of the road.

Jos. C. Suit and Walter B. Richie, for petitioners.

Clarence Brown, for receiver.

RICKS, District Judge, (after stating the facts.) The receiver appointed by the court to operate and manage the defendant railroad, pending foreclosure proceedings, is an officer of the court, and in that capacity represents all parties interested in the property. The persons employed by him occupy such a relation to the court that, in a controversy between them and the receiver concerning any alleged wrongs and injuries committed by him, they may be heard by the court upon a proper application being made. When such application is made, it becomes the duty of the court to consider the same, and, if the allegations are of a character to make it proper to further consider them, the receiver should be required to file an answer thereto. The court will then be able

to determine from such pleadings whether the issue between the parties is of such a character as to make it proper to hear testimony and make a formal investigation, either by reference to a master or by hearing witnesses in open court. But the very object in having a receiver experienced in the management of railroads to represent the court and operate the road and preserve the property preparatory to a sale is to relieve the court from the responsibility of its maintenance and management.

The receiver is chosen on account of his experience and sound judgment to operate the road for the benefit of the creditors and all concerned. While he is the officer of the court, and subject to the orders and directions of the latter, yet his instructions are always general in their character. He is expected to look after the details of the business, and to apply to the court from time to time when special instructions seem necessary. The very nature of his relations to the court, and his duties to the creditors, entitle him to the largest degree of discretion possible in the discharge of his duties.

The court is constituted of several judges, and the railroad being operated extends through several judicial districts, so that it is difficult to secure uniformity in the administration of the property when an attempt is made to retain control of the details of the management in the court. It is therefore the settled practice, both as a matter of comity between the judges and as a matter of necessity to the proper and safe administration of the trust, to impose, as far as possible, the management of the property upon the receiver, and to remit the supervision of his management to the court in which he was appointed, and in which the primary jurisdiction attached.

In view of this well-defined policy, it must be apparent that in the operation of a railroad extending from Toledo to St. Louis the court must necessarily rely upon the receiver, and hold him responsible for details. His discretion in such management will not be interfered with, except where some abuse and wrong is manifest. In *Taylor v. Sweet*, 40 Mich. 736, Judge Cooley, speaking for the supreme court of Michigan, in reference to the employment of help in the management of business confided to a receiver in that case, said:

"The receiver, however, has ample power to employ them, and any other persons whose services he may need, and we think a court, which can know much less about the needs of the business than the receiver, ought not to interfere with his discretion unless some abuse is alleged and shown."

In *Kerr on Receivers* the following principle is given in paragraph 175:

"If he is empowered by the court to continue the management of the business over which he is appointed, he may employ such persons as may be necessary for the purpose, and the court will not interfere with his discretion as regards such employment, unless some abuse is shown."

These principles of law were declared in a case where a receiver was managing the business of a partnership. With how much greater force and pertinence do they apply to a receiver charged with looking after the intricate business of a great railroad 450

miles in length, requiring familiarity with detail and expert knowledge, which can only be acquired through long training and experience!

A controversy recently arose between the engineers, firemen, and trainmen on the East Tennessee, Virginia & Georgia Railroad and the receivers in charge of that extended system, running through several states, as to an order of the latter concerning the wages of employes. The receivers were appointed in the circuit court of the United States for the eastern district of Tennessee. During the controversy, and while the chiefs of the organization of engineers and firemen were in Knoxville, negotiating with Receiver Fink on the subject, the former made representations as to the nature of the contention between them to Circuit Judge Lurton, then in Knoxville. The latter declined to entertain jurisdiction of the controversy, and remitted the question to the receivers, saying their decision would be final, unless palpable wrong and injustice were done.

This is the only proper practice to pursue in these controversies. Courts are not constituted to manage and operate railroads. The judges, learned in the law though they may be, are not experienced in large business undertakings. They are not trained in those departments of railroad management which relate to the wages of employes, to the numbers necessary for the maintenance of the roadbed and for the safe operation of trains, to the tariffs for freight, and the purchases of supplies. Even if capable of mastering such details, their time will not permit. They are occupied in determining the legal rights of parties in litigated cases, and though in these days of large ventures and improvident railroad enterprises the courts are called upon, through receivers, to temporarily manage them pending litigation necessary to a foreclosure sale, yet, as before stated, they assume this burden because it cannot be evaded; but they manage them through receivers, selected for their experience and demonstrated ability, and they rely upon their experience and judgment to wisely and economically administer the trust.

In view of these well-settled principles, let us examine the application now before the court. Do the petitioners in this case show such an abuse of the power and discretion of the receiver as to call for the interference of the court? The facts set forth in the complaint have already been substantially stated. The most serious averment made is that the schedule of wages agreed upon in June, 1893, contained a provision that no abrogation of it should be made except upon 30 days' notice, and it is averred that no such notice was given. The receiver avers that such notice was given. The fact is established not only that such notice was given on September 26, 1893, to the committee representing the petitioners, but that negotiations concerning such reduction in wages, continuing over a month, were carried on between said committee and the superintendent of the road, acting for the receiver. Mutual concessions resulted, and a full hearing was had, and a decision made by the superintendent. From that decision an ap-

peal was taken to the receiver. He heard the committee, made some further concessions, and then promulgated the schedule framed after such full negotiations and hearing, and ordered that it should take effect from November 1, 1893. In view of all these facts, I cannot see how the petitioners can so solemnly declare and aver that the receiver acted in bad faith with them in changing the schedule of June, 1893, without the notice and hearing for which it provided.

Other facts recited by counsel for the petitioners demonstrate the very embarrassments and difficulties already suggested that would confront the court should an investigation be undertaken as to the facts in issue. The petitioners seem to realize the force of the receiver's statement that the proposed reduction in wages is absolutely necessary, because of the substantial decrease in the earnings, which are stated from the books to be \$365,194.51 for the last six months of 1893, as compared with the same period of 1892, or at the rate of \$2,000 per day. They undertake to break the force of this statement by controverting the fact, but they do not undertake to do this by challenging the correctness of the receiver's books, or charging any manipulation in the accounts to make a false showing of the earnings. They attempt to show that there has been no such decrease, based upon a table of gross and net earnings of 12 trains on specified days in the month of October, and a few in the months of September and November. With a candor that can only be inspired by confidence in their calculations, the petitioners seriously controvert the official statements from the books. Their calculations are, of course, incomplete, and involve but a small part of the expenses of the road, which extend far beyond the mere cost of motive power and the handling of freight.

If we pass to the other averments in the petition, we find further embarrassments that would attend a hearing and judicial finding on the issues presented. The petitioners deny that a reduction of the wages of those they represent is necessary, because they say a great saving in the expenses can easily be made by a reduction in the numbers of officers and clerks in several other departments. They proceed to propose a practical reorganization of the road, and suggest in detail certain officers and employes in the department of maintenance and repair of tracks, and in other branches of the business, whose services could be dispensed with. They aver that too many men are employed on certain divisions of the road in the repair of tracks, that too many men are employed in clerical work, and that unnecessary officers are employed at extravagant salaries. They specify those extravagant sums, and allege salaries allowed greater than are paid to any one in the employ of the receiver, or even to the receiver himself, as the court well knows. The earnings of engineers and firemen are stated at a much lower figure than those shown to be paid by the receiver's answer, but those errors are shown to be reached by a wrong basis of calculation.

Reference is made to these general charges, and to the more detailed character of the issues presented, for the purpose of show-

ing how useless and barren of results would be an investigation upon the questions of fact involved. This court must accept the official reports of the receiver and the statements of his books as final on any issue as to whether or not there has been a decrease in the earnings of the road. The verity of his accounts could hardly be said to be put in issue by a denial of a decrease of earnings founded on any calculations made on such a partial and imperfect basis as the earnings of a few trains, as set forth in the petition.

Then the court is asked to hear testimony and pass upon the question of whether a few section foremen or deputy division superintendents or a few clerks could be dispensed with, so that a reduction in the wages of others might be made unnecessary. The receiver avers that the petitioners are paid wages as high, and some higher, than is paid for the same kind of labor by competing lines in the same territory. This petitioners deny, and recite facts and figures which seem to sustain their claim, but which, as stated, are susceptible of explanation to sustain the receiver's averment.

All these issues, if entered into, involve the court in a consideration of the entire present organization of this railroad, and in an examination as to the entire force of employes,—whether they are too numerous, whether their wages are too high, whether some could be entirely dispensed with or their duties combined in a fewer number, whether the rates of freight are too high, whether the earnings could be increased and the expenses diminished.

The very statement of the questions necessarily involved and to be fully considered and determined by such an investigation, and the nature of the evidence to be taken and considered in support of the various issues presented, is in itself sufficient to suggest the answer that the court cannot entertain any such proposition. As before stated, the determination of all such matters must necessarily rest with the receiver, and only when it is manifest that he has abused that discretion will the court interfere. It will then interfere, not by assuming to reverse his administration and settle the details of such complaints, but by selecting a new receiver, to whom such matters can more satisfactorily be intrusted. But no such abuse is shown.

I have treated this petition with the greatest respect, and have given it full and fair consideration. It is presented by over 500 men, who believe they have a grievance which the court should hear. They have chosen to come into court and petition for redress for their alleged grievances, rather than strike, or embarrass the receiver by any interference with the management of the property. I have therefore undertaken to state their claim at length and with fairness, to show them how impossible it is for a court to enter into a detailed investigation such as their petition invites with any possibility of reaching an intelligent and just conclusion. Without impugning the sincerity or good faith of the petitioners, and without passing upon the facts set forth in their complaint, it is sufficient to say that the present financial condition of the property, and the unfortunate and deplorable general busi-

ness depression and distress which everywhere prevails, all combine to satisfy the court that the claims of the receiver that this reduction in wages was absolutely necessary and inevitable are so manifestly true and just that the court, upon the pleadings and facts, of which we must take judicial notice, must find that no case for interference with the receiver's order is made.

The court the more readily reaches this conclusion because from repeated interviews with the receiver, and examination of the reports of earnings and expenses filed from month to month, I am satisfied this reduction of wages is unavoidable. During the time this property has been in the custody of the court, I have studied closely the policy and management of the receiver. He has the confidence of the court in the highest degree. He was chosen because of his long experience and conceded ability. The statement that during the six years of his management of the property now in his control, first as president and later as receiver, no serious accident has occurred, is the best proof that his duties have been faithfully discharged, and the confidence of the court is worthily bestowed. If the petitioners had presented to the receiver during their negotiations with him, or if they had suggested in their present application to the court, a reasonable proposition upon which they were willing to accept a fair reduction, and had placed their proposition in such shape that it did not involve the embarrassments and difficulties heretofore suggested, the court would feel hopeful that satisfactory results might follow further negotiations. But, in the absence of any such practical plan, it would be useless to give it further consideration.

The court feels authorized for these reasons to continue its management of this property under the judgment and discretion of the receiver, and to decline to interfere unless an abuse of that trust is shown. To the proper management of the property it is essential that there should be discipline and co-operation among all employees, and that the authority vested in the receiver should be maintained. This will be the policy of the court, and only when an abuse of that authority is clearly shown will it interfere. The matter of wages is one that naturally appeals to the sympathy of all. It would be far easier, and much more agreeable, to accede to this demand than to refuse it. If it were a mere matter of personal preference, or an appeal to the generous impulses of the court or the receiver, there would be no reduction of wages; but this property is a trust, to be administered for the benefit of creditors, and must be maintained and preserved to the best possible advantage for the interests of those whose money is unfortunately involved in the insolvent company, as well as for the just and fair compensation of those whose labor operates and preserves it.

For the reasons stated, the motion of the petitioners for an order to the receiver to set aside the schedule now in force, and to grant an investigation as to the necessity thereof, is refused.

CENTRAL TRUST CO. OF NEW YORK v. EAST TENNESSEE, V. & G. RY. CO.

(Circuit Court, D. Kentucky. January 17, 1894.)

No. 6,247.

1. RECEIVERS—SUITS IN OTHER COURTS—INJUNCTION.

The permission given by the third section of the judiciary act of 1887-88 to sue receivers of federal courts for acts or transactions of theirs in carrying on the business connected with the property, without leave of the appointing court, is not restricted to the courts having jurisdiction of the receiver and the property, or to the federal courts generally, but extends to any court of competent jurisdiction, and the appointing court has no power to enjoin the bringing of such suits in any other than the federal courts. *Railway Co. v. Johnson*, 14 Sup. Ct. 250, followed.

2. SAME—GARNISHMENT PROCEEDINGS, ETC.

Garnishment proceedings are not suits against the receiver for "any act or transaction of his," within the meaning of the statute, and the appointing court may enjoin the bringing of such proceedings, as well as suits upon causes of action originating before the receivership, and all other suits not arising from some act or transaction of the receiver in carrying on the business connected with the property in his charge.

3. SAME—REMOVAL OF RECEIVERS.

The statute does not affect the right of the receivers to remove from the state courts suits involving more than \$2,000. Such right is based on the fact that the suit is against a receiver appointed by a federal court, and is therefore one arising under the constitution and laws of the United States.

In Equity. Bill by the Central Trust Company of New York against the East Tennessee, Virginia & Georgia Railway Company. Heard on a rule for attachment for contempt in violating an injunction. Rule discharged, and injunction modified.

Statement by LURTON, Circuit Judge:

The receivers appointed in this cause have, by petition, prayed for an attachment against certain persons for contempt, in bringing suits in other courts against them as receivers, and without leave of this court, in respect to certain acts and transactions while carrying on the business of operating the railway line committed to their custody by this court. The receivers rely upon an injunction, granted by Judge LURTON, which is in the following language: "On application, and upon the petition of the receivers heretofore appointed in these causes, and for good cause shown, it is ordered that all suits brought against the said receivers herein for damages to person or property, or incident to their duties as such receivers, shall be brought in some one of the federal courts, or by intervention in this case." The defendants answer, and justify their action under the third section of the act of March 3, 1887, as corrected by the act of August 13, 1888.

Edward Colston, E. F. Trabue, and G. H. Henderson, for receivers.
Humphrey & Davis and Stone & Sudduth, for respondents.

Before TAFT and LURTON, Circuit Judges, and BARR, District Judge.

LURTON, Circuit Judge. The possession of property in the hands of a receiver, appointed in the exercise of a general equity jurisdiction, is the possession of the court. The receiver is but the agent of the court, appointed to hold the property until the court shall determine ownership, or how the proceeds of its sale shall be

divided among those interested therein. The general doctrine is thus stated in 2 Story, Eq. Jur. (13th Ed.) 833a, where it is said, speaking of a receiver:

"For his possession is deemed the possession of the court, and the court will not permit itself to be made a suitor in a court of law. The proper and usual mode adopted under such circumstances is for the party claiming an adverse interest to apply to the court to be permitted to come in, and be examined *pro interesse suo*. He is then allowed to go before the master, and to state his title, upon which he may, in the first instance, have the judgment of the master, and ultimately, if necessary, that of the court. And where the question to be tried is a pure matter of title, which can be tried in an ejectment, the court, from a sense of convenience and justice, will generally authorize such a suit to be brought, taking care, however, to protect the possession by giving proper directions."

In *Davis v. Gray*, 16 Wall. 218, the supreme court of the United States, on this subject, said:

"Money or property in his hands is in *custodia legis*. He has only such power and authority as are given to him by the court, and must not exceed the prescribed limit. The court will not allow him to be sued touching the property in his charge, nor for any malfeasance as to the parties, or otherwise, without its consent; nor will he permit his possession to be disturbed by force, nor violence to be offered to his person, while in the discharge of his official duties. In such cases, the court will vindicate its authority, and, if need be, will punish the offender by fine and imprisonment, for contempt. Where property in the hands of a receiver is claimed by another, the right may be tried by proper issues at law, by reference to a master, or otherwise, as the court, in its discretion, may see fit to direct."

In *Barton v. Barbour*, 104 U. S. 126, the whole question of the effect of a judgment against a receiver, obtained in a suit prosecuted without leave of the court appointing him, was elaborately discussed, and a judgment thus obtained held to be absolutely void, for want of jurisdiction in the court rendering it. Leave of the court having custody of the property operated by the receiver was held essential to jurisdiction. The fact that the liability arose from the negligence of the servants of a receiver, while operating a railway as receiver, was held in no way to take the case out of the general rule. On this subject that court said:

"We do not perceive how the fact that the receiver, under the orders of the court, is doing the business usually done by a common carrier makes his case any exception to the rule under consideration. It was said by this court in *Cowdrey v. Railroad Co.*, 93 U. S. 352, that 'the allowance for goods lost in transportation, and for damages done to property whilst the road was in the hands of the receiver, was properly made.' 'The earnings received were as much chargeable with such loss and damage as they were chargeable with the ordinary expenses of managing the road. The bondholders were only entitled to what remained after charges of this kind, as well as the expenses incurred in their behalf, were paid.' This puts claims against the receiver, in his capacity as a common carrier, on the same footing precisely as the salaries of his subordinates, or as claims for labor and material used in carrying on the business. If a passenger on the railroad, who is injured, in person or property, by the negligence of the servants of the receiver, can, without leave, sue him to recover his damages, then every conductor, engineer, brakeman, or track hand can also sue for his wages without leave. To admit such a practice would be to allow the charges and expenses of the administration of a trust property, in the hands of a court of equity, to be controlled by other courts, at the instance of impatient suitors, without regard to the equities of other claimants, and to permit the trust property to be wasted in the costs of unnecessary litigation."

"Such is not the course and practice of courts of equity in administering a trust estate. The costs and expenses of a trust are allowed by the court, upon a reference to its own master. If the adjustment of the claim involves any dispute in regard to the alleged negligence of the receiver, or any other fact upon which his liability depends, or in regard to the amount of the damages sustained by a party, the court, in a proper case, in the exercise of its legal discretion, either of its own motion, or on the demand of the party injured, may allow him to sue the receiver in a court of law, or direct the trial of a feigned issue, to settle the contested facts. The claim of the plaintiff, which is against the receiver for a personal injury sustained by her while traveling on the railroad managed by him, stands on precisely the same footing as any of the expenses incurred in the execution of the trust, and must be adjusted and satisfied in the same way. We therefore think that the demand of the plaintiff is not of such a nature that it may be prosecuted by suit, without leave of the court." 104 U. S. 130, 131.

This same general principle has been frequently announced in the highest courts of most of the states of this Union. Some of these cases we cite: *Robinson v. Railway Co.*, 66 Pa. St. 160; *Skinner v. Maxwell*, 68 N. C. 400; *Railway Co. v. Smith*, 19 Kan. 229; *Hazlerigg v. Bronaugh*, 78 Ky. 62; *Chafee v. Quidnick Co.*, 13 R. I. 442; *Payne v. Baxter*, 2 Tenn. Ch. 517; *Olds v. Tucker*, 35 Ohio St. 584.

Such was the state of the law when congress passed the act of March 3, 1887, corrected by the act of August 13, 1888, and known as the "Judiciary Act." The third section of that act is as follows:

"That every receiver or manager of any property appointed by any court of the United States may be sued in respect of any act or transaction of his in carrying on the business connected with such property, without the previous leave of the court in which such receiver or manager was appointed; but such suit shall be subject to the general equity jurisdiction of the court in which such receiver or manager was appointed, so far as the same shall be necessary to the ends of justice."

Whether it was the intention of congress to permit receivers, appointed by, and accountable to, United States courts, to be sued with respect to acts and transactions as such receivers in courts of other jurisdictions, is by no means clear. Under the law as it stood, the court having custody of the property, *pendente lite*, had exclusive jurisdiction of all suits affecting such property, and drew to itself complete jurisdiction with respect to all the acts and transactions of its receiver, in maintaining or operating property so sequestered. It was just as much a contempt of court to institute a suit affecting such property, or its custodian as such, in the court of his appointment, without previous leave of court, as it was to bring such suit in another jurisdiction. A judgment against the receiver is a judgment against the receivership. It is a judgment affecting the property, and to be paid therefrom. To properly administer a sequestered property, the liabilities should be determined in one cause, and the claims ranked, and the property marshaled and distributed according to legal or equitable priorities.

The act might well have been construed as only permitting suits in the court having jurisdiction of the property and the receiver. This would have secured to the suitor the right of jury trial, according to the usual course of the court, where the demand was of legal character. At the same time, such judgment would have been

subject to the equitable jurisdiction of the court, and be given its proper rank in the distribution of the property. There is much force in the argument that, in view of the previous exclusive jurisdiction of the court appointing the receiver over him and over the sequestrated property, a construction ought to be given this act which would have preserved the equitable jurisdiction of the circuit courts over property in custodia legis, and over suits affecting it. We, however, feel precluded from now placing such a construction upon the act, in consequence of the decisions of the supreme court of the United States in *McNulta v. Lochridge*, 141 U. S. 327, 12 Sup. Ct. 11; *Railway Co. v. Johnson*, (decided Jan. 3, 1894, and not yet officially reported,) 14 Sup. Ct. 250.

It is true, as contended, that the construction now insisted upon does not seem to have been presented or passed upon in either of the opinions of that learned court. The fact, however, remains that, in the first case, a judgment against the receiver, obtained in a suit in a state court, brought without leave of the court appointing the receiver, was recognized as valid. A similar judgment was held void, before the passage of the act of 1887, in *Barton v. Barbour*, *supra*.

The case of *Railroad Co. v. Cox*, 145 U. S. 603, 12 Sup. Ct. 905, has no bearing on this point. The suit was at law, and was brought without leave of the court, but it was brought in the court which, under ancillary proceedings, had appointed the receiver sued, and which had jurisdiction over the property.

In the case of *Railway Co. v. Johnson*, *supra*, the suit was commenced in a state court, against a receiver appointed by a circuit court of the United States. Subsequently, the railroad company was joined as a defendant; the receiver in the meantime having been discharged, and the property of the company restored to its possession. There was a judgment against the receiver and the company, affirmed on appeal by the supreme court of Texas. 13 S. W. 463. Among other questions decided, the court, in an opinion by Chief Justice Fuller, said,

"By section 3 of the act of March 3, 1887, c. 373, (24 Stat. 552,) as corrected by the act of August 13, 1888, c. 866, (25 Stat. 433,) every receiver appointed by a court of the United States may be sued, in respect of any act or transaction of his in carrying on the business connected with the property, without the previous leave of the court by which such receiver was appointed. Necessarily, such a suit may be brought in any court of competent jurisdiction, and proceed to judgment accordingly. This suit was so brought."

Assuming, therefore, that, under the act of 1887, it was permissible to sue the receivers in any court having jurisdiction of the person of the receiver and of the subject-matter, we are brought to the consideration of the question as to whether such liability to suit could be limited or controlled by the injunctive process of the circuit court appointing the receiver.

The writer of this opinion entertained, originally, the view that the intent of congress was only to permit suit in the court where the property sought to be affected by the suit was sequestrated. This view was entertained upon two grounds:

1. By the construction above referred to as to the purpose of congress, as indicated in the affirmative portions of section 3.

2. By reason of the effect to be given to the proviso of that section, which is in these words:

"But such suit shall be subject to the general equity jurisdiction of the court in which such receiver or manager was appointed, so far as the same shall be necessary to the ends of justice."

It seems that if such suits, so brought without leave, were to be, and remain, "subject to the general equity jurisdiction of the court in which such receiver or manager was appointed, so far as the same shall be necessary to the ends of justice," they should be brought within the court having the right to exercise such equitable jurisdiction over the suit. Without elaborating these views, it is sufficient to say that they were deemed to justify an injunction against suits in courts of other jurisdictions. Like views were entertained by Judge Taft, who now joins in this opinion; he having made an order of like character in the case of *Thomas v. Cincinnati, New Orleans & Texas Pacific Railway Co.*

Upon full consideration, we are now led to the conclusion that the injunction was improvidently granted in so far as it may be, and has been, construed as restraining suits in any court having jurisdiction of the parties and of the subject-matter, where the action originates in an "act or transaction" of the receiver "in carrying on the business connected with such property."

If that act authorized a suit against a receiver in a state court, without leave of the court appointing the receiver, in respect to a liability incurred while carrying on the operation of a railroad as a receiver under a decree of a United States circuit court, as was held in *McNulta v. Lochridge*, supra, then a right of suit thus conferred by congress cannot be restrained in advance of its exercise. This would be, in effect, to nullify the act of congress, and, therefore, in excess of jurisdiction. The power given by the proviso must not be so construed as to authorize the courts to prevent that which congress has expressly provided may be done. That it was intended by congress that some meaning should be attached to the very significant proviso contained in section 3 is most obvious. It was not intended that the right to litigate with the receiver in any court should be an unrestrained right. Whether the proviso should be limited so as to give the court appointing the receiver power upon equitable grounds, and upon special application, to restrain proceedings in a pending suit, brought without leave of the court, or whether, after judgment, the court should exercise its equitable jurisdiction by inquiry into the judgment, in order to determine its justice, or its place and rank in the distribution of the property out of which it is to be paid, are questions which need not now be settled.

A wide difference of opinion has been entertained as to the power of the court over judgments obtained against the receiver in courts other than that appointing the receiver. *Central Trust Co. v. St. Louis, etc., Ry. Co.*, 40 Fed. 426; *Eddy v. Wallace*, 1 C. C. A. 435, 49

Fed. 801; *Missouri Pac. Ry. Co. v. Texas Pac. R. Co.*, 41 Fed. 311. In the two cases first cited it was held that such judgments were conclusive. In the case reported in 41 Fed. it was held that it was within the power of the court, when such judgments were filed in the case in which the fund was being distributed, to look into them, and allow the whole, or half, or any part, as justice might require. The latter view seems to have been entertained by Mr. Justice Jackson, for, while judge of this circuit, he made an order in this cause, which has not been revoked, requiring all judgments in other courts, obtained in suits prosecuted without leave of the court, to be filed by intervening petition in the main cause, together with a full bill of exceptions, showing the evidence upon which the judgment rested. That the judgment is conclusive, so far as to be regarded as a judicial ascertainment of liability, and of the amount, is probably the better view. Speaking of the effect of the proviso, the learned chief justice, in the case of *Railway Co. v. Johnson*, supra, said that "the right to sue without resorting to the appointing court, which involves the right to obtain judgment, cannot be assumed to have been rendered practically valueless by this further provision in the same section of the statute which granted it."

It is enough, for a decision of the question now before us, to say that we are of opinion that the injunction against bringing suits without leave of the court should be modified, so as not to restrain suits growing out of acts and transactions in respect to the carrying on of the operations of the railroad. The act does not affect suits not having their origin in the operation of the railroad by the receiver. With respect to all contracts and causes of action originating before the receivership, and all not arising out of an alleged liability of the receiver to the suitor, for some act or transaction of the receiver while carrying on the business of a common carrier, the injunction will stand.

Garnishment proceedings are not suits against the receiver, for any act or transaction of his, and such claims must be prosecuted in the manner heretofore settled by order in this cause. Such claims, filed with the commissioner appointed to hear them, can be thus more speedily and economically determined than by the institution of regular suits. A proceeding for garnishment purposes is an equitable seizure of the funds and property within the custody of the court. The principle governing such seizure is clearly settled by the decision in *Ex parte Tyler*, 149 U. S. 182, 13 Sup. Ct. 785.

The right of the receivers to remove any suit, brought in a state court, where the sum involved is \$2,000, seems to be unaffected by the act of 1887. The right of removal, in such cases, rests upon the fact that the suit is one against a receiver appointed by a court of the United States, and is therefore one arising under the constitution and laws of the United States. *Railroad Co. v. Cox*, 145 U. S. 603, 12 Sup. Ct. 905; *Buck v. Colbath*, 3 Wall. 334.

The pending applications for leave to bring suits in other courts are refused. The parties so applying will not be affected by the injunction as modified, and they can exercise their statutory right of suit if they see fit.

A decree will be drawn up in accordance with this opinion, and the rule discharged. The costs will be paid by the receivers, out of the funds in their hands.

MESSINGER v. NEW ENGLAND MUT. LIFE INS. CO.

(Circuit Court, W. D. Pennsylvania. January 15, 1894.)

No. 35.

RELEASE AND DISCHARGE—BAR TO ACTION AT LAW—EVIDENCE OF MISTAKE.

In an action at law in a federal court evidence is not admissible to show that a release, which, on its face, constitutes a complete bar to the action, was given under a mistake of fact, such as, in equity, would require its rescission or cancellation.

At Law. Action by I. N. Messinger, administrator d. b. n. of the estate of Joseph C. Raudenbush, against the New England Mutual Life Insurance Company. On motion for a new trial. Denied.

D. W. Cox, Lorenzo Everett, and S. C. McCandless, for plaintiff.

A. A. Leiser and Shiras & Dickey, for defendant.

BUFFINGTON, District Judge. This is a motion for a new trial. The suit was upon a policy issued by the defendant company for \$15,000 upon the life of Joseph C. Raudenbush, of whom the plaintiff is administrator d. b. n. By its terms the "policy shall be void if the assured shall die by his own hand or act, whether sane or insane, within three years from the date thereof; but the company agrees to pay upon the policy thus voided the net reserve held against it, reckoned according to the legal standard of Massachusetts." The decedent died within three years. In defense there was offered and received in evidence a sealed release, executed by the former administrator, and acknowledging receipt of \$755 23/100, "in full satisfaction and discharge of all claims and demands under policy" aforesaid. In rebuttal, the plaintiff offered to show by the wife of decedent that Raudenbush had not committed suicide, but had died from a pistol shot accidentally inflicted by himself, and that the settlement had been mistakenly made by the administrator under the belief he had committed suicide. To this evidence objection was made and sustained, and the evidence was refused on two grounds: First, that the release could not be attacked in an action at law, but only on the equity side of the court; and, secondly, that, if allowable on the law side, the evidence proposed was not sufficient to warrant the cancellation of the release under the facts of the case. Our conclusions were recited in binding instructions for the defendant, and we see no reason to question the action thus taken. That equitable relief must be sought on the equity side of the federal courts is a proposition too well established to require citation of authorities. That rescission or cancellation is the subject of equitable jurisdiction is equally well established. As the court said in *Ivinson v. Hutton*, 98 U. S. 82:

"Courts of equity have jurisdiction * * *. If the instrument was executed in ignorance or mistake of facts material to its operation, the error may be corrected, or the erroneous transaction may be rescinded. * * * Power to reform written contracts for fraud or mistake is everywhere conceded to courts of equity, and it is equally clear that it is a power which cannot be exercised by common-law courts. *Hearne v. Insurance Co.*, 20 Wall. 490."

The same doctrine is laid down in the text-books. *Bisp. Eq.* (1st Ed.) § 31, p. 41.

Such being the law, we inquire whether the paper offered was of a character to require cancellation or rescission. On this point we are clear. The policy in suit was payable, in case of death, to the decedent's "executors or administrators," so that in his administrator was vested the right of action at his death. By the death of the insured the question of the company's liability was raised. The cause, mode, and facts concerning his death were necessary subjects for inquiry. If it was caused by accidental means, the administrator was entitled to recover the whole amount from the general funds of the company; if by suicide, then the policy was void, and a portion of the reserve fund only was recoverable. Presumably these inquiries were duly made, and an agreement reached by which the administrator received some \$700 from the reserve fund, and released all claims arising under the policy; the language of the release being that said sum was received "in full satisfaction and discharge of all claims and demands under policy No. 83,471, by reason of the death of Joseph C. Raudenbush, the insured." This instrument, made by the representative of the deceased under seal, acknowledging and reciting the payment of money thereon, standing alone and unrepudiated, formed a complete legal defense to any claim under the policy. Manifestly, such an instrument must be canceled or rescinded before a recovery could be had, enforcing claims which the administrator had once released. Such effort to rescind was never made by the first administrator. The release remained unimpeached during his life, and for more than a year after it was made. Nor did his successor in the trust repudiate it by bill filed, or tender back the money paid upon it. Standing thus unimpeached, it formed an insuperable barrier to a recovery upon the policy in a suit at law. To permit its rescission or cancellation on the law side of the court would be to trench upon the exclusive jurisdiction of a court of equity.

The motion for a new trial is refused, and the clerk is directed to enter judgment upon the verdict.

POST PUB. CO. v. HALLAM.

(Circuit Court of Appeals, Sixth Circuit. December 9, 1893.)

No. 120.

1. LIBEL—EVIDENCE—PRIOR PUBLICATIONS.

A prior or contemporaneous publication in another newspaper owned by defendant is competent evidence on the question of malice, although a

separate suit is pending thereon. A double recovery is to be avoided by a caution from the court that damages can be allowed only for the article sued on. *Frazier v. McCloskey*, 60 N. Y. 337, disapproved.

2. **SAME—CROSS-EXAMINATION.**

Where the editors of a newspaper have testified that the publication was without malice, and their feeling towards plaintiff friendly, it is competent, on cross-examination, to show by them that they had never published notice that plaintiff had sued them, and that they had an agreement with other papers not to publish notice of the bringing of libel suits; thus even suppressing the knowledge that plaintiff was seeking to vindicate his reputation in the courts.

3. **SAME.**

It is competent, in the cross-examination of an editor who has testified to good faith and freedom from malice, to prove statements by him, in conversation with plaintiff after the publication, which tend to show that it was his policy, in conducting the paper, to increase its circulation by making sensational charges against individuals, thus showing a reckless indifference to the rights and reputations of others, equivalent to malice.

4. **SAME—REPUTATION—REBUTTAL EVIDENCE.**

Where the libelous charge is that a candidate for office sold out to a rival, and the defense has given evidence that his reputation for integrity in politics is bad, the evidence in rebuttal may go to his general reputation for integrity, and need not be confined to the matter of political conduct. 55 Fed. 456, affirmed.

5. **SAME—EVIDENCE OF GOOD FAITH—REBUTTAL.**

If defendant, for the purpose of showing good faith, is allowed to prove the circulation of rumors interpreting plaintiff's conduct in the same way as stated in the publication, there is no error in permitting plaintiff to show in rebuttal the existence of a widespread, general understanding which placed an entirely innocent interpretation on his acts.

6. **SAME—PROVINCE OF JURY.**

On the question as to the meaning of the publication the jury are to determine, not what defendant intended to charge, but what in fact he did charge, and what the reading public might reasonably suppose he intended to charge. 55 Fed. 456, affirmed.

7. **SAME—PRIVILEGED COMMUNICATIONS.**

False allegations of fact, charging a candidate for office with disgraceful conduct, are not privileged; and good faith and probable cause constitute no defense. 55 Fed. 456, affirmed.

In Error to the Circuit Court of the United States for the Western Division of the Southern District of Ohio.

At Law. Action by Theodore F. Hallam against the Post Publishing Company for libel. Verdict for plaintiff. Motion for new trial denied, (55 Fed. 456,) and judgment for plaintiff entered on verdict. Defendant brings error. Affirmed.

Statement by TAFT, Circuit Judge:

This was a writ of error to reverse the judgment of the circuit court in favor of Theodore F. Hallam against the Post Publishing Company for \$2,500 for libel.

After the proper averments of jurisdiction, the petition of the plaintiff below stated his case as follows:

"Prior to October 14, 1892, plaintiff, as was well known to the people of Kenton county, Kentucky, where he lived, and to the people of Hamilton county, Ohio, and other counties of Ohio, was a candidate, in competition with Albert S. Berry, similarly well known to be such candidate, and in competition with other candidates, for the nomination, before the Democratic convention of the sixth Kentucky congressional district, for the office of representative in the congress of the United States for said district. That

for a long time prior to and on October 14, 1892, defendant was engaged in the business of composing, printing, publishing, and circulating a daily newspaper called the Cincinnati Post, which paper it claimed on that day had a daily circulation more than double that of any other daily paper in Ohio, save one in Cleveland, and a circulation in Cincinnati and Hamilton county on week days 10,000 in excess of the combined circulation of the English morning papers and the only other English evening paper. Prior to the meeting of said convention, which met at Warsaw, Kentucky, plaintiff contracted with the St. Nicholas, a company engaged in the business of catering and keeping a hotel, acting through E. N. Roth, to furnish, on board the steamer Henrietta, food and drink for the use of delegates and friends of said Hallam, who were about to proceed on said steamer to Warsaw to attend said convention, for which said food and drink so to be furnished, and which was thereafter furnished, by said St. Nicholas, said Hallam agreed to pay said St. Nicholas. At said convention, after it had been in session for several days, and many ballots had been taken without a nomination being reached, said plaintiff finally requested the delegates from his county, who had continuously voted for him, to cast their next ballot for said Berry, and thereupon on the next ballot, by the aid of the votes so cast by the delegates from Kenton county, said Berry was nominated as the candidate for said office by said convention on September 30, 1892. And thereafter, on October 14, 1892, defendant, knowing the premises, composed and published in its said newspaper, of and concerning the plaintiff and his conduct as a candidate for nomination at the hands of said convention, the following false, malicious, and libelous article:

"Berry Paid.

"Expenses of Theo. Hallam in the Sixth (Ky.) District Contest for the Nomination of a Democrat for Congress.

"The Berry-Hallam congressional fight in the sixth Kentucky district is still on,—that is to say, Banquo's ghost bobs up now and then, to the annoyance of the congressional nominee, Berry, and the mortification of the defeated candidate, Theo. F. Hallam. The Boone County Recorder delivers a broadside at the Kenton county delegates, and naively asks: "Why don't they come out and tell the truth about what induced them to go to Berry? The world knows." Yes, the world knows, and you may say Mars and the planets know it also. Proprietor Roth, of the St. Nicholas Hotel, has an inside cinch on this inside information. Everyone knows Colonel Berry. He is a monopolist, corporation controller, millionaire speculator, political wire-puller, first-class hustler, and a pretty good sort of a fellow. Hallam is a successful lawyer at Covington; but legal eminence does not mean the fat incomes that are its synonyms on this side of the Ohio. Hallam is one of the bhoys, loves ward politics for the fun, if not the emoluments, and is about as poor as a church mouse. In fact, he owes several hundred dollars for taxes. The two counties, Kenton and Campbell, threw out their hooks for the congressional nomination. Kenton swore by Hallam, while Campbell vowed that the political friend and chum of Carlisle, Cassius M. Clay, Jr., and Charles J. Helm, their own millionaire and boss, Albert S. Berry, should be the nominee. The fight waxed hot. The convention was held at Warsaw, commencing on September 27th, and ending September 30th. The Kenton boys prepared for the fray. The principal preparation consisted in engaging the steamer Henrietta to carry the delegates to Warsaw, and the carte blanche orders of Mr. Roth, of the St. Nicholas hostelry, to fill her up from truck to keelson with the best the cellar and the larder of the house afforded. As one delegate remarked: "Why, the champagne flowed off the decks so much that even the Henrietta was swimming in it." Hallam and his crowd did all the feasting and the drinking. The Campbell county men were not in it. But the bill was made out to Colonel A. S. Berry. Here is the bill: "St. Nicholas. Edward N. Roth. Cincinnati, October 10, 1892. Colonel A. S. Berry, per Theodore F. Hallam, to the St. Nicholas Hotel Company, Dr.: For meals, service, wine, and cigars served on board the steamer Henrietta, \$865.15." Then again: "At Warsaw the battle raged four days. On the last day Colonel Berry and Lawyer Hallam were seen to go arm

in arm to the rear of the courthouse, where the convention was held. They had a quiet and confidential chat. At its conclusion Hallam called his warriors about him, and spoke to them in whispers. Immediately thereafter the whole Kenton county delegation cast its vote for Colonel Berry, and he received the nomination. Is Colonel Berry carrying out all and every one of the promises he made? Ah, there's the rub. Mr. Roth, of the St. Nicholas, has sent a bill of \$865.15 to Colonel A. S. Berry. That bill is for "dry" and "wet" provisions ordered by Hallam, and disposed of by Hallam's supporters. Such generosity on the part of the victor to the vanquished is truly touching. Thereby meaning that said Hallam had requested his supporters, the delegates from Kenton county to said convention, to cast their votes upon the conclusive ballot for said Berry, in pursuance of a corrupt understanding or bargain between said Hallam and Berry, and for a pecuniary consideration to be paid by said Berry, and particularly upon the understanding that, in consideration of said Hallam's procuring the said delegates from Kenton county to cast their votes on said ballot for said Berry, said Berry would pay to the said St. Nicholas the bill for the food and drink which said Hallam had ordered, and for payment of which said Hallam was liable to said St. Nicholas. Wherefore plaintiff prays judgment against defendant for damages in the sum of ten thousand dollars."

The answer of the Post Publishing Company was as follows:

"And now comes the Post Publishing Company, defendant in the above cause, and for answer to the petition therein says: It admits that it is a corporation organized under the laws of Ohio, and a resident of that state. It admits that prior to October 14, 1892, the plaintiff was a candidate in competition with Albert S. Berry at the Democratic convention for nomination of a Democratic candidate for congress in that district. It admits that it was engaged on October 14th in printing and publishing the Cincinnati Post, of the circulation described in the said petition. It admits that plaintiff contracted with the St. Nicholas Company, or Hotel, for the supply of provisions, food, and drink for the use of delegates attending said convention; that said food and drink were thereafter furnished on board the steamer Henrietta, and, if need be, elsewhere, for which the plaintiff was to become, and did become, indebted. It admits that, after a session of several days of the said convention without nomination, the delegation from Kenton county, being the county of the plaintiff, at plaintiff's request cast their votes on a final ballot for said Berry, and thereby secured his nomination on the 30th day of September, 1892, having previous thereto continuously supported plaintiff as against said Berry. It admits that it published in the Cincinnati Post the article contained in said petition, but denies each and every other allegation thereof."

The evidence of the plaintiff and his witnesses tended to show that the charge or insinuation that he had received any consideration for influencing his supporters to transfer their votes to Berry was wholly unfounded; that Campbell, the Covington reporter of the defendant, falsely representing himself by telephone to be Berry's son, requested the St. Nicholas Hotel to make out Hallam's bill, and deliver it to the messenger he would send; that, thereafter, another employe of the defendant, also representing himself as Berry's son, went to the St. Nicholas Hotel, and got the bill against Hallam, but afterwards brought it back, and said that he did not want the bill made to Hallam, but to Berry per Hallam, and the bill to Col. A. S. Berry per Theodore F. Hallam was accordingly made out and delivered to him; that this conduct of the reporters of the defendant was without the knowledge or consent of Hallam or Berry. The evidence for defendant tended to show that the employes of defendant had not suggested the form of the hotel bill, and to show good faith and no malice in the publication.

The article set forth in the petition was an abridged statement of the contents of a much longer, more detailed, and more conspicuous and sensational article, which appeared in a paper published by the defendant, called the Kentucky Post. In the longer article was printed a fac simile of the bill obtained from the St. Nicholas Hotel by defendant's employes. The defendant published, in the afternoon of each day except Sunday, several editions of the Cincinnati Post and of the Kentucky Post. Matters of gen-

eral interest were identical in the two papers. News of peculiar local interest in Kentucky was given at large in the Kentucky Post, and only in abridged form in the Cincinnati Post. The latter had a wide circulation in Cincinnati and the surrounding country, but very little in Kentucky, while the former was circulated only in Kentucky. At the time of the trial in the court below another suit brought by Hallam against the defendant for damages for the publication of the article in the Kentucky Post was pending in the United States circuit court for Kentucky.

Bateman & Harper, for plaintiff in error.

Wilby & Wald and W. H. Jackson, for defendant in error.

Before TAFT and LURTON, Circuit Judges, and RICKS, District Judge.

TAFT, Circuit Judge, after stating the case as above, delivered the opinion of the court.

It is first assigned for error that the circuit court admitted in evidence the article in the Kentucky Post. This was proper. The article was relevant for the purpose of showing malice. By the weight of authority, prior and contemporaneous publications of the same libel, other than that declared on, are competent evidence to show malice, whether such other publications may themselves be made the basis of recovery in separate suits or not; and the danger of a double recovery for the same publications is to be avoided by a caution from the court that damages are to be allowed only for the article sued on. *VanDerveer v. Sutphin*, 5 Ohio St. 293; *Pearson v. Lemaitre*, 5 Man. & G. 700; *Chamberlin v. Vance*, 51 Cal. 75; *Shock v. McChesney*, 2 Yeates, 473; *Gibson v. Cincinnati Enquirer*, 2 Flip. 121; *Townsh. Sland. & L.* § 392; *Odgers, L. & Sland.* 272; *Newell, Defam.* 331. In its charge the circuit court, calling the jury's attention to the pendency of the suit in Kentucky for damages for the Kentucky Post article, quite distinctly told them not to find any damages except for the article in the Cincinnati Post. In New York, other publications of the same or different libels by the defendant are not admitted to prove malice, unless suit upon them is barred by limitation, or for some other reason, (*Frazier v. McCloskey*, 60 N. Y. 337;) but, as already stated, this is contrary to the weight of authority.

It was said that the introduction of the Kentucky Post article was likely to lead the jury to include damages for the malice of the Kentucky article in a verdict on the Cincinnati article. The fact is, doubtless, that the same motive—whether of malice or public interest—which prompted one article prompted the other. It was to enable the jury to judge what the real motive was that the Kentucky Post was admitted. There is nothing which prevents the award of exemplary damages for the same malice in separate publications of the same or similar libels. The same criminal intent may lead to the commission of two separate offenses, but they are separately punished by two sentences. It may be, as suggested by Judge Bartley in *VanDerveer v. Sutphin*, 5 Ohio St. 293, 296, and by the learned judge who presided at the trial below, that the judgment in the first suit would be competent evidence in the second

suit to reduce punitive damages; but that question is not before us.

It was urged by counsel that the Cincinnati and Kentucky publications were merely different editions of the same paper, and that the two libels were one and the same thing. Such an argument would be more relevant on a plea of *res judicata* in the second suit. But, if the contention be well founded, it removes the only reason suggested in any authority for excluding the Kentucky publication, —that is, that it may be made the basis of a second recovery.

It is assigned for error that the defendant's counsel was not permitted to ask the plaintiff, when on the stand, whether it was true that he had not paid his taxes. The statement that Hallam had not paid his taxes in the alleged libel was for the purpose of emphasizing his poverty, and thus lending probability to the insinuation that Hallam had sold his influence to Berry for the payment of the bill at the St. Nicholas Hotel. Defendant was permitted to show that Hallam was a man of small means, and whatever weight such a circumstance, with others shown, might reasonably have in the mind of the defendant to induce a bona fide belief in the charge against Hallam, the defendant had the benefit of before the jury. It does not appear that defendant's counsel made any proffer to the court of what he intended to show in answer to the question. It may be that Hallam would have answered that he had paid his taxes, and, if so, the defendant was not injured by the exclusion of the evidence. Moreover, the question was put on cross-examination, when nothing had been asked of Hallam on the subject in chief. In the federal courts, the right to cross-examine a witness is limited to matters stated in his direct examination. *Houghton v. Jones*, 1 Wall. 702. Had defendant's counsel deemed the matter of sufficient importance, it would have been easy for him to offer the record evidence of the nonpayment of Hallam's taxes when presenting defendant's evidence, and the ruling of the court then would have involved only the question of the relevancy of the evidence in mitigation. He did not do this. As the point is now presented on the record, there is no prejudicial error apparent.

The third assignment of error is that the court permitted counsel for the plaintiff, in cross-examining the managing and city editors of the defendant, to ask them whether, after the suit was brought, there had been any notice of it published in the defendant's newspapers. We think this was a circumstance which the jury might properly consider in weighing the direct evidence of these two editors to the effect that their feeling towards Hallam was friendly and free from malice. It is quite true that the defendant was under no legal obligation to publish the fact that Hallam had asserted, under oath, the falsity of defendant's statement concerning him, and had sought to vindicate his injured reputation by a suit; but the fact was of a class of facts usually recorded in the court news of every newspaper, and its intentional omission reflected on the good faith of the statement that the feeling of the defendant and its editors was entirely friendly to Hallam. A similar ruling was made by the court below with reference to evidence, also brought out on cross-examination of the same witnesses, that defendant was party to an

agreement with all the other newspapers of Cincinnati that they should not publish the fact that a libel suit had been brought against any one of them. The agreement was not unlawful, but defendant's purpose thus manifested, to prevent one whose reputation should be injured by unfounded charges in defendant's columns from securing the partial remedy of publishing in any newspaper his denial under oath, and his intention to vindicate his character tended to show an indifference on defendant's part to the possible wrong it might do to such a person. If, as was suggested by counsel, the motive for such an agreement can be found in the desire of the defendant not to impair its credit by publishing the fact of a suit for large damages against it, this is an argument to be addressed to the jury in explanation of the circumstance; but it is not so conclusive in its character as to prevent the circumstance from being relevant, for the reason already given.

It is next objected that the circuit court permitted plaintiff's counsel, on cross-examination of the witness McRae, to ask the following question in regard to a conversation between the witness and Hallam at the St. Nicholas Hotel after the publication:

"Q. Did not Mr. Hallam further say this to you: 'The way that you are running that paper, you want to have it so that when one man meets another on the street he will say, "Did you see that terrible roasting that so and so got this afternoon?" and thereupon the other man will say, "No, I wonder where I can get a paper."' And did you not thereupon reply to him, 'That is modern journalism?' A. No, sir; I did not."

And the plaintiff was subsequently permitted on the stand to testify that such a conversation as that implied in the foregoing question did take place.

McRae testified on direct examination that the article had been submitted to him by the editor who prepared it, with the assurance that it truly stated the facts as developed after a thorough investigation, and that he thereupon approved its publication because it was news of much public interest. He denied having any malice toward Hallam. The conversation embodied in the foregoing question, if it occurred, would tend to show that McRae's policy in conducting the newspaper was to increase its sale by making sensational charges against individuals,—a policy which would strongly indicate reckless indifference on his part to the rights and reputations of others. It is well settled that reckless indifference to the rights of others is equivalent to the intentional violation of them, and that for the one, as well as the other, a jury in a case of libel or other tort may give punitive or exemplary damages. *Association v. Rutherford*, 1 U. S. App. 296, 2 C. C. A. 354, 51 Fed. 513; *Gott v. Pulsifer*, 122 Mass. 235, 239; *Warner v. Publishing Co.*, 132 N. Y. 181, 30 N. E. 393; *Holmes v. Jones*, 121 N. Y. 461, 24 N. E. 701. If, in approving the publication, McRae was moved by malice or its equivalent, he so far represented the defendant corporation as its general manager that his malice was in law the malice of the defendant. *Railway Co. v. Prentice*, 147 U. S. 101, 114, 13 Sup. Ct. 261; *Railway Co. v. Harris*, 122 U. S. 610, 7 Sup. Ct. 1286. If the conversation occurred, it had a tendency to contradict McRae on the subject of his motive in publishing the article, which thus was one of the main issues in the

case, and not a mere collateral matter. It was, therefore, manifestly proper for the plaintiff, in rebuttal, to adduce evidence to show that such a conversation did take place, in order to impeach McRae's credibility as a witness in regard to the important issue of malice.

Another error assigned is that the court permitted plaintiff to introduce evidence of his general character for integrity, to rebut evidence offered by defendant that Hallam's reputation for integrity in politics was bad. It is undoubtedly the rule that evidence as to reputation upon the question of damages must be confined to the reputation for that particular trait of character which is involved in the libelous charge. *Drown v. Allen*, 91 Pa. St. 393; *Duval v. Davy*, 32 Ohio St. 604; *Sanford v. Rowley*, 93 Mich. 119, 52 N. W. 1119; *Moyer v. Moyer*, 49 Pa. St. 210; *Greenl. Ev.* § 55. When a man is charged with selling his influence in a political convention, the trait of his character which is attacked is his integrity,—his general integrity. If a man's general reputation for integrity is good, proof of it certainly rebuts evidence that he has a reputation for corruptly selling himself in political conventions, for the two are inconsistent. We should be loth to differentiate a want of integrity in political matters from the same failing in business or society.

The theory upon which evidence of bad reputation may be introduced in libel cases is that a man with a bad reputation in the phase of character involved in the charge has very little reputation to lose from such a charge, though false, and is therefore entitled to but little compensation. But, if a man can show a good general reputation for integrity, he has much to lose from a false charge of corruptly selling his influence in politics, and, when it is attempted to diminish his loss by evidence of bad reputation for political integrity, he may very well be permitted to rebut such evidence, and its intended effect, by showing that he has always been regarded as a man of general integrity in all transactions of his life.

The cases cited by counsel for defendant do not sustain his contention. In *Moyer v. Moyer*, 49 Pa. St. 211, it was held that it was competent in a libel suit, where the charge was perjury, for the defendant to show that plaintiff's reputation for truth and veracity was bad. If the rule were as strict as here contended for, then, in the case cited, the defendant should have been limited to proving that plaintiff's reputation for telling the truth under oath in court was bad. In *Sanford v. Rowley*, 93 Mich. 119, 52 N. W. 1119, where the libel charged political treachery and lying, the defendant was permitted to prove that the plaintiff's reputation for political treachery and lying was bad; but it was stated by the court that the defendant might have shown that plaintiff's reputation for truth and veracity generally was bad. Say the court (page 124, 93 Mich., and page 1121, 52 N. W.):

"It would necessarily follow, if these [i. e. bad reputation for treachery and lying in political matters] were shown, that the plaintiff's general reputation for truth was bad, for it can hardly be conceived that a person whose general reputation for truth is bad, in a political sense, has a good reputation for truth and veracity."

In *Drown v. Allen*, 91 Pa. St. 393, the charge was that the plaintiff was a thief, and the defendant offered to prove that he had that reputation, but the trial court restricted him to proving that plaintiff's reputation for honesty was bad. The supreme court reversed this ruling, and held that the defendant was entitled to show plaintiff's reputation for being a thief. In neither of these cases was it held that the plaintiff might not have rebutted, in the one case by proof of general reputation for veracity, or in the other by proof of general reputation for honesty. In the case at bar the defendant was permitted to offer proof of the plaintiff's bad reputation for integrity in politics, and was not compelled to attack his general integrity. The objection here is that plaintiff was permitted to rebut by showing his general integrity. The objection can only be sustained on the theory that a man's general reputation for integrity may be good, and his reputation for corruptly selling his political influence may be bad,—a theory to which, as already said, we cannot yield our assent.

The defendant was permitted to offer evidence that its editor who prepared the article had heard, from several sources, rumors that Hallam had transferred his support to Berry for a money consideration. In rebuttal the plaintiff offered, and was allowed to introduce, over defendant's objection, evidence that it was the general and widespread understanding at the convention and in the community that the reason why Hallam and his supporters, after giving up the fight in his behalf, transferred their votes to Berry instead of to a country candidate, was that they had transferred their votes from Hallam to country candidates in previous conventions, and they resented the ingratitude of the delegates from the country counties in not coming to Hallam's aid in this convention. This is assigned for error.

There is much conflict of authority on the point whether the defendant may give evidence of rumors, known to defendant, in mitigation of damages, and the cases will be found cited in *Townsh. Sland. & L.* (4th Ed.) § 411. A well considered case is that of *Scott v. Sampson*, 8 Q. B. Div. 491, where such evidence is held to be improper. See, also, *Edwards v. Publishing Co.*, (Cal.) 34 Pac. 128. The circuit court, in admitting the evidence, followed the decision of the supreme court of Ohio in *VanDerveer v. Sutphin*, 5 Ohio St. 293. It is unnecessary for us to decide the question, for it is clear that if the defendant opened the door to evidence of rumors, however incompetent, it cannot be heard to object to the plaintiff's offering the same kind of evidence in rebuttal. *Bogk v. Gassert*, 149 U. S. 17, 25, 13 Sup. Ct. 738; *Ward v. Manufacturing Co.*, 56 Fed. 437, 441, 5 C. C. A. 538; *Elliott's App. Proc.* § 628, and cases cited. All that we have to consider, therefore, is whether the evidence of rumors put in by plaintiff was in rebuttal to that offered by defendant.

Defendant offered the rumors to show that its reporter had some basis for his belief, and acted in good faith, and thus to disprove actual malice or wanton negligence or indifference. The plaintiff, by showing other reports which were so widespread through the

community that any one investigating the matter must have heard them, and which offered an explanation of the transfer of the Kenton county vote consistent with Hallam's integrity and that of his followers, made it appear probable that the reporter of the defendant had the benefit of this explanation, or at any rate could have had it by the slightest inquiries, and yet preferred that which reflected on Hallam. A failure to refer in the article to the explanation favorable to Hallam certainly tended to rebut the claim of good faith in its publication, based only on the hostile rumors. This was the effect of the charge of the court on the subject. We do not think that there is any reversible error in the ruling.

It is further objected that the court did not submit the question to the jury whether the innuendo of the petition was sustained by the libel, because issue had been made upon the innuendo, and the defendant was entitled to have the question of the meaning of the article submitted to the jury as a question of fact. From a reading of the charge of the court it seems to us that the question what the article in fact did mean was most fully left to the jury. The court refused to give a charge on the subject which was requested by the defendant below. That charge was as follows:

"In order to entitle the plaintiff to recover in this action it will be necessary that he shall satisfy you, by a reasonable preponderance of proof, of the allegation of that part of the petition usually called the 'innuendo,'—that is to say, that by the article published the defendant intended to charge said Hallam with having requested his supporters to cast their votes upon the last ballot for Berry for a pecuniary consideration to be paid by said Berry, and especially that he should pay to the St. Nicholas Hotel the bill incurred by said Hallam for food and drink ordered by him; and, unless you shall find that the defendant did so intend and charge, you will find for the defendant."

The charge was rightly refused. The question in the case was not what the plaintiff intended to charge in the article, but what in fact he did charge, and what the public who were to read the article might reasonably suppose he intended to charge. *Curtis v. Mussey*, 6 Gray, 261. No error can be based on the refusal of the court to give the charge stated.

Finally, we come to those assignments of error which are based on the charge of the court in regard to privileged communications. The court in effect told the jury that the article in question, relating, as it did, to a matter of public interest, came within a class of communications that were conditionally privileged; that the public acts of public men (and candidates for office were public men) could be lawfully made the subject of comment and criticism, not only by the press, but also by all members of the public, for the press had no higher rights than the individual; but that while criticism and comment, however severe, if in good faith, were privileged, false allegations of fact, as, for instance, that the candidate had committed disgraceful acts, were not privileged, and that, if the charges were false, good faith and probable cause were no defense, though they might mitigate damages. Counsel for the plaintiff in error and the defendant below has argued with great vigor and an array of authorities that we ought not to adopt the view of the

circuit court upon this important question, but should hold that the privilege extends to statements of fact as well as comment.

The argument is this: Privileged communications comprehend all bona fide statements in performance of any duty, whether legal, moral, or social, even though of imperfect obligation, when made with a fair and reasonable purpose of protecting the interest of the person making them, or the interest of the person to whom they are made. Townsh. Sland. & L. § 209. It is of the deepest interest to the public that they should know facts showing that a candidate for office is unfit to be chosen. Therefore, every one who has reasonable ground for believing, and does believe, that such a candidate has committed disgraceful acts affecting his fitness for the office he seeks, should have the right to give the public the benefit of his information, without making himself liable in damages for untrue statements, unless malice is shown. Though of imperfect obligation, it is said to be the highest duty of the daily newspaper to keep the public informed of facts concerning those who are seeking their suffrages and confidence. Can it be possible, it is asked, that public policy will make privileged an unfounded charge of dishonesty or criminality against one seeking private service, when made to the private individual with whom service is sought, and yet will not extend the same protection to him who in good faith informs the public of charges against applicants for service with them? Is it not, at least, as important that the high functions of public office should be well discharged, as that those in private service should be faithful and honest?

The a fortiori step in this reasoning is only apparent. It is not real. The existence and extent of privilege in communications are determined by balancing the needs and good of society against the right of an individual to enjoy a good reputation when he has done nothing which ought to injure it. The privilege should always cease where the sacrifice of the individual right becomes so great that the public good to be derived from it is outweighed. Where conditional privilege is extended to cover a statement of disgraceful fact to a master concerning a servant or one applying for service, the privilege covers a bona fide statement, on reasonable ground, to the master only, and the injury done to the servant's reputation is with the master only. This is the extent of the sacrifice which the rule compels the servant to suffer in what was thought to be, when the rule became law, a most important interest of society. But, if the privilege is to extend to cases like that at bar, then a man who offers himself as a candidate must submit uncomplainingly to the loss of his reputation, not with a single person or a small class of persons, but with every member of the public, whenever an untrue charge of disgraceful conduct is made against him, if only his accuser honestly believes the charge upon reasonable ground. We think that not only is such a sacrifice not required of every one who consents to become a candidate for office, but that to sanction such a doctrine would do the public more harm than good.

We are aware that public officers and candidates for public office are often corrupt, when it is impossible to make legal proof thereof,

and of course it would be well if the public could be given to know, in such a case, what lies hidden by concealment and perjury from judicial investigation. But the danger that honorable and worthy men may be driven from politics and public service by allowing too great latitude in attacks upon their characters outweighs any benefit that might occasionally accrue to the public from charges of corruption that are true in fact, but are incapable of legal proof. The freedom of the press is not in danger from the enforcement of the rule we uphold. No one reading the newspaper of the present day can be impressed with the idea that statements of fact concerning public men, and charges against them, are unduly guarded or restricted; and yet the rule complained of is the law in many of the states of the Union and in England.

In *Davis v. Shepstone*, 11 App. Cas. 187, Lord Chancellor Herschell delivered the judgment of the judicial committee of the privy council in an appeal from a judgment for libel recovered in the supreme court of Natal. The plaintiff below was a resident commissioner of Great Britain in Zululand, and the alleged libel charged him with having committed unprovoked and altogether indefensible assaults upon certain Zulu chiefs. The publication was made in the colony of Natal, where the conduct of the resident commissioner in Zululand was of great public interest. It was claimed that the article was conditionally privileged, and that the plaintiff ought to have succeeded only on proof of express malice. This claim was denied. The lord chancellor thus stated the law:

"There is no doubt that the public acts of a public man may lawfully be made the subject of fair comment or criticism, not only by the press, but by all members of the public. But the distinction cannot be too clearly borne in mind between comment or criticism and allegations of fact, such as that disgraceful acts have been committed or discreditable language used. It is one thing to comment upon or criticise, even with severity, the acknowledged or approved acts of a public man, and quite another to assert that he has been guilty of particular acts of misconduct. In the present case the appellants, in the passages which were complained of as libelous, charged the respondent, as now appears, without foundation, with having been guilty of specific acts of misconduct, and then proceeded, on the assumption that the charges were true, to comment upon his proceedings in language in the highest degree offensive and injurious. Not only so, but they themselves vouched for the statements by asserting that, though some doubt had been thrown upon the truth of the story, the closest investigation would prove it to be correct. In their lordships' opinion there is no warrant for the doctrine that defamatory matter thus published is regarded by the law as the subject of any privilege."

Other English cases laying down the same doctrine are *Campbell v. Spottiswoode*, 3 Fost. & F. 421, 432, affirmed 3 Best & S. 769, and *Popham v. Pickburn*, 7 Hurl. & N. 891, 898. The latest American case, and the most satisfactory, is that of *Burt v. Newspaper Co.*, 154 Mass. 238, 242, 28 N. E. 1, where Justice Holmes discusses the question, and quotes with approval the foregoing passage from the judgment in *Davis v. Shepstone*. Other American cases approving the same rule are *Smith v. Burrus*, 106 Mo. 94, 101, 16 S. W. 881; *Wheaton v. Beecher*, 66 Mich. 307, 33 N. W. 503; *Bronson v. Bruce*, 59 Mich. 467, 26 N. W. 671; *Brewer v. Weakley*, 2 Overt. 99; *Sweeney v. Baker*, 13 W. Va. 183; *Hamilton v. Eno*, 81 N. Y. 126; *Rearick v.*

Wilcox, 81 Ill. 77; Negley v. Farrow, 60 Md. 158, 176; Jones v. Townsend, 21 Fla. 431, 451; Banner Pub. Co. v. State, 16 Lea, 176; Publishing Co. v. Moloney, (Ohio,) 33 N. E. 921; Seely v. Blair, Wright, (Ohio,) 358, 683; Wilson v. Fitch, 41 Cal. 383; Edwards v. Publishing Co., (Cal.) 34 Pac. 128; State v. Schmitt, 49 N. J. Law, 579, 586, 9 Atl. 774; Eviston v. Cramer, 57 Wis. 570, 15 N. W. 760.

In *Publishing Co. v. Moloney*, supra, the supreme court of Ohio say, with reference to the doctrine that statements of fact should be regarded as privileged when made concerning a candidate for an office, as follows:

"We do not think the doctrine either sound or wholesome. In our opinion, a person who enters upon a public office, or becomes a candidate for one, no more surrenders to the public his private character than he does his private property. Remedy, by due course of law, for injury to each, is secured by the same constitutional guaranty, and the one is no less inviolable than the other. To hold otherwise would, in our judgment, drive reputable men from public positions, and fill their places with others having no regard for their reputation, and thus defeat the purpose of the rule contended for, and overturn the reason upon which it is sought to sustain it. That rule has not been generally adopted in this country, and the converse of it has hitherto obtained in this state."

The view we have taken of the main question makes it unnecessary for us to consider whether the privilege claimed could extend, in any event, to statements concerning Hallam published two weeks after he ceased to be a candidate, and made to a public none of whom was a voter or a citizen of the congressional district in which Hallam had offered himself as a candidate.

Having examined the record and the assignments of error with much care, we find no error prejudicial to the defendant below, and therefore affirm the judgment of the circuit court, with costs.

WINNIPISIOGEE PAPER CO. v. NEW HAMPSHIRE LAND CO. et al.

(Circuit Court, D. New Hampshire. December 11, 1893.)

No. 372 Law.

1. DEED—DESCRIPTION—SUFFICIENCY.

Under the rule that that is certain which can be made certain, a description bounding a grant by the northern line of a prior grant is sufficiently definite, if referred to under circumstances making it a controlling call, although said northern line has never been marked upon the ground.

2. SAME—CONSTRUCTION AND EFFECT.

Where a line is described as running south to the "northwest corner of Burton; thence westerly along the northern line of Waterville,"—both parties assuming that the northeast corner of Waterville is at the northwest corner of Burton,—but it afterwards turns out that the Waterville corner and north line are a substantial distance further south, the grant only goes to the Burton corner, and the southern boundary must be run westerly therefrom, and parallel with the north line of Waterville, thus excluding the intervening territory. *Land Co. v. Saunders*, 103 U. S. 316, distinguished.

3. SAME—RECORD—ADDITIONS TO.

The addition, to the record or copy of a deed, of a map or plan which was not on the original, for the purpose of making the claim of the

grantee more specific, but without any fraudulent intent, or purpose to make it appear as part of the original deed, does not render the grant inoperative.

4. **SAME—CONSTRUCTION.**

A quitclaim by the state to "the said A. and others claiming under T." carries the entire title to A., when it does not appear that any "others" were then claiming title to the lands, or afterward accepted the grant.

5. **WRIT OF ENTRY—DEFENSES—FORFEITURE.**

A forfeiture accruing to the state as against its grantee may be waived, and is not available to one not claiming intervening rights.

6. **PUBLIC LANDS—STATE GRANTS.**

If one of a number of grantees of the state reject the grant, but the others accept it, and pay the consideration for the whole tract, including his share, they take title to the whole. *Corbett v. Orcross*, 35 N. H. 99.

7. **SAME—EJECTMENT—ESTOPPEL.**

The fact that the state's grantees, in making their survey, by mistake locate a line so as to exclude part of the grant, does not prevent them from afterwards claiming to the true line.

8. **WRIT OF ENTRY—EVIDENCE—DEEDS—COPIES.**

Office copies of deeds not in the chain of title of either party, and offered by defendant for the purpose of showing title in a third party, are not admissible, without proof of search for the originals. *Wells v. Iron Co.*, 48 N. H. 491, followed.

9. **ADVERSE POSSESSION—WILD LANDS.**

Adverse possession under color of title, sufficient to create possessory title, may be established in New Hampshire, in the case of wild lands, by showing surveys, prosecutions for trespass, depositions in perpetuum, grants, and payment of taxes.

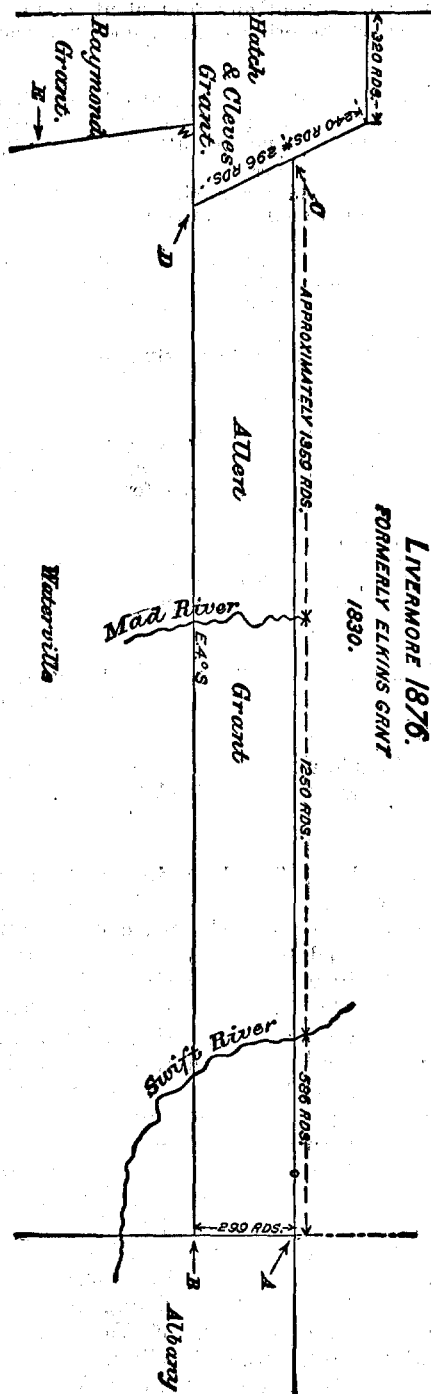
At Law. Writ of entry. Plea, nul disseisin. Jury waived, and trial by the court, under the statute. Findings and judgment for plaintiff.

F. N. Parsons, L. G. Leach, and E. B. S. Sanborn, for plaintiff.

Streeter, Walker & Chase and D. C. & C. C. Saunders, for defendants.

ALDRICH, District Judge. The land in question is situated in Grafton county, and between the town of Albany on the east, the Hatch & Cleves grant on the west, the town of Waterville on the south, and an alleged spotted line on the north, running from the northwest corner of Albany west to Hatch & Cleves' grant, and is 8 or 9 miles in length, and about 300 rods in width. The case is one of large importance, involving in its consideration a great number of exhibits and a vast amount of documentary and oral evidence.

Albany was chartered in 1776, and was then, and for a long time, known as Burton. Hatch & Cleves' grant was granted in 1811, and has always been known as "Hatch & Cleves' Grant." Waterville was granted in 1818, and was then, and for a long time thereafter, called the "Gillis & Foss Grant." Elkins' grant, under which the defendants claim title, was granted in 1830, and has always been known as the "Elkins Grant." Allen's grant, under which the plaintiff claims in part, was a provisional grant made in 1839, and in substance was a release of the state's interest in all ungranted lands, if any, between Elkins' grant and the north line of Waterville. Waterville and Albany join, and the west line of Albany extends something like 300 rods further north than the east line of Waterville.



The plaintiff claims the spotted line running west from the northwest corner of Albany to Hatch & Cleves' to be the south line of Elkins' grant and the north line of Allen's grant. The defendant disputes the spotted line as a boundary, and claims that Elkins' grant goes to Waterville, and that there was consequently no land ungranted at the time of the provisional grant to Allen, under whom the plaintiff claims, and that plaintiff's grantor herefore took no title by virtue of the grant of 1839. The town of Livermore was incorporated in 1876, and includes Hatch & Cleves' North Raymond, and Elkins' grants, and extends to Waterville; but it is not contended by either party that the title to the lands, or the interests of the parties, were affected thereby. The territory in the northwesterly portion of Albany or Burton, and the northerly portion of Waterville, as well as Hatch & Cleves' and Elkins', including the territory in dispute, is wild and mountainous, and in 1830 was uninhabited and covered with wooded growth, and still is without improvement or occupation, except such as result from the grants, surveys, claims, and logging operations hereinafter stated.

We now come to an important question in the case. The plaintiff contends that the north line of Waterville named in the deed or grant to Elkins and his associates of August 31, 1830, is a course rather than a monument, and, if a monument, that it is a mistaken one, and that under reasonable construction the calls of the deed stop at the northwest corner of Burton, (now Albany;) that the Waterville line should therefore be rejected, and the southerly line of Elkins' extended on the same course west from the Albany or Burton corner to Hatch & Cleves',—while the defendants contend that the north line of Waterville is called for by the deed, and that the north line of Waterville is therefore the southerly bound of Elkins' grant. If the defendants' theory is the true one, the state parted with its title in 1830, and had no land between Waterville and Elkins' to convey or release to Allen in 1839; and, if the plaintiff's theory is the true one, his title to the land in dispute is absolute and unquestioned, provided the Allen grant is operative, and the plaintiff is in a position to claim thereunder. Waterville, embracing the territory of the Gillis & Foss grant, was incorporated in 1829 as the town of Waterville, and was a territorial subdivision well known; but neither the north line, nor the northerly corners thereof had been marked on the ground in 1830, when the grant was made to Elkins and his associates. The lines of Burton (now Albany) had been surveyed and marked prior to 1830, and a corner marked, which was known as the northwest corner thereof. The description in the grant to Elkins and his associates of August 31, 1830, is as follows:

"Beginning at the northeast corner of the town of Lincoln, and running east, seven miles and one hundred and seventeen rods, to Hart's location; thence southerly, by the westerly bound of said location, to a point so far south that a line drawn thence due south shall strike the northwest corner of the town of Burton; thence south to said northwest corner of Burton; thence westerly along the northern line of Waterville to the eastern boundary of Hatch & Cleves' grant; thence northerly and westerly by said grant to the east line of Thornton; thence by said line of Thornton northerly to the line of Lincoln, and along this line to the point first mentioned."

Applying the New Hampshire rule established in *Corbett v. Norcross*, 35 N. H. 99, which was recognized and emphasized by the federal courts in *Land Co. v. Tilton*, 19 Fed. 73, and *Land Co. v. Saunders*, 103 U. S. 316, that, in respect to land conveyances, that is certain which can be made certain, I hold that the Waterville north line, although not on the ground, was a sufficiently definite and certain course or boundary, provided it was referred to under such circumstances as to become a reasonable and controlling call of the deed. It will be observed, by reference to the deed, that from the northwest corner of Burton the description runs "thence westerly along the northern line of Waterville," and that no course or distance is given which brings you to the north line of Waterville, which is some considerable distance south of a line drawn west from the northwest corner of Burton. I think it is established that the parties to the deed all acted upon the supposition that the northwest corner of Burton and the northeast corner of Waterville were coincident; but I find as fact that the northeast corner of Waterville was on the west line of Burton, (now Albany,) something like 300 rods south of the northwest corner thereof. There are three lines on the north of Waterville, varying in age and distinctness, the middle line, perhaps, having been the most generally accepted; but the most northerly line claimed by any one as the north line of Waterville is not less than 260 rods south of a line drawn from the northwest corner of Albany. Questions as to the true north line of Waterville are now pending in the state courts, and it is not material to inquire or decide here which is the correct one. It is a matter that can be made certain, and it is only material, for the purposes of the questions involved in this proceeding, to know that it is some substantial distance south of the corner of Burton. I find from the evidence in the case, direct and circumstantial, that at the time the resolution which was the basis of the deed was adopted and approved, and when the explorations were being made for the purpose of making the appraisal contemplated by the resolution, as well as at the time the deed was executed and delivered to Elkins and his associates, all parties understood that the northeast corner of Waterville was a part of the northwest Burton corner monument, and that a line extended westerly therefrom to the east line of Hatch & Cleves' grant would be the north line of Waterville; that no land south of that line was either appraised or paid for; and that the explorations were made by the agents named in the resolution at the expense of the petitioners, subsequent to the resolution, and before the delivery of the deed.

Upon careful consideration of the arguments of counsel, and a more complete examination of the case, I find myself unable to sustain my intimations at the trial that, under the doctrine of *Land Co. v. Saunders*, the Waterville line would probably govern wherever found. In this case it appears almost beyond controversy or question, from the wording of the description in the deed, aided by the situation of the property, and the situation and conduct of the parties, and the other evidence in the case competent under the

New Hampshire rule, that all concerned understood at the time of the grant that the line of Waterville extended west, direct from the northwest corner of Burton. Assuming this point to be established, as I do, it must clearly follow that neither party intended, at the time, to go further south than a line drawn west from Burton corner. In other words, they supposed that to be the north line of Waterville, and using the term, "thence westerly along the northern line of Waterville to the eastern boundary of Hatch & Cleves' grant," as they undoubtedly did, as descriptive of a boundary as well as a course, it was inadvertently used, and to carry the conveyance to such line, which is something like 300 rods further south than either party supposed, would be doing violence to the manifest intention of the parties; and the only justification for such violence would be the inadvertent term in the deed, used by mistake, and one which falsified the fact as both parties then understood it.

An omitted boundary may be supplied to give effect to the intention of the parties; and under the same principle a mistaken term, or course, or boundary, used in a deed inadvertently, may be rejected (*Morse v. Rogers*, 118 Mass. 573, 578; *Land Co. v. Saunders*, 103 U. S. 316, 322) in a case where its effect would be, if permitted to stand, quite as clearly to defeat the manifest intention of the parties. There is great force in the reasoning of counsel for the defendants, based upon *Land Co. v. Saunders*, *supra*, as applicable to the question under consideration; but upon careful examination of that case it seems to me as not controlling for the defendants upon the questions involved in this part of the line, but, on the contrary, in principle against their position. In that case the west line of Hart's location was known as a jurisdictional line, but its location on the ground, unlike the Burton corner, was not known by the parties. On that part of the line the parties intended to go to Hart's location; on this part they intended to stop at Burton, and supposed they did, under the term employed in the deed. There the call was "to Hart's Location;" here it is not "to" the Waterville line, but "to said northwest corner of Burton; thence westerly along the northern line of Waterville." There apt words took the parties to Hart's location without any course being supplied; here there are no apt words taking you to Waterville, and a course must be supplied to take you there, which course, so supplied, would be contrary to the understanding and intention of the parties. There the course supplied was from a bound to which the deed, by apt words, took the parties to another bound, which was well known and not in dispute; while here, to give effect to the defendants' contention, we must supply a course to reach Waterville at a point on the ground beyond where the parties understood it to be, thus including territory manifestly not intended. In that case, as has been observed, it was clear that the parties intended to go to the west line of Hart's location, and thence to Burton corner; and when the line was found, and it was ascertained that from the west line of Hart's location the due south line therefrom named in the grant would not carry them to

the northwest corner of Burton, one was supplied which would go there, and effect thereby given to the intention of the parties. In this case it is quite as clearly established that the parties did not intend to go further south than Burton corner, which was a known and definite corner marked on the ground, where they were to stop, and proceed direct from that point to the east line of Hatch & Cleves'; and, understanding that the north line of Waterville was at this point, the term descriptive of the Waterville line was used as a convenient boundary or course to carry them to the east line of Hatch & Cleves', which was the next call in the deed. Now, when it is found that the Waterville line is not at the place where the parties understood it to be, or, in other words, at the Burton corner monument, but nearly a mile south, taking the most direct course, supplying the necessary course and distance to get there would be inserting a term contrary to the facts as the contracting parties understood them, and taking from the grantor land which it did not suppose was included in the grant, and giving to the grantees land which they did not think was in the grant, which was not appraised or paid for, and which they supposed at the time was in the town of Waterville. Indeed, it seems clear that the principle controlling *Land Co. v. Saunders*, and which supplies a course necessary to give effect to the intentions, would reject a course or mistaken bound, quite as clearly doing violence to the intention of the parties.

Holding this view, I must construe the deed as going south to the Burton corner only, and reject the Waterville line as one inadvertently used by the parties under misapprehension; and, under what remains in the description which is sufficiently certain, the south line of Elkins' grant must go on a westerly course, parallel with the north line of Waterville, from the northwest corner of Burton (now Albany) to the east line of Hatch & Cleves'. In this view of the case the territory south of a line laid upon the ground parallel with the north line of Waterville, from the Burton corner to Hatch & Cleves', and between Waterville on the south, Burton on the east, and Hatch & Cleves' on the west, was ungranted in 1839, and passed to Allen by virtue of the resolution and deed of July 16, 1839, under which the plaintiff claims.

The defendants further object to the Allen deed from the state as a muniment of title on the ground that it was mutilated, or, in other words, a plan added thereto or inserted, after its execution, and before record. I find that the plan appearing on plaintiff's Exhibit 22, (which is a copy from the office of the secretary of state,) following the certificate of Franklin Pierce, was not on the original deed, but was added to the record or copy after the execution and delivery of the original grant, and that it was done by or at the suggestion of the plaintiff's grantors later than 1850, for the purpose of making more specific their claim as to the location of the land. I am not able to find upon the evidence that it was done with fraudulent intent, or for the purpose of making it appear as a part of the original grant. Upon these facts I am of

opinion that the grant was not rendered inoperative, or the rights of the plaintiff's grantors impaired thereby.

Another objection to the plaintiff's title under the Allen grant of 1839 is that there were grantees other than Allen named in the resolution, which is as follows: "The treasurer of the state is hereby authorized to make and deliver to the said Allen, and others claiming title under Stephen Thayer, a quitclaim deed," etc.; and similar language was used in the deed based upon the resolution. There is no evidence that there were others claiming title to the land in question, or that there were others who accepted the grant, and made claim to rights and interests thereunder. The deed was executed and delivered to Allen, who accepted it. Under such circumstances, the entire title passed to Allen under the doctrine of *Corbett v. Norcross*, supra; but, if not, and there are others claiming under the Thayer title and Allen grant, the defendants are not in a position to interpose such situation against the plaintiff's right of recovery in this proceeding.

The defendants also say that the deed to Allen, which was dated in 1839, was not recorded until 1860, and that, by a statute of the state, a deed not recorded within one year became void. This objection is not available to the defendants. The title passed at the time of the delivery without entry, and the effect of the failure to record within the year, as provided by the statute, would work a forfeiture. As between the state and its grantee, the forfeiture might well be waived, as was done by the resolution of 1860. If the defendants had acquired intervening rights, it might be otherwise, but that is not proved or claimed.

My verdict, therefore, on this branch of the case, is that the plaintiff has proved title under the Allen grant to all the territory between Albany, Waterville, Hatch & Cleves', and a line drawn from the northwest corner of Albany, parallel with the north line of Waterville, to the east line of Hatch & Cleves' grant.

The plaintiff also claims title to the land in question under the Elkins grant, being the same grant under which the defendants claim. If the view which I hold—that Elkins' grant does not extend southerly beyond a line drawn west from the Albany corner—should be sustained, this phase of the case becomes wholly immaterial; but I will state the facts, so that the questions under this branch of the case may be determined, provided they become material. The grant of 1830, known as the "Elkins Grant," was to Jasper Elkins, Samuel H. Walker, Jacob Sargent, Jr., Ebenezer P. Elkins, John Eaton, and David Perkins, all of Thornton, which adjoined Waterville, Hatch & Cleves', and the land granted on the west. I find that David Perkins rejected the grant, and that the other grantees accepted it, and paid the consideration, including Perkins' share, which was accepted by the state; and I hold, under the doctrine of *Corbett v. Norcross*, 35 N. H. 99, 100, that the title, including Perkins' share, vested in the five remaining grantees, who took all the territory covered by the state deed of August 31, 1830. I find from the marks on the ground, and other evidence in the case, that the grantees under the Elkins grant very soon

(and probably as early as 1831 or 1832) caused surveys to be made in what they then claimed to be the southerly part of the grant, and, understanding that the grant stopped at the corner of Albany, and that the Waterville line was there, caused a line to be marked on the ground as the south line of Elkins', extending from the Albany corner to Hatch & Cleves'. I do not think, however, that this survey, either on the ground of practical location or under the doctrine of estoppel, should operate to defeat the title of such grantees, provided, by the terms of the grant, their land extended further. If, by mistake, they claimed less than the grant, it should be treated as a tentative effort to locate their lands, and should be subject to correction according to the facts. So, if there are no reasons disclosed by the other branches of the plaintiff's title why it should not be so, it is open to the defendants to claim to Waterville, provided the court shall hereafter construe the Elkins grant as going to that line.

I further find that, soon after these surveys were made, (and according to the testimony of Daniel Elkins, son of Jasper, within two or three years thereafter,) the grantees discovered that Waterville was further south, and thereupon undertook to annex the intervening territory. It is claimed by the plaintiff that a division was made among the original grantees, whereby Jacob Sargent and Ebenezer P. Elkins were to take all the territory, if any, south of the Albany corner. There is no evidence in this case to justify a finding of fact, or a ruling that Jacob Sargent and Ebenezer P. Elkins took the sole title of the grantees (if they had any) to the territory south of the Burton corner.

The plaintiff's title on this branch of the case rests on two deeds from Jacob Sargent and Ebenezer P. Elkins to Stephen Thayer, one dated March 21, 1836, and the other dated June 25, 1836. The first of these I find as matter of fact, and rule as law, is void for uncertainty. There is no bound or starting point given by which the measurements can be started, and the location of the land ascertained. The deed of June 25, 1836, would seem to be sufficiently certain to answer the law. It refers to prior conveyances, and can therefore be made certain; and Jasper having previously conveyed to Ebenezer, who joins with Sargent in this conveyance, Thayer would take three undivided fifths of the title of the five original grantees, if any, in the territory south of Burton. The deed of Jasper to Ebenezer is also attacked on the ground that Jane Elkins, a witness, was the wife of Jasper. I find as a fact that she was the wife, but overrule the objection, under the New Hampshire law. *Frink v. Pond*, 46 N. H. 125; Pub. St. c. 224, § 20.

The defendants further object to the plaintiff's title under the foregoing deeds upon the ground that Thayer had conveyed the whole or part of his interest before his deed to Allen, in 1838, and that Sargent had conveyed the whole or part of his interest prior to his deed to Thayer, in 1836. In support of this the defendants sought to establish title in a third party by the introduction of office copies, without proof of search for the original deeds, or proof of execution or delivery. The conveyances of which the exhibits

purport to be copies are not in the chain of either party, and would therefore seem to be excluded by the doctrine of *Wells v. Iron Co.*, 48 N. H. 491, 535.

My verdict on this branch of the case is that, provided the Elkins grant shall hereafter be construed as going beyond Albany corner, and to Waterville, the plaintiff has proved title to an undivided three-fifths interest in the land described in the deed of June 25, 1836.

The plaintiff's third and last ground is that, if the paper title fails, he has title by adverse possession.

There is much evidence bearing upon this branch of the case. It would seem that in 1836, and after the original grantees had discovered that the Waterville line was not where they at first understood it to be, Jacob Sargent and Ebenezer P. Elkins, who claimed to hold, by virtue of a division among the original grantees, all the title in that part of the grant south of the Burton corner, conveyed to Stephen Thayer, who from that time claimed to hold the land in question; that he entered upon the tract in 1836 with Jonathan Cummings, a surveyor, and made explorations with a view of ascertaining the quantity, and measured the east line of Waterville, and fixed a point as the northeast corner of Waterville; that he executed deeds of the territory, or portions of it, was involved in lawsuits based upon such conveyances, and that in 1838 he conveyed to Allen. In 1839, and subsequent to the litigation, Allen applied to the legislature for a release of the state's title, or a confirmation of the title from Sargent and Elkins and Thayer, and in the same year the legislature passed the resolution, which was approved by the governor, and the state treasurer executed and passed to Allen the deed which has been referred to as the "Allen Grant." About 1840, Allen caused a survey and plan to be made under the 2,700-rod clause in his deed from the state, indicating his claim as extending on the Waterville line 2,700 rods west from the Albany west line; thence in a northerly direction, parallel with the west line of Albany, to the line extending west from the northwest corner thereof, or, in other words, to the bound originally surveyed as the south line of Elkins' grant, thus leaving a gore between his possessions, as marked on the ground, and Hatch & Cleves' grant; and from this time Allen and his grantees have claimed the land between the lines and bounds so established, under both the Sargent and Elkins title, and the grant from the state of 1839. In 1839 or 1840, Allen caused a line to be run from a point at or near the southeast corner of Hatch & Cleves' to the west line of Albany, striking that line about 300 rods south of the northwest corner thereof, where he established a corner. Allen and his grantees have always claimed this line to be the south bound of the Allen tract. In 1840, Allen, upon notice to Ebenezer P. Elkins, one of the original grantees, caused the depositions of Davis Baker and Jonathan Cummings to be taken, "in perpetual remembrance of facts relating to lands adjoining the north line of Waterville;" and Jasper Elkins and S. H. Walker, two of the other grantees, appeared at the caption, and took part in the examination of the witnesses. In 1855 there were

some explorations and markings in the northwest corner of the Allen tract, but the evidence is not very clear as to what extent. In 1860 or thereabouts, Allen prosecuted parties for trespass and cutting timber on the east end of the territory, and in 1861 collected damages for similar cuttings. These unincorporated places were first taxed in 1861, and Elkins' grant and Allen's grant were taxed separately, as territorial subdivisions, from 1861 to 1876, when Livermore was incorporated, and the taxes on Allen's grant were paid by parties claiming under the grant of 1839. In 1864 or 1865 the holders of the Allen title permitted cutting on the east end thereof in settlement of damages. In 1869 the line was perambulated between Waterville and Allen as the town line, and the Baker line of 1840 was respotting. Upon this branch of the case the defendants claim (1) that the acts of possession have been interrupted; and (2) that, standing alone, they are not sufficient to give title to wild lands by adverse possession.

As to the first point the defendants introduced considerable evidence of logging operations at various times in the Mad river valley, in the Haselton brook valley, and on the Hancock and Eastman branches of the Pemigewassett river, all of which are in the vicinity of the land in question. None of the witnesses were able to state from recent examination the precise location of the operations, though several, in a general way, stated the cuttings to be in the "Bread-Tray" country, a part of which somewhat indefinite country, at least, is within the lines claimed by the plaintiff. The evidence was of a character uncertain, largely speculative, and unsatisfactory. The plaintiff called a witness who had recently ascertained, by explorations and surveys, the precise location of the lines claimed by the plaintiff and its grantors, and who spent several weeks in careful examination of the territory for the purpose of ascertaining the extent, if any, of the cuttings within such lines. His evidence was clear and positive that no logging operations had taken place on the territory, and that only a few scattering trees had been cut over the lines. This evidence (as said by Mr. Justice Bradley in *Land Co. v. Saunders*, supra) was of such a character as to admit of contradiction, but the defendants failed to avail themselves of the opportunity. Upon all the evidence in the case, including the character of the country and the length of the haul, my conclusion is that the operations in the Mad river country did not extend so far north as to reach the territory claimed by the plaintiff, and that the operations on the west and north did not extend over the possessory bounds of the plaintiff's grantors, and that the cutting of the scattering trees was not of such a character or extent as to indicate an intention to interrupt or disturb the possession. I find, so far as it is a question of fact, that the plaintiff's grantors were in open, notorious, adverse, exclusive, peaceable, and uninterrupted possession, under color of title and a claim of right, of that part of the territory marked off by the 2,700-rod limit on the Waterville line, for more than 20 years prior to the disseisin of which the plaintiff, in its writ, complains, and that the defendants' grantors had knowledge of the possession and claim of the plaintiff's grantors.

The foregoing are my findings of fact; but it is not intended thereby to remove from the case a consideration of the question of law,—whether, under such conditions, the character of the occupancy was such as to create possessory title.

The defendants contend, as matter of law, that these claims and acts of possession do not constitute a sufficiently open and actual occupancy to come within the general doctrine as to title by adverse possession. It will be found, upon examination of the cases cited by counsel in support of this position, that some do not possess the important element of color of title, while in others the acts of possession are equivocal, and without notorious claim of right, and in others were not of a character clearly indicating a claim of ownership adverse to the title of the real owner, and in others, still, the element of knowledge by the owner of the character and extent of the adverse claim did not exist. It must be admitted, however, that the authorities in many jurisdictions are not quite in harmony with what would seem to be the law of New Hampshire in respect to the application of the doctrine of title by adverse possession to wild lands, where the possession results from surveys and lines only. But in the same connection it may be remarked that it seems difficult to find any reason for a distinction between a possession resulting from surveys and lines under color of title, accompanied by an unequivocal claim, inconsistent with the title of the owner, who has actual knowledge, and a possession and occupancy of land under improvement. The language of the learned Chief Justice Parker in the early case of *Bailey v. Carleton*, 12 N. H. 9, 15, would indicate that the New Hampshire courts did not regard the extent or character of the territory as the test, but rather the character of the acts of possession, and knowledge of the owner. See, also, *Little v. Downing*, 37 N. H. 355, 366; *Merrill v. Hilliard*, 59 N. H. 481. Assuming that neither the deed from the state to Allen nor the deed from Elkins and Sargent of June 25, 1836, passed any title, (*Waldron v. Tuttle*, 4 N. H. 371,) and that the Allen deed was not recorded, (*Minot v. Brooks*, 16 N. H. 374,) still, the plaintiff's grantors had color of title; and in view of the nature and notoriety of the claim, and the various attempts to cumulate and strengthen the title by grants, depositions in perpetuum, surveys, prosecutions, and payment of taxes, and the relation of the holders of the Elkins' grant title to these various transactions, it would seem reasonable to assume that they had actual notice of the fact that Allen was making claims inconsistent with their title, if they understood that their lands extended below the Albany corner. The doctrine of title by adverse possession is fraught with danger, as applied to wild lands, and its application should be made with great caution; and it may be doubtful whether it should be applied upon constructive notice, or in any case, unless the evidence is clear and unmistakable that the owner had notice of the surveys and lines, as well as the character and extent of the claims. With these views it is with considerable hesitancy that I hold the acts of the plaintiff's grantors sufficient to create possessory title; but, under the peculiar circumstances of this case, it seems that the evidence warrants the finding that

the defendants' grantors had knowledge of Allen's claim, and acts of possession and ownership by him and his grantees, and either slept upon their rights or acquiesced in the title. The resolution of the legislature in 1839, the record of the Allen grant in Grafton county in 1842, and the resolution of 1860, and the record of the grant in the office of the secretary of state in the same year, the official perambulation of the Waterville line, the payment of taxes, the depositions in perpetuum, to which two or more of the original grantees were parties, and the taxation of the Allen grant as a separate territorial subdivision, were all acts of a public and notorious character, and as such gave character and form to the claims and purposes of the plaintiff's grantors.

My verdict on this branch of the case is that the plaintiff has proved possessory title to the tract of land between Albany on the east, Waterville on the south, the line drawn from the Waterville north line parallel with Albany west line, and 2,700 rods therefrom, to the line originally marked as the south bound of Elkins' grant, and a line drawn from that point on the old line to the northwest corner of Albany.

My conclusions of law are: (1) That the deed to Allen should be construed as releasing or granting the state's interest in all ungranted lands between Waterville, Elkins' grant, Hatch & Cleves' and Albany, and, as no entry was necessary, (*Enfield v. Permit*, 8 N. H. 512; *Bellows v. Copp*, 20 N. H. 492, 501,) that the plaintiff's grantor took title to all the territory described in the verdict on the first branch of the plaintiff's case; (2) that, if the Elkins grant goes to Waterville, the plaintiff is the owner of the undivided three-fifths of the land described in the deed of June 25, 1836, named in the verdict on that branch of the case; (3) if the plaintiff's recovery is not upon his paper, but upon possessory title, that he is restricted to the 2,700-rod limit stated in the verdict on the last branch of the case.

The defendants have 30 days in which to present a bill of the exceptions taken at the trial, and such as they desire to take from the rulings herein. If the defendants except, the plaintiff may except to the ruling as to the uncertainty of the deed of March 31, 1836.

ROBINSON v. TURRENTINE et al.

(Circuit Court, E. D. North Carolina. January 9, 1894.)

No. 37.

NATIONAL BANKS—ASSESSMENT OF STOCK—LIABILITY OF MARRIED WOMEN.

Code N. C. § 1826, provides that no woman during coverture shall be capable of making any contract to affect her real and personal estate without the written consent of her husband. *Held*, that a purchase of stock by a married woman is not a "contract" within the terms of the statute, and that the wife is liable upon an assessment although the stock was purchased without the written consent of her husband.

At Law. Action by W. S. O'B. Robinson, receiver of the First National Bank of Wilmington, N. C., against M. B. Turrentine and

her husband, John R. Turrentine, to recover an assessment on certain shares of bank stock held by her. Judgment for plaintiff.

Daniel L. Russell, for plaintiff.

John D. Bellamy, Jr., and Herbert McClammey, for defendants.

SEYMOUR, District Judge. This is an action at law brought by Robinson, receiver of the First National Bank of Wilmington, N. C., to recover an assessment of 100 per cent. which the comptroller of the currency has duly made on the shareholders of the bank. The feme defendant was, it is alleged, at the time of its suspension, a shareholder of the stock of the bank to the amount of 20 shares of the par value of \$100. M. B. Turrentine is a married woman. After her marriage and after the passage of the act of 1871 of North Carolina, (Code, § 1826,) the stock in question "was transferred to and acquired by her," to use the language of her answer. Her husband, the other defendant, never gave his written consent to the purchase. Mrs. Turrentine is not a "free trader," under Code, §§ 1828, 1831, 1832.

So, we have the case of a married woman, a citizen of North Carolina, who, without the written consent of her husband, acquired stock in a national bank, and held the same at the time that, upon its insolvency, it passed into the hands of a receiver; of an assessment upon stock of the bank by the comptroller, and a suit on such assessment; and of a defense contending that under the laws of North Carolina a married woman who has acquired national bank stock without the written consent of her husband is not liable for an assessment on such stock. If the feme defendant was the owner of the stock, she is liable for the assessment. Section 5151, Rev. St., imposing individual responsibility, to the amount of the par value of their shares, upon all stockholders in national banks, makes no exceptions in favor of married women. *Keyser v. Hitz*, 133 U. S. 138, 10 Sup. Ct. 290. Persons holding stock as executors, administrators, guardians, or trustees are not personally so liable, (Rev. St. § 5152,) but the estates and funds in their hands are. By the banking laws of the United States all the shares in the stock of national banks are liable to an assessment like the one levied on the stock of plaintiff's bank. To hold that a state law, were there such a law, could except certain shares from the liability, would enable states to defeat the policy of the federal government in establishing the national banking system. That the congress has power to establish and legislate for such banks has not, since 1819, been an open question. *McCulloch v. Maryland*, 4 Wheat. 316. If a purchase of stocks in a national bank by a married woman without the written consent of her husband gives her the ownership of such stock, judgment must be given against the feme defendant. If she owned the stock at the failure of the bank, she is liable to the assessment; if she did not, she is not liable. While the federal government exclusively controls the question of the liabilities of stockholders in national banks, it is not doubted but that a state has power to say that for reasons seeming good to its legislature, and not in conflict with or-

ganic law, a particular class of persons shall not be permitted to own particular classes of property. It may lawfully be provided that a guardian or other trustee may not invest in securities other than those specified by statute. Probably it might be held that a statute might constitutionally provide that purchases by guardians, of, say, railroad stock, in the name of their trust, should be absolutely void. In such case it might be held that an attempted transfer of such stock so purchased passed no title; that the stock still remained, although duly assigned and transferred, on the corporation books, the property of the vendor; and that the guardian could recover the money paid from the vendor. It would, I think, require strong and plain words to induce courts to give such a construction to an act of the legislature.

If Mrs. Turrentine's purchase of the 20 shares in the stock of the First National Bank of Wilmington did not pass the title in it to her, various inconveniences ensue. All persons dealing with her are presumed to know the law. Payments of dividends to her before the failure of the bank were not good payments. A person advancing money to her on a hypothecation of the stock for her necessary expenses would lose his security. A purchaser of the stock from her would acquire no title. But it is needless to elaborate the many complications that would ensue from such a state of uncertain ownership of bank stock standing in the name of married women. I will only add one. Upon such a supposition the 20 shares of the feme defendant still belong to the person who perhaps 20 years ago transferred them to her, and he is still liable to the assessment.

Does the legislation of North Carolina bear such a construction? It certainly is nowhere enacted, directly, that a married woman shall not own stock in national banks, or stock that, upon the failure of the corporation, shall be liable to assessment. In fact, there is no statute that requires the assent of a husband to any purchase of property by a wife. The constitution of North Carolina, in article 10, § 6, reads as follows:

"The real and personal property of any female in this state acquired before marriage, and all property real and personal to which she may after marriage become in any manner entitled, shall be and remain the sole and separate estate and property of such female, and shall not be liable for any debts, obligations, or engagements of her husband, and may be devised and bequeathed, and with the written assent of her husband conveyed by her as if she were unmarried."

The written assent of the husband is thus required to validate a married woman's conveyance of land. This assent may be signified simply by joining in the deed. *Farthing v. Shields*, 106 N. C. 289, 10 S. E. 998. But no consent of her husband is required for the conveyance of real estate to her. The act of 1871 (1 Code, § 1826) reads thus:

"No woman during her coverture shall be capable of making any contract to affect her real or personal estate except for her necessary personal expenses, or for the support of the family, or such as may be necessary in order to pay her debts existing before marriage, without the written consent of her husband, unless she be a free trader as hereinafter allowed."

These two provisions are the only ones material to the matter in controversy that have been presented to the court. Section 1826 does not, in terms, require the assent of the husband to an assignment to the wife of personalty, any more than does the constitution require his assent to a conveyance to her of real estate. But it is contended that the sale of bank stock to the defendant was itself a contract, and that it is such a contract as must necessarily affect both her real and personal estate, because, in the event of the failure of the bank, her separate estate may be taken by reason of the statutory assessment to which the holders of bank stock are liable. It seems to me that this contention fails to note the distinction between a contract and the remote consequences of a contract. The defendant, by her purchase of bank stock, did not become liable to the assessment which is the subject-matter of this action. More than 10 years after that purchase, a series of events culminating in the insolvency of the bank, and the appointment of a receiver of its property, occurred. These events rendered it possible for the assessment by the comptroller of the currency to be made. At the time of the contract of the sale of the stock, she in no proper sense by it "affected her real or personal estate." It was or may be affected by the operation of subsequent events. Nor does the liability under the assessment come within the words of section 1826. "No woman," etc., says the statute, shall be capable of making "any contract to affect," etc. The contract by which the stock was purchased was a simple contract of sale. Its only purpose was to transfer the title of the stock from vendor to vendee. It affected simply that stock, which was not at the time of the sale, a part of the personal estate of the defendant, but became so by reason of the sale. The contract to affect a married woman's real or personal property, intended by the statute, is a contract charging such property with a debt or liability specifically ascertained at the time that it is entered into.

A still more conclusive reason against defendant's contention arises from the construction which the supreme court of North Carolina has placed upon the statute in *Farthing v. Shields*, *supra*. It is well settled, says Shepherd, J., in that case, that "a feme covert is at law incapable of making any executory contract whatever;" and the learned judge (now chief justice of North Carolina) gives the meaning of the statute in these words: "No woman, during her coverture, shall be capable of making any engagements in the nature of an executory contract, by which her statutory real or personal estate is to be charged in equity, without the written consent of her husband," with the exceptions mentioned in the statute. It can hardly be contended that the purchase by Mrs. Turrentine of the stock in question was an engagement in the nature of an executory contract, by which her statutory estate was charged in equity. I am, then, of the opinion that there is nothing in the state constitution or laws by which a feme covert is prohibited either from owning bank stock or from purchasing it without the written consent of her husband.

The objection does not seem to be taken by the answer that this suit will not lie at law; nor do I know that there would be anything in the objection. As a married woman is incapable at common law of making any contract, of course she could not, in the absence of a statute, be sued on a contract. In North Carolina, however, a woman may be sued at law. It is so decided in several cases. *Smaw v. Cohen*, 95 N. C. 85; *Vick v. Pope*, 81 N. C. 22; *Neville v. Pope*, 95 N. C. 346; *Burnett v. Nicholson*, 86 N. C. 99. If as the court concludes the feme defendant is liable, she is so, not by reason of any charge upon her separate estate, but because of the United States statute creating the liability. There is no equitable ground of action, for there is no equitable charge to be enforced. The liability is a legal one. I know of no reason why it should not be enforced by an ordinary action. *Keyser v. Hitz*, 133 U. S. 138, 10 Sup. Ct. 290, was, like this, an action at law to collect from a married woman an assessment on her national bank stock, and was sustained. The earlier case of *Bundy v. Cocke*, 128 U. S. 185, 9 Sup. Ct. 242, was a bill in equity, and was also sustained, on the ground, however, that the prayer of the bill of revivor asks for relief out of the assets of the defendant's deceased wife, the feme owner of stock being dead. In *The Reciprocity Bank*, 22 N. Y. 9, 15, which involved the liability of a married woman as shareholder in a state bank, *Comstock, C. J.*, said:

"It is also said that femes covert are not liable to suit or judgment at common law, and in general that is true. It is true, also, that the apportionment of liability among stockholders, when duly confirmed, becomes a judgment against each stockholder, to be enforced by execution. But it was competent for the legislature to depart from the rules and analogies of the common law, and to make married women and their estates liable, as other shareholders in banks are liable. This, we think, has been done."

On the whole I see no reason why, the liability existing, it should not be enforced by an action at law.

Another objection to holding that an action at law cannot be maintained to enforce a married woman's liability to the statutory assessment is that to do so would interfere with the national banking system. What the receiver is entitled to under the legislation is an absolute judgment, which may affect all the married woman's property, and which shall bind her personally,—not a decree giving a lien on perhaps only a part of it. She stands in the position of any other stockholder under the federal law, and the remedy against her must be the same as against any other owner of such stock. I have elaborated the position that under the state law a married woman is liable to the assessment, perhaps unnecessarily. I think that the federal law conclusively controls the decision. I will note, however, one more point under the former head.

The liability of a married woman for an assessment upon national bank stock, while it in no wise grows out of contract, is one of a class of liabilities which may be enforced in an action in form *ex contractu*; and this fact is one which has often, in analogous cases, caused confusion in minds accustomed only to the ideas of the common law. The liability of an infant or an insane person for necessities has often been called a liability arising *ex contractu*, solely

by reason of the form of the action to enforce it. So of a suit for a statutory penalty. An action against a married woman, who happened to own a mill site and tract of land, obligated to keep up a bridge over the runway of a mill stream at a public road crossing, would be in form *ex contractu*. I do not suppose the position would be taken that under the act of 1871 the married woman could own the land without being liable both to the obligation and its enforcement, or that the act in question has the effect to prevent her acquisition of the mill property without the written consent of her husband. Obligations of this class are called by the civilians "quasi contracts," or, to use the more proper vocabulary of our own law, they arise from "constructive contracts," which Sir Henry Maine distinguishes from "implied contracts" in his *Ancient Law*. Page 373. He says:

"It has been usual for English critics to identify quasi contracts with implied contracts; but this is an error, for implied contracts are true contracts, which quasi contracts are not. In implied contracts, acts and circumstances are the symbols of the same ingredients which are symbolized in express contracts by words; and whether a man employs one set of symbols or the other must be a matter of indifference, as far as concerns the theory of agreement. But a quasi contract is not a contract at all."

This distinction between "contract" and "constructive contract" is very well elaborated in an article by Mr. Keener in the May (1893) number of the *Harvard Law Review*. Inattention to it has caused the difficulty sometimes felt in discussing the liabilities of infants and lunatics, and particularly of reconciling the proposition, universally admitted, that a lunatic cannot contract, with his liability to an action on a contract.

The liability of the defendant in this action is quasi contractual; is treated, for certain purposes growing out of the limitations of ancient forms of action, as contractual; but it does not arise from a contract, and is not affected by the act of 1871-72, *supra*. No state statute prohibited Mrs. Turrentine from being the owner of the bank stock in question as being a married woman. Could such a statute be found, it would perhaps conflict with the rights given married women by the state constitution, (article 10, § 6.) No law of the state, as I construe the state statutes, exempts married women from this assessment. If it did, such law would violate the organic law of the United States, unless it at the same time forbade her ownership of the stock. No objection is taken to the form of the suit, nor do I see that such objection, if taken, could be sustained.

Judgment for plaintiff.

NEW YORK ACC. INS. CO. OF CITY OF NEW YORK v. CLAYTON.

(Circuit Court of Appeals, Eighth Circuit. December 4, 1893.)

No. 320.

1. ACCIDENT INSURANCE—DEFENSES—VIOLATING LAW.

A defense that the injury was sustained while violating the law by hunting on Sunday, contrary to a provision of the policy, need not be established beyond a reasonable doubt. A preponderance of evidence is sufficient.

2. SAME—CLASSIFICATION OF RISKS—ACTS OF GENERAL AGENT.

A classification of the applicant's occupation by a general agent of the company, who has been fully informed as to the facts, is binding on the company. *Insurance Co. v. Snowden*, 58 Fed. 342, and *Insurance Co. v. Robison*, Id. 723, followed.

In Error to the Circuit Court of the United States for the Western District of Missouri. **Reversed.**

William H. Dowe, Grant R. Bennett, William D. Rusk, and J. M. Johnson, for plaintiff in error.

H. K. White, S. P. Huston, and T. H. Parrish, for defendant in error.

Before CALDWELL and SANBORN, Circuit Judges.

SANBORN, Circuit Judge. George W. Clayton, the defendant in error, brought an action upon a policy of accident insurance issued by the New York Accident Insurance Company of the City of New York, the plaintiff in error, to recover \$2,500 for the loss of his right foot by the accidental discharge of a shotgun. The case was tried to a jury, and a judgment rendered against the company.

One of the defenses to the action was that the policy contained a stipulation that "this policy does not cover injuries, fatal or otherwise, caused wholly or in part, directly or indirectly, by any of the following causes: * * * Violating the law;" and that when the accident happened the insured was hunting game on Sunday, in violation of section 3852 of the Revised Statutes of Missouri, 1889, which provides that:

"Every person who shall either labor himself, or compel or permit his apprentice or servant or any other person under his charge or control to labor or perform any work other than the household offices of daily necessity, or other works of necessity or charity, or who shall be guilty of hunting game or shooting on the first day of the week, commonly called Sunday, shall be deemed guilty of a misdemeanor, and fined not exceeding fifty dollars."

There was evidence in support of this defense. The court charged the jury that, in order to avail itself of this defense, the company must prove it beyond a reasonable doubt. This was clearly erroneous. Where a criminal act is alleged in a civil suit, proof beyond a reasonable doubt is not required to warrant a verdict and decision in support of the allegation. A preponderance of the evidence is sufficient. This is so well settled by the authorities in this country that it does not permit discussion. *U. S. v. Shapleigh*, 4 C. C. A. 237, 54 Fed. 126, 134; 1 Greenl. Ev. § 13a, note; *Kane v. Insurance Co.*, 17 Amer. Law Reg. (N. S.) 293, 297; *Insurance Co. v. Wilson*, 7 Wis. 169; *Blaeser v. Insurance Co.*, 37 Wis. 31; *Knowles v. Scribner*, 57 Me. 495; *Hoffman v. Insurance Co.*, 1 La. Ann. 216; *Schmidt v. Insurance Co.*, 1 Gray, 529; *Young v. Edwards*, 72 Pa. St. 257, 267; *Insurance Co. v. Johnson*, 11 Bush, 587; *Rothschild v. Insurance Co.*, 62 Mo. 356; *Bradish v. Bliss*, 35 Vt. 326; *Ellis v. Buzzell*, 60 Me. 209; *Folsom v. Brawn*, 5 Fost. (N. H.) 114; *Matthews v. Huntley*, 9 N. H. 146; *Welch v. Jugenheimer*, 56 Iowa, 11, 8 N. W. 673.

Another defense pleaded in the answer was that in his application for insurance the insured had warranted that he was a merchant,

when in fact he was a junk dealer; that a junk dealer belonged to a more hazardous class than a merchant, and could obtain from this company but \$300 insurance against death, and but \$100 against the loss of a foot, while a merchant could obtain, and this defendant in error did obtain, if he was properly insured as a merchant, \$5,000 insurance against death and \$2,500 against the loss of a foot. There was, however, evidence tending to show that the agent of the company who solicited the application was fully informed of, and well knew the character of, the business and of the occupation in which the insured was engaged when he took his application; that he desired the general agent to classify this risk; that he took the application from the insured, signed in blank, so far as the occupation was concerned, for this purpose; that he stated to the general agent of the company the character of the business and occupation of the insured, and the general agent then classified him, and wrote the word "merchant" into the application, to describe his occupation. On this application the policy was issued and the premium paid. Some portions of the charge of the court upon this state of facts are assigned as error. We shall not pause to state or review them, as the case must be retried in any event. We content ourselves with citing *Insurance Co. v. Snowden*, 58 Fed. 342, and *Insurance Co. v. Robison*, Id. 723, where the rule we deem applicable to this class of cases, and the reasons for it, are stated.

The judgment below is reversed, and the cause remanded, with directions to grant a new trial.

In re AH YOW.

(District Court, D. Washington, N. D. January 16, 1894.)

CHINESE—EXCLUSION ACTS—LABORERS.

A restaurant proprietor, who keeps a place for serving meals, and provides, prepares, and cooks raw materials to suit the tastes of his patrons, is a laborer, and is not privileged to enter the United States as a merchant.

At Law. Petition for habeas corpus in behalf of Ah Yow, a Chinese passenger detained by reason of the refusal of the collector of customs to permit him to land in the United States. Denied.

Frank Hartley Jones, for petitioner.

W. H. Brinker, U. S. Atty.

HANFORD, District Judge. The petition for a writ of habeas corpus in this case is filed in behalf of a Chinese passenger on board the steamship Tacoma, and sets forth that said Chinese person is proprietor of a restaurant in Seattle, to which place he is now returning from a visit to China, and that he is unlawfully detained on said vessel by the master thereof, for the reason that the collector of customs has refused to permit him to land in the United States; and, in the argument, counsel for the petitioner insists that a restaurant keeper is not a "laborer," in the sense in which that

word is used in the exclusion acts, and that a Chinese person in that business is privileged to enter the United States the same as a merchant. A restaurant keeper is a caterer, who keeps a place for serving meals, and provides, prepares, and cooks raw materials to suit the tastes of his patrons. A person in that business is not a merchant, nor does he come within the definition of any of the terms used in the statutes to describe the class of Chinese who are privileged to enter the United States; and I hold that, to the word "laborer" in these statutes, meaning must be given broad enough to include master mechanics and tradesmen, such as blacksmiths, cabinet makers, tailors, and shoemakers, who receive orders, and cut and make up materials in such forms and of such dimensions as their customers require. Those who, in following such callings, employ journeymen, and perform no manual labor themselves, still represent themselves to be, and they are, in popular estimation, blacksmiths, cabinet makers, tailors, and shoemakers,—that is to say, skilled workmen. All Chinese persons who follow such callings are barred from coming to the United States. I hold that a restaurant keeper belongs to the same class, and is likewise barred. The application for a writ of habeas corpus is therefore denied.

UNITED STATES v. CAMFIELD et al.

(Circuit Court, D. Colorado. January 25, 1894.)

No. 2,972.

1. PUBLIC LANDS—UNLAWFUL INCLOSURES.

The inclosure of public lands by a private corporation is unlawful, under the act of February 25, 1885, without regard to the intent with which it is done.

2. SAME.

An inclosure by one owning odd sections is unlawful, even though the fence is so constructed as to be entirely on his own lands, if the result is to inclose therewith the even sections belonging to the government.

Proceeding against Daniel A. Camfield and William Drury for unlawfully inclosing public lands. Heard on exceptions to the answer. Sustained.

All the odd-numbered sections in townships 7 and 8 N., range 63 W. of the sixth principal meridian, were purchased by the defendants from the Union Pacific Railway Company. The lands were incapable of successful cultivation without irrigation, as also were the adjoining lands, belonging to the United States. The defendants have undertaken to build reservoirs, to be supplied from the neighboring stream, for the irrigation of their own lands and the adjacent even-numbered sections belonging to the government. The method which the defendants pursued to inclose the lands was to place a fence on their own—the odd-numbered—sections, along the lower line thereof, and dropping down about six inches, and continuing the line of fence on the odd-numbered sections in the tier of sections next below on the upper line thereof, making a continuous fence except at intervals where the break of six inches occurs.

H. V. Johnson, U. S. Dist. Atty.

H. E. Churchill, A. C. Patton, and James W. McCreery, for defendants.

HALLETT, District Judge. The act of congress of February 25, 1885, (23 Stat. 321,) declares that any inclosure of public lands made without claim or color of title shall be unlawful, and confers jurisdiction on federal courts to abate and remove, in a summary way, all fences erected contrary to the provisions of the act. In this bill the government seeks to enforce the act with respect to certain fences erected by respondents, inclosing government lands in townships 7 and 8 N., of range 63 W. of the sixth principal meridian, covering an area of 20,000 acres. It is charged in the bill that respondents, owning odd-numbered sections in these townships and other townships adjacent, have erected a fence on their own lands in such manner as to inclose the even-numbered sections in townships 7 and 8, belonging to the government. Respondents confess the fact to be as alleged, and say that the inclosure was made with a view to bring the lands under cultivation by building canals and reservoirs, from which they may be irrigated. As to respondents' intent we cannot inquire, for that is not, under this statute, a judicial question. If the fence is forbidden by statute, we are not at liberty to inquire with what intent it was built; and obviously the case is within the statute, which declares "that all inclosures of public lands" shall be unlawful, without reference to whether the fence constituting the inclosure shall be on public or private lands. The circumstance that respondents have put their fence on their own lands is of no weight against the fact that the fence makes an inclosure of public lands. Often, in this circuit, the statute has been declared to have this effect, and some of the cases are found in the reports. *U. S. v. Brighton Ranch Co.*, 25 Fed. 465, 26 Fed. 218; *U. S. v. Cleveland & Colo. Cattle Co.*, 33 Fed. 323. Respondents rely on two cases which seem to support the answer, but they cannot be accepted in this court: *U. S. v. Douglas-Willan Sartoris Co.*, 3 Wyo. 288, 22 Pac. 92; *U. S. v. Brandestein*, 32 Fed. 738. The exceptions to the answer will be sustained.

UNITED STATES v. McDONALD et al.

(District Court, N. D. Illinois. August 22, 1893.)

POST OFFICE—NONMAILABLE MATTER—LOTTERIES—BOND INVESTMENT SCHEMES.

A bond investment scheme, according to which only a limited few, who are determined by the order in which their applications are received, are certain to receive a return, and the rest are dependent for any return, and for the time thereof, upon the probability that the great majority will permit their bonds to lapse, is a scheme in which the prize is dependent on chance, and constitutes a "lottery," which it is criminal to advertise through the mails.

At Law. Indictment of George M. McDonald and others, officers of the Guarantee Investment Company, for violation of the lottery act of September 19, 1890, (26 Stat. 465.)

Thos. E. Milchrist, U. S. Dist. Atty.

Collins, Goodrich, Darrow & Vincent, and L. S. Metcalf, for defendants.

GROSSCUP, District Judge, (charging jury orally.) The statutes of the United States, gentlemen of the jury, provide that any person who shall knowingly deposit or cause to be deposited, send or cause to be sent, through the mails, any letter, postal card, or circular concerning any lottery, so-called gift concert, or other similar enterprise, offering prizes dependent upon lot or chance, shall be guilty of a misdemeanor.

The indictment, in the first and second counts, charges these defendants with having deposited, or caused to be deposited, sent, or caused to be sent, through the United States mails, certain letters or envelopes concerning a lottery, and in the third count it charges the defendants with having sent, or caused to be sent, through the United States mails, certain papers, pamphlets, or circulars concerning a lottery.

The proof shows that two letters were sent through the department to the defendant George M. McDonald, president of the Guarantee Investment Company, asking him, in substance, for such printed matter as he might wish to send the writer concerning the business and purposes of his company; and, in response thereto, envelopes and printed matter were deposited in the mails, directed to the individuals by whom the information was asked. The proof also shows the responses were put in the mails by defendants, or by clerks under the direction of the defendant in the case, and in furtherance of a practice under which like circulars and literature were habitually sent through the mails by this company in response to inquiries.

If you are satisfied of these facts upon the proofs beyond a reasonable doubt, (and no contradiction of them is attempted by the defendants now on trial,) it will be your duty to find a verdict of guilty, provided the papers inclosed in these envelopes concerned a lottery, or enterprise similar to a lottery, or gift concert, offering prizes dependent upon lot or chance. What, then, is the scheme or enterprise which this printed matter is calculated to promote?

The Guarantee Investment Company is an incorporated organization under the laws of the state of Missouri, which empower it to issue bonds and securities, hold real estate, and make investments thereon. The whole purpose of the company, however, seems to be to issue so-called bonds. For this purpose it maintains an office in St. Louis, and has agents throughout the country to induce people to buy these bonds. To the applicants are issued bonds of the company, being issued in consecutive numbers from one upwards, in the exact order of the imprint chronologically, said to have been made by an electrical contrivance attached to a clock.

For these bonds the applicant has already paid \$10, a portion of which goes to the agent as his commission, the remainder to the company for its maintenance, and he has agreed to pay each succeeding month, for each bond purchased, \$1.25 more, the 25 cents to be retained by the company for its maintenance, and the \$1 going into the treasury, or so-called trust fund, for the redemption of the bonds. The trust fund is also increased by certain fines imposed for deferred payments and other delinquencies. For this the applicants receive the promise of the company, embodied in the bond,

that out of the redemption fund they will respectively receive, for each bond held, \$1,000, the payment to be made in the following order:

First, bond No. 1, then bond No. 5, then bond No. 2, then bond No. 10, and so on, the priority alternating between the unpaid bonds bearing the lowest absolute number and the unpaid bond bearing the lowest number divisible by five, one class being known as numerals and the other class known as multiples. In instances where bonds have lapsed for nonpayment of premiums, the next lowest bond takes its place. The so-called trust fund is said to be kept in the treasury, excepting \$100,000, which is deposited in the state of Missouri with some of the officers of that government. It seems to be no part of the scheme to invest this money, so as to enlarge the bulk by interest or other increment.

Now, does this constitute a lottery? There is no doubt, gentlemen, upon the face of it, that it constitutes a cheat. The testimony shows that this company has been in existence now for two years, and has had 50,023 applications. According to the constitution of its organization, it has therefore received more than half a million dollars from the \$10 preliminary fee. The testimony shows that it has paid out \$206,000 from the so-called trust fund. If it had paid out all it received, as the constitution of the company required it to do, then it has received, as maintenance from the dues, more than \$40,000. Therefore, after an experience of two years, the officers and the stockholders have received more than \$500,000, and its so-called beneficiaries have received but \$206,000. That is plunder of the public. It is said that this has been done fairly. The court, of course, is not sitting here to pass upon the fairness of any such transaction. Two hundred years ago, when coaches were robbed by highwaymen on the heaths of London, it was always said that the highwaymen acted with courtesy, but nobody but an ignorant fool returned to London without knowing he had been plundered. But that does not prove that it is a lottery. It may be a cheat, but we must ascertain by the legal canons and definitions whether it is a lottery. What is a lottery? The best definition I can find for it is this: Where a pecuniary consideration is paid, and it is determined by chance or lot, according to a scheme held out to the public, whether he who pays the money is to have anything for it, and, if so, how much, that is a lottery. You will see, therefore, that the elements of this definition are two: First, that the party who pays the pecuniary consideration must have a return,—a prize; second, that that return or prize is determinable by lot or chance.

Now, every enterprise in which we engage has a return or prize, or is supposed to have. That is the incentive which makes men industrious and active. Whether that return or prize be determinable by mere lot or chance makes it either a legitimate enterprise, or a lottery, and therefore an unlawful enterprise. We perhaps can illustrate that best by referring to some of the schemes of life in which men are engaged. Take, for instance, the life insurance companies,—those that proceed either on the stock plan or on the

assessment plan. They require of the member that he pay in a certain amount of money. That is the pecuniary consideration. That money is invested, or supposed to be invested, in securities, and, when the member dies, a certain amount, stipulated in the policy, is paid to his heirs or the beneficiary named in the policy. That is the return. The man may have been insured but a month, and have paid in but a few dollars, and have received back \$5,000 or \$10,000. In such instances as that, a much larger sum has been returned than the consideration; but the fact that there was such a return does not make it an unlawful enterprise. Why? Because the prize is not determinable by, or dependent upon, chance or lot. It is dependent upon the life of a man, and the life of a man is determined by the laws of nature, and not by the chances of lot.

A man who makes an investment in real estate may put in a few thousand dollars, and take out a million. What he puts in is the consideration; what he takes out is the prize. It may be a hundred-fold larger than what he puts in, but on what is it dependent? Upon the growth of the town in which he lives; upon the growth of public sentiment respecting the value of property in that particular locality; upon the law of growth, which is itself a natural one,—an industrial law. But suppose a man puts a ticket in a hat with a hundred other tickets, and then it is drawn by a blindfolded man, his chance of the prize offered is dependent upon that drawing. The ticket may cost but 50 cents. The prize may be worth \$10,—much larger than the price of the ticket, though not larger in proportion than the life insurance policy or the real estate investment. But the getting of the prize is dependent upon the chance or lot of his ticket being drawn, not upon any natural law, as a man's life, nor upon any industrial growth, as the growth of the value of real estate. This illustrates to you the difference between legitimate investments, which may yield, according to the good fortune of the investor, a hundredfold more than the amount invested, and a gambling investment, according to a lottery, which can only yield in case the allotment or chance, which is purely artificial, turns in his favor.

In the case at bar the return or prize is \$1,000. Now, is that determined by lot or chance? Is it determined by one of the laws of nature, or of industrial growth, which determines the other returns of life? Let us look at the practical workings of the scheme. Let us look at it, first, independently of what is called the multiple system. Here is a company which in two years has taken in more than 50,000 applications. In order to make a return certain to each one of these applicants of the amount of money promised in the bond, it would be necessary that the company should have a fund of \$50,000,000. In two years they have only accumulated a fund of \$206,000. According to the constitution of the company, outside of lapses, there are 50,000 men who are entitled to these returns if they persist in paying. In two years, 206 have been paid. If each man were to get a return according to the promise of the company, outside of lapses, and every dollar which went into the fund of the company were to be used for that purpose, and no man to receive more

than what he paid in, it would take 1,000 months, or more than 83 years, for each man to receive back his return. This money would be idle, not growing by interest or other investment. Is it not perfectly apparent that from the very necessity and constitution of the scheme, if the multiple system were not introduced, the company could not go on, and no man would receive back anything except those who had been the fortunate possessors of the first bonds?

It is said—and is one of the boasts of the company—that everybody who has been paid back has been paid \$1,000 on an investment not to exceed \$30. That again shows the entire impossibility, according to the constitution of the scheme, of but a limited few—one in a hundred—ever receiving any return, or prize, except for the lapses; because money lying idle in the treasury, shorn in the first place of 20 per cent. of the amount, will never grow to pay 1,000 to 1, or 1,000 to 30, so long as the present economic law of the universe prevails. These defendants have foreseen this, and foreseen that the company must therefore come to an immediate end, and have instituted what is called the multiple system. Thereby a chance is held out to men, even after the company has grown to be 50,000, to receive an early payment of their bonds. But upon what is that chance dependent? What determines that return or prize? Any law of nature or of industrial growth, such as applies to insurance companies or real estate investments, which I have used as illustrations? Not at all. It is solely dependent upon the order in which his bond may go through the registration process. If he draws a multiple, and the company continues, he eventually will be paid. If he draws a numeral, it is as morally certain as any law of the universe that, unless the company is almost entirely abandoned by its bondholders, he will never be paid.

It is said here in argument that the lapses will secure certain payment in time; in other words, enough men will become discouraged at the outlook, and will drop out, so as to advance those whose bonds are deferred. What does that mean? It means that by the very constitution of this company the success of its enterprise depends entirely upon its insolvency,—its gross and well-known insolvency,—so insolvent that in the very method of its organization no hope of its carrying out its promise can be entertained. Now, the court cannot say that that is a legitimate enterprise, promising a certain return of money, which, by the very constitution of the company, is dependent upon the insolvency of the company and a wholesale repudiation of its promises. That is not the rule of any other legitimate enterprise. The determination, therefore, of the return or prize, is dependent upon a chance or allotment.

The only substantial difference between the scheme disclosed to you by the proof and the well-recognized lotteries of the world, such as the Louisiana Lottery Company, is that the latter are, in comparison, honest and free from the opportunities of chicanery. The wheel of the lottery and the hat of the raffle are to the fortune hunter incomparably fairer contrivances for the determination of his chances. He is not dependent in them upon the honesty or accuracy of a secretary, with whom it is as easy to put one application through the

register as another. The whole scheme disclosed by the proof is a cunning trick to attract the cupidity and ignorance of men.

A great menace to the civilization not only of the United States, but of the world, is the growing tendency to gamble or engage in lottery. Two hundred years ago their promoters were characterized in the statutes of England as rogues. No prospect is so attractive as that which is wrapped up in the mysteries of a chance. To the winner comes some money, many congratulations, wide advertisement throughout the newspapers, and the propensity to go in again. To the losers, one hundredfold in number, come stripped homes, impoverished wives and children, lost opportunities of building up a competence legitimately, and, in too many instances, the temptation to go in again upon means that are obtained from an employer or cestui que trust, first by a supposed borrowing, then by intentional theft, forgery, and embezzlement. The rainbow of hope lures and lures until its chaser falls over the precipice into suicide or the penitentiary.

The mails of the United States are intended for legitimate business or friendly communication, and are defiled by the dissemination and promotion of such a scheme as the evidence in this case admittedly discloses.

If you believe, beyond a reasonable doubt, that these defendants deposited the printed matter submitted to you in the mails, as charged in the indictment, and that the scheme which it promoted was of the nature and character sworn to indisputably here by the witnesses, then it is your duty to return a verdict of guilty.

UNITED STATES v. ARMSTRONG.

(District Court, S. D. California. January 25, 1894.)

1. OBSTRUCTING AND INFLUENCING JUSTICE—INDICTMENT.

It is not sufficient to charge an endeavor to influence and obstruct justice in a federal court, by means of a threatening letter, in the general language of Rev. St. § 5404.

2. SAME.

An averment that defendant procured the arrest "within this district" of his wife, who was living separate and apart from him, for the purpose of procuring from her "a dissolution of the bonds of matrimony existing between them, through such arrest," is insufficient, in that it fails to show that the arrest was under process issued out of a federal court.

At Law. Indictment of D. F. Armstrong for endeavoring to obstruct and influence the administration of justice. On demurrer to the indictment. Sustained.

George J. Denis, U. S. Atty.

Frank P. Flint, for defendant.

ROSS, District Judge. "In an indictment upon a statute, it is not sufficient to set forth the offense in the words of the statute, unless those words, of themselves, fully, directly, and expressly, without any uncertainty or ambiguity, set forth all the elements

necessary to constitute the offense intended to be punished." U. S. v. Carll, 105 U. S. 612. The present indictment is based upon section 5404 of the Revised Statutes, which reads:

"Every person who, corruptly, or by threats or force, or by threatening letters, or any threatening communications, endeavors to influence, intimidate, or impede any grand or petit juror of any court of the United States in the discharge of his duty, or who corruptly, or by threats or force, or by threatening letters, or any threatening communications, influences, obstructs, or impedes, or endeavors to influence, obstruct, or impede, the due administration of justice therein, shall be punishable by a fine of not more than one thousand dollars, or by imprisonment not more than one year, or by both such fine and imprisonment."

The indictment contains two counts, the first of which charges that the defendant, at a certain time and place within this judicial district, did corruptly, and by threats and force, and by a certain threatening letter written by him to one Clara Armstrong, who was at the time his wife, but living separate and apart from him, endeavor to influence, obstruct, and impede the due administration of justice in the circuit court of the United States for the ninth circuit, southern district of California.

The second count charges that the defendant, at the same time and place, did corruptly, willfully, unlawfully, and feloniously endeavor to influence, obstruct, and impede the due administration of justice in the circuit court of the United States, ninth circuit, southern district of California, in the following manner, to wit:

"He, the said D. F. Armstrong, did procure the arrest within said district of one Clara Armstrong upon a complaint sworn to by him, the said D. F. Armstrong, against the said Clara Armstrong, she, the said Clara Armstrong, being then and there the wife of the said D. F. Armstrong, but was then and there living separate and apart from him, for the purpose and with the intent of procuring from the said Clara Armstrong a dissolution of the bonds of matrimony existing between them, through such complaint and arrest."

It is essential to the sufficiency of an indictment that the acts charged be, if proved, sufficient to support a conviction of the offense alleged. In neither count of the indictment is it alleged what proceeding in the circuit court of the United States for the ninth circuit, southern district of California, the defendant endeavored to influence, obstruct, or impede, nor, indeed, that there was any proceeding there pending to be influenced, obstructed, or impeded, nor that there was any proceeding pending there at all. The threatening letter that the defendant is by the first count charged with having written to his wife is not set out or so described as to be capable of identification, and the sole act charged by the second count against him is that he procured the arrest within this district of his wife, who was at the time living separate and apart from him, for the purpose and with the intent of procuring from her "a dissolution of the bonds of matrimony existing between them through such complaint and arrest." It by no means necessarily follows from the alleged fact that defendant procured the arrest of his wife within this judicial district that such arrest was made under process issued out of a court of the United States.

The object of the indictment is, as said by the supreme court in *U. S. v. Cruikshank*, 92 U. S. 542:

"First, to furnish the accused with such a description of the charge against him as will enable him to make his defense, and avail himself of his conviction or acquittal for protection against a further prosecution for the same cause; and, second, to inform the court of the facts alleged, so that it may decide whether they are sufficient in law to support a conviction, if one should be had."

The indictment in the present case does not answer either of these requirements.

Demurrer sustained.

UNITED STATES v. KENWORTHY et al.

(District Court, E. D. Pennsylvania. January 2, 1894.)

No. 3.

CUSTOMS DUTIES—APPRAISERS—VALUATION.

Under the tariff act of 1883 the appraisers were limited to determining the "market value" at the place from which the importation was made, and could not add thereto any commissions, or consider the cost of the particular goods, except as a means of determining market value.

At Law. Action against Kenworthy & Bro. to recover duties. New trial granted.

Ellery P. Ingham, for the United States.

Leonard Myers, for defendants.

BUTLER, District Judge. In 1884 the defendants imported a cargo of wool from Glasgow, and paid duty thereon according to the entry. The appraiser raised the value, placed the wool in a higher class and increased the duty accordingly. The defendants thereupon complained and demanded a "merchant appraisalment." The collector selected an experienced merchant, who with the appraiser re-examined the question. The merchant sustained the entry, finding the wool to be below 12 cents in value, as entered, while the appraiser placed it materially higher—subjecting it to an increased rate of duty. On report of this disagreement the collector adopted the appraiser's valuation. The importers appealed to the secretary of the treasury, who affirmed the collector's action.

While the law governing the subject is made intricate by the terms of the various sections of the several statutes applicable, it is nevertheless well settled by the decisions of the courts. The action of the collector when unappealed from, or affirmed, is final in so far as he has confined himself to a discharge of his proper duties under the statutes. When his acts are unlawful, or improper, they are not binding. On suit by the importers to recover improper exactions, or by the government to recover unpaid assessments (after appeal to the secretary) he may show that the action of the customs officers was unlawful or improper, that the importation was improperly classified, etc. The valuation when made in conformity with law is final. The subject has been so fully discussed in the several

cases which have arisen that nothing can profitably be added. See *Hilton v. Merritt*, 110 U. S. 97, [3 Sup. Ct. 548;] *Converse v. Burgess*, 18 How. 413; *Schlesinger v. U. S.*, 120 U. S. 264, [7 Sup. Ct. 546;] *Clinkenbeard v. U. S.*, 21 Wall. 65; *Earnshaw v. U. S.*, 146 U. S. 69, [13 Sup. Ct. 14.] The argument of plaintiff's counsel (in error) and his citation of authorities, in the case last named may be examined with profit in considering this question.

In the case before us it was the appraiser's duty and after him the collector's to ascertain the market value of the wool at Glasgow, and so appraise it. If they did this the importers must pay accordingly. The importers say, however, they did not, that they added commissions to this value, which the statute of 1883 expressly forbids. If an importer should deduct commissions from the actual market value of his merchandise it would be a fraud, and the customs officers of course might add or disregard it. There is nothing here, however, to justify suspicion of such fraud; on the contrary the appraiser exonerates them from any imputation of an attempt to impose on the government.

Is there evidence that the appraiser and collector added commissions to the market value? I believe there is. It seems reasonably clear from the appraiser's report (which the collector adopted) and the accompanying explanatory letter that he made such addition. It is urged that he merely used the commissions to make "market value." But we do not think the report and letter admit of this view. In the latter he says: "While I might have felt disposed to defer to his [the merchant's] greater experience and better judgment as to the quality of the wool, and the actual market value thereof, were these, without qualification, the only points to be considered;" and he then proceeds to state his views of the law, and to discuss the facts in the light of these views. He was wrong in supposing that his duties in this regard involved more than an ascertainment of the quality of the wool and its market value. What he says seems to show that instead of confining himself to ascertaining the market value of such wool at Glasgow, as the merchant did, he sought to determine what this particular cargo cost the defendants, after allowing them one of the two commissions which they were compelled to pay, under the peculiar circumstances attending the purchase. This was a mistake. If they had been compelled to pay four commissions instead of two they would have been so much the more unfortunate. But it would have interested themselves alone. The error arose from supposing the appraiser had anything to do with the subject. The importer's liability to the government is based on the actual market value of the merchandise without regard to its cost to the merchant, in commissions or otherwise. Of course this cost may be considered as an element in ascertaining the market value, but nothing more.

The court directed a verdict for the plaintiff pro forma reserving the defendant's point, for the purpose of enabling it to enter judgment for them, if this should seem proper on fuller examination. I now believe it is safer to grant a new trial, on the rule taken for that purpose, and let the question respecting the appraiser's and

collector's acts go to the jury, on the evidence now in and such other as may hereafter be produced, in case the government desires another trial.

KOHLER MANUF'G CO. v. BEESHORE.

(Circuit Court of Appeals, Third Circuit. December 4, 1893.)

No. 8.

1. TRADE-MARKS—INTENTION TO ADOPT.

Sales of a few dozen bottles of a medicinal preparation, with written labels affixed, bearing a name different from that previously used for such preparation, does not amount to use in such circumstances as to publicity, and to such length of use, as show an intention to adopt the written words as a trade-mark. 53 Fed. 262, affirmed.

2. SAME—REGISTRY AS EVIDENCE OF INTENTION.

Although registration of a trade-mark under the act of March 3, 1881, may not prevent the adoption of another device as a common-law trade-mark for the same article in domestic markets, such registry may be evidence, in a suit to restrain infringement of such common-law trade-mark, to show what complainant really claimed.

3. SAME—STATEMENT TO OBTAIN REGISTRATION.

In such suit, the statement filed to obtain registration, and attached to the affidavits on motion for a preliminary injunction, may be considered on the final hearing.

4. SAME—INFRINGEMENT.

"One Night Cure," used as a trade-mark for a cough remedy and for a corn remedy, is not infringed by the use of the words "Beeshore's One Night Cough Cure." 53 Fed. 262, affirmed.

5. SAME—INJUNCTION—QUACK MEDICINES.

Query, whether equity will intervene by injunction to protect the use of words claimed as a trade-mark, between owners of quack medicines.

6. SAME—WORDS MAKING FALSE ASSERTION.

It seems that an injunction should not be granted to protect the use of words, as the trade-mark of a medicinal preparation, which assert a manifest falsehood or physiological impossibility.

Appeal from the Circuit Court of the United States for the Eastern District of Pennsylvania.

In Equity. Bill by the Kohler Manufacturing Company, of Baltimore city, against Ellsworth S. Beeshore, for infringement of a trade-mark. Bill dismissed. 53 Fed. 262. Complainant appeals. Affirmed.

Statement by SHIRAS, Circuit Justice:

During the year 1888 the firm of the Kohler Medicine Company, composed of Louis Yakel and Charles W. Greble, carried on the proprietary medicine business in Baltimore, Md. Among other preparations, the firm made and sold a cough remedy called "Rocky Mountain Cough Syrup." The formula for this medicine the firm had received from the estate of Dr. P. W. Kohler, together with formulas for other medicines, and also the right to use the name "Kohler" in connection with said remedies, and the business in which they were manufactured. The firm also purchased from the Kohler estate a quantity of the syrup which had been prepared by Dr. Kohler, and all the labels which he had on hand at the time of his death. The cough syrup thus purchased was bottled and labeled, and sold by the Kohler Medicine Company during the spring and summer of 1889, and when the stock was exhausted more syrup was made, and sold under the same label that had been

used by Dr. Kohler. During the early part of 1889, the Kohler Company began to make, and extensively sell, an article which they called "One Night Corn Cure." During November, 1889, the labels for the "Rocky Mountain Cough Syrup" gave out, and the firm concluded to change the name of the remedy, and adopted the name "One Night Cough Cure." They did not use printed labels, but wrote the name upon paper which was pasted on the bottles containing the syrup. Several dozen bottles with this written label appear to have been sold from time to time during November and December, 1889, and perhaps later. The label bore the words "One Night Cough Cure" alone, but the agents who sold it stated that the syrup was made and sold by the Kohler Medicine Company. In February, 1890, a corporation of the state of Maryland was formed, styled "The Kohler Manufacturing Company," and the assets, trade-marks, and business of the firm were transferred to it, and the previous business was continued under the same management. In December, 1890, the corporation filed an application for the registration of the words "One Night Cure" as a trade-mark for a corn remedy and a cough syrup, and on January 20, 1891, a certificate numbered 18,867 was issued to the Kohler Manufacturing Company for said trade-mark. On January 28, 1891, Ellsworth S. Beeshore filed an application for registration of the words "One Night Cough Cure" as a trade-mark for a cough remedy, and for which a certificate was issued to him, dated March 3, 1891, and numbered 19,112.

On February 17, 1892, the Kohler Manufacturing Company, as a corporation organized under the laws of the state of Maryland, filed its bill of complaint in the circuit court of the United States for the eastern district of Pennsylvania against Ellsworth S. Beeshore, as a citizen of the state of Pennsylvania. In this bill the complainant alleged that, ever since the summer of 1889, it and its predecessor, the Kohler Medicine Company, had been engaged in the manufacture and sale of a medicinal preparation for the cure of coughs and colds, bearing the arbitrary symbol or name of "One Night Cough Cure," which name it had duly adopted as a trade-mark for said article, and had caused the same to be fixed to the bottles containing said syrup by means of labels, and that said article was sold to the public generally, was known to the public as an article made and sold by the complainant company, and that the name "One Night Cough Cure" was recognized as an indication of the ownership and origin of the same. The bill charges that the defendant Beeshore, in the month of November, 1890, and ever since, had manufactured and sold a medicinal preparation of substantially the same descriptive properties as those of the complainant, and bearing printed labels and wrappers, with the name "One Night Cough Cure," in such a manner as was likely to mislead and deceive careless or ignorant purchasers into buying the medicine of defendant in mistake for that of the complainant. The bill prayed for an injunction, account, etc.

On March 15, 1892, the defendant answered, denying that complainant had, since November, 1889, manufactured and sold an article with the name "One Night Cough Cure" as a trade-mark, and denying that complainant was the owner of the said words as a trade-mark. The answer admitted that defendant had, since November, 1890, sold an article of merchandise with label bearing the words "One Night Cough Cure" as a trade-mark, but not with intent to mislead or deceive, and claimed that he was the lawful owner of the trade-mark described, viz. "One Night Cough Cure," by virtue of his having registered the same, and procured a certificate therefor from the United States patent office on March 3, 1891. The defendant further alleged in his answer that the complainant never had affixed the said words to its medicine until defendant had duly adopted it as his trade-mark, and that complainant had interpolated the word "Cough" into the words "One Night Cure," which it had previously used as a trade-mark for a corn remedy, with the purpose of getting the public to mistake complainant's cough cure for that of the defendant.

Issue was joined, evidence taken, and the cause was argued on November 10, 1892, and on November 22, 1892, the opinion and decree of the circuit court were filed, dismissing the bill of complaint, with costs, from which decree the present appeal was taken.

Arthur Stewart, (Price & Stewart, of counsel,) for appellant.
Wm. Henry Browne, for appellee.

Before SHIRAS, Circuit Justice, and ACHESON, Circuit Judge.

SHIRAS, Circuit Justice, after stating the facts, delivered the opinion of the court.

It has been more than once held in this circuit that courts of equity will not intervene by injunction in disputes between the owners of quack medicines, meaning thereby remedies or specifics whose composition is kept secret, and which are sold to be used by the purchasers without the advice of regular or licensed physicians. *Fowle v. Spear*, (Nov. Term, 1847,) 7 Pa. Law J. 176; *Heath v. Wright*, 3 Wall. Jr. 141. A similar view has prevailed in several state courts. *Wolfe v. Burke*, 56 N. Y. 115; *Smith v. Woodruff*, 48 Barb. 438; *Laird v. Wilder*, 9 Bush, 132. In the present case, the so-called "trade-mark," "One Night Cough Cure," asserts a manifest falsehood or physiological impossibility. A cough or cold so far seated as to require medical treatment cannot be cured in a single night, and a pretense to the contrary is obviously an imposition on the ignorant. If it be said that the court cannot take notice of such a state of facts, and that there is no evidence from which the court can infer it, we can, at all events, take notice of the plaintiff's evidence, whereby it is shown that the trade-mark in question was not selected because experience had shown that the nostrum availed to cure coughs and cold within the period of a single night, but because a similar trade-mark or designation, "One Night Corn Cure," had proved to be a popular and taking one.

This view of the case was not called to the attention of the court below, nor has it been urged in this court. As the contest is really for the ownership of the trade-mark, the defendant could not be expected to resort to a defense which, if successful, would deprive the coveted words of any market or legal value. It does not appear that the supreme court of the United States has, in any reported case, expressed an opinion on the right of owners of so-called patent medicines to protection by injunction. The reports do show that that court has dealt with trade-mark cases in which proprietary medicines, whose composition was not disclosed, were involved, without condemning them as unfit to receive the protection of courts of equity. Thus, the case of *McLean v. Fleming*, 96 U. S. 245, is a leading case, often referred to, and related to a trade-mark of a patent medicine. So, too, in the southern district of New York, in the case of *Filkins v. Blackman*, 13 Blatchf. 440, Judge Shipman protected the trade-mark "Dr. I. Blackman's Healing Balsam." We therefore prefer to determine this case upon the facts and law, as dealt with in the court below.

The plaintiff, in its bill, puts itself upon its adoption and use of a certain phrase or name as a trade-mark, and does not allege the fact that it has registered a trade-mark in the patent office. The trade-mark so registered was "One Night Cure," and the accompanying statement was as follows:

"The trade-mark of said company consists of the words 'One Night' preceding the word 'Cure' or 'Remedy.' These have generally been arranged as shown in the accompanying fac simile of one of their labels, which represents the words 'One Night Cure' printed on a circular label; but the style of printing and the shape of the label are unimportant, and can be varied at will without affecting the character of the trade-mark, the essential features of which are the words 'One Night Cure.' "

Exception is taken to an expression in the opinion of the court below, in which it was said that "the registration was notice to everybody that the trade-mark claimed was what was there set up, and nothing else." It may be that this statement by the court below of the effect of registration was too broad. We are not willing to affirm the proposition that the registration in the patent office of a certain name or phrase as a trade-mark for an article made and sold by the owner will in all cases prevent or estop the owner from adopting and using another name or phrase as a trade-mark, which might become his property by reason of such adoption and use. If, indeed, the legal effect of registry of a trade-mark would be to protect the owner, in all markets, from infringement of the name so registered, it would probably follow that registry of a given name for an article would conclude the owner, and he could not be permitted to claim that his trade-mark was other than that which the registry notified the public was claimed by him. But as the effect of such a registry in the patent office of the United States is restricted by the act of March 3, 1881, (21 Stat. 502,) to the case of a trade-mark to be used in commerce with foreign nations or Indian tribes, the contention that, as to domestic commerce, he might adopt and use a different trade-mark than that registered would seem to be reasonable. As the scope and operation of a trade-mark act is constitutionally confined to foreign commerce, trade with Indian tribes, and commerce between the states, and as the act of March 3, 1881, provides only for a trade-mark to be used in commerce with foreign states and with Indian tribes, a trade-mark might well be adopted and registered for the purpose of those trades, and a different one be used in domestic commerce. Trade-Mark Cases, 100 U. S. 82; *Ryder v. Holt*, 128 U. S. 525, 9 Sup. Ct. 145. This view is not inconsistent with the doctrine of the case of *Richter v. Remedy Co.*, decided in the western district of this circuit, and reported in 52 Fed. 455. That was the case of a foreigner, who, prior to his registration, had never sold any of his medicines in the United States, and who, not having here a common-law trade-mark, had to depend upon his registry. He alleged in his bill of complaint that the defendants were infringing his trade-mark as registered, and, when met by the defense that the defendants had used the trade-mark prior to the plaintiff's registry, he sought to invoke the doctrine of a common-law trade-mark; and this the court rightfully held he could not do, but that he was restricted to the trade-mark described in his registry. The complainant in that case was unable to support his claim that he had acquired, as against the defendants, a common-law right to the exclusive use of certain words in connection with the manufacture and sale of medical compounds.

Complaint is also made of the court below in holding that there was no sufficient evidence that the plaintiff had acquired a trade-mark in the collocation of words stated. It may be, as is argued by complainant's counsel, that the interference of a court of equity does not depend on the length of time the name has been used, and that the rule is that he who first adopts a trade-mark acquires the right to its exclusive use in connection with the particular class of merchandise to which its use had been applied. Nevertheless, however short the time may be in which a person may acquire a title to a trade-mark, there must be shown an actual intention to acquire such a title. A merely casual use, interrupted, or for a brief period, would not support a claim to a trade-mark. *Menendez v. Holt*, 128 U. S. 514, 9 Sup. Ct. 143. Nor will a court of equity recognize by injunction a proprietary right in a phrase or name, unless it has been used in such circumstances, as to publicity and length of use, as to show an intention to adopt it as a trade-mark for a specific article.

We agree with the court below in thinking that the complainant's evidence in these particulars was very unsatisfactory. A sale of a few dozen bottles, with written labels pasted on the bottles, in the circumstances disclosed by the evidence, could not suffice to establish such an intentional use and appropriation of the words as a trade-mark as to warrant the interference of a court of equity.

Moreover, while we do not think it necessary to hold that mere registry in the patent office of the United States of a trade-mark for a specific article of manufacture would of itself prevent the use and adoption of another device as a common-law trade-mark in domestic markets, yet such registry can operate as evidence tending to show what was really claimed by the complainant. And, in the statement accompanying the complainant's application for a certificate of registry, it is stated that the words "One Night Cure" have been used by the corporation as a trade-mark, continuously, since the middle of January, 1890; and such continuous use is not alleged to have been restricted to the trade of the company with foreign nations and Indian tribes, if, indeed, it has such. We agree with the court below in thinking that the defendant's label or trade-mark, "Beeshore One Night Cough Cure," was so materially different from the trade-mark "One Night Cure" as not to lead to any mistake of one article for the other.

It is, indeed, said that the court cannot take notice of the contents or statements of the complainant's statement in the patent office, because it was neither set up in the bill, nor put in evidence. However, it seems to have come into the case as an exhibit attached to one of the complainant's affidavits used on a motion for a preliminary injunction; and, as the correctness of the copy is not denied, we think that the court below, where it had been read on the preliminary argument, might legitimately refer to it at the final hearing.

Upon the whole, we think the court below was right in its conclusion, and that its decree dismissing the bill should be affirmed.

RICHTER v. REYNOLDS et al.

(Circuit Court of Appeals, Third Circuit. December 12, 1893.)

No. 21.

1. TRADE-MARKS—INTENTION TO ADOPT.

Sales of medical preparations in this country by a foreign manufacturer, to a limited extent, upon special orders, to supply particular customers, do not amount to use in such circumstances as to publicity, and to such length of use, as show an intention to adopt a symbol placed upon such preparations as a trade-mark. *Kohler Manuf'g Co. v. Beshore*, 53 Fed. 262, followed. 52 Fed. 455, affirmed.

2. SAME—REGISTRY AS EVIDENCE OF INTENTION.

The registry of a trade-mark under the act of March 3, 1881, may be evidence in a suit to restrain infringement of a common-law trade-mark used for the same article in domestic commerce, to show what complainant really claimed. *Kohler Manuf'g Co. v. Beshore*, 53 Fed. 262, followed.

3. SAME.

The registry of a trade-mark, the essential feature of which is described as the representation of a red anchor in an oval space, is not proof of intention to adopt a trade-mark consisting of the word "anchor" and the symbol of an anchor, irrespective of color and surroundings. 52 Fed. 455, affirmed.

4. TREATY WITH GERMANY—CONSTRUCTION.

The treaty of 1871 between the United States and Germany, (article 17; 17 Stat. 931,) which provides that, with regard to the marks of labels of goods, or of their packages, the citizens of Germany shall enjoy in the United States the same protection as native citizens, does not give to a citizen of Germany who has acquired the right to a trade-mark in that country a similar right to the trade-mark in the United States.

Appeal from the United States Circuit Court for the Western District of Pennsylvania.

In Equity. Suit by Dr. F. Ad. Richter, doing business as F. Ad. Richter & Co., against W. E. Reynolds and John Sullivan, doing business as the Anchor Remedy Company, for infringement of a trade-mark. Bill dismissed. 52 Fed. 455. Complainant appeals. Affirmed.

Wm. L. Pierce and Arthur v. Briesen, for appellant.

Before DALLAS, Circuit Judge, and BUTLER and GREEN, District Judges.

DALLAS, Circuit Judge. There are 17 assignments of error in this case. Only 2 of them relate to matters of fact, and by them it is alleged that the circuit court erred—

"In finding that complainant had made no sales in this country of medicinal compounds bearing the trade-mark in issue prior to the date of the opening of his New York branch house; and in finding that the complainant had not made sales in the United States, nor importations thereto, prior to his registration of 1885."

What the court said is:

"The proofs show that the plaintiff's factory is at Rudolstadt, Germany, where his goods are and always have been manufactured, marked, labeled, and put up for the market. All the plaintiff's medical compounds, of which we have before us many specimens, are unmistakably German preparations, with printed labels, directions, etc., thereon in that language, although having

also labels in English; and they are all distinctly marked, 'Manufactured by F. Ad. Richter & Co.' The bill, it will be perceived, is quite indefinite as to the length of time the plaintiff had been engaged in the city of New York in the sale of his medicines before this suit was brought. Nor do his proofs certainly fix the date when his branch sales house was established in that city. It was undoubtedly after May 1, 1887, for Charles Bernhart Drugulin, who opened that house for the plaintiff, did not leave Rudolstadt until that date. Prior to that time the plaintiff had no establishment in the United States. Neither had he ever sold any of his medical compounds in this country before he opened his New York branch house. It is true there had been previously some importations, to a limited extent, into the United States, of the plaintiff's medicines, but by druggists and others who sent orders for the medicines to Rudolstadt, to supply persons who had lived in Europe, and there had used them."

The record sustains this finding; and the other material facts are so well and fully presented by the learned judge of the court below that it would be superfluous to here detail them at length, especially in the absence of any specification respecting them.

The propositions affirmed by the remaining assignments, so far as they raise any question which it is necessary for us to consider, are that (1) the complainant had a common-law right to the word "Anchor" as his trade-mark in this country; and, also, to the symbol of an anchor, irrespective of color and surroundings; (2) the complainant had, by registry in this country, a trade-mark consisting of the word "Anchor" and the symbol of an anchor, irrespective of color and surroundings; and (3) by virtue of a certain treaty between Germany and the United States; the acquisition by complainant, as alleged, of a right to the trade-mark in issue in Germany, was also the acquisition of that right in the United States.

The first of these propositions cannot be maintained, in view of the opinion of this court delivered by the circuit justice during the present term, in the case of *Manufacturing Co. v. Beeshore*, 59 Fed. 572. That opinion deals with the character of the use which is requisite to the acquisition of title to a trade-mark, and also with the effect of the registry of one device upon a claim made by the same person to a different device as a common-law trade-mark for use upon the same kind of goods. In that case the use shown was the sale of a few dozen bottles of a proprietary medicine, having written labels thereon which displayed the collocation of words which was claimed; and the registry in the patent office was of the words "One Night Cure," while those set up by the plaintiff, and to which he asserted a common-law title, were "One Night Cough Cure." This court said:

"Complaint is also made of the court below in holding that there was no sufficient evidence that the plaintiff had acquired a trade-mark in the collocation of words stated. It may be, as is argued by complainant's counsel, that the interference of a court of equity does not depend on the length of time the name has been used, and that the rule is, that he who first adopts a trade-mark acquires the right to its exclusive use in connection with the particular class of merchandise to which its use had been applied. Nevertheless, however short the time may be in which a person may acquire a title to a trade-mark, there must be shown an actual intention to acquire such a title. A merely casual use, interrupted, or for a brief period, would not support a claim to a trade-mark. *Menendez v. Holt*, 128 U. S. 514, 9 Sup. Ct. 143. Nor will a court of equity recognize by injunction a proprietary right in

a phrase or name, unless it has been used in circumstances, as to publicity and length of use, as to show an intention to adopt it as a trade-mark for a specific article. We agree with the court below in thinking that the complainant's evidence in these particulars was very unsatisfactory. A sale of a few dozen bottles, with written labels pasted on the bottles, in the circumstances disclosed by the evidence, could not suffice to establish such an intentional use and appropriation of the words as a trade-mark as to warrant the interference of a court of equity.

"Moreover, while we do not think it necessary to hold that mere registry in the patent office of the United States of a trade-mark for a specific article of manufacture would of itself prevent the use and adoption of another device as a common-law trade-mark in domestic markets, yet such registry can operate as evidence tending to show what was really claimed by the complainant."

Reference was also made to the decision of the present case by the circuit court, as reported in 52 Fed., at page 455, as follows:

"That was the case of a foreigner, who, prior to his registration, had never sold any of his medicines in the United States, and who, not having here a common-law trade-mark, had to depend upon his registry. He alleged in his bill of complaint that the defendants were infringing his trade-mark as registered; and, when met by the defense that the defendants had used the trade-mark prior to the plaintiff's registry, he sought to invoke the doctrine of a common-law trade-mark, and this the court rightfully held he could not do, but that he was restricted to the trade-mark described in his registry. The complainant in that case was unable to support his claim that he had acquired, as against the defendants, a common-law right to the exclusive use of certain words in connection with the manufacture and sale of medical compounds."

The defendants in the case before us, had, in good faith, used the mark complained of as early as in the fall of 1887; and, as appears from the findings of the court below, the complainant, although there is evidence of his having established a branch house in New York at some time not fixed, but certainly after May 1, 1887, has not shown sales of his medicines in this country prior to the defendants' use, nor any importations, except to a limited extent upon especial orders, to supply particular customers. This is not enough. It does not amount to use "in such circumstances, as to publicity and length of use, as to show an intention to adopt it as a trade-mark for a specific article." It indicates no intention to acquire title, and therefore none was acquired. The judgment in *Manufacturing Co. v. Beeshore* is conclusive, also, as to the effect of the registry made by the complainant in this country. As late as July 7, 1885, he registered as his trade-mark an accurately and distinctively defined design, the "essential feature of which" [as he then declared] "is the representation of a red anchor in the oval space." As evidence tending to show what was really claimed, or had been intended to be appropriated, the court below was clearly right in taking this into consideration; and, in our opinion, it was right, also, in concluding therefrom that the complainant's intention was to confine his claim of trade-mark to the specific device designated and described, and which he further declared to be the one which he had "adopted." Upon both the grounds which have been discussed, the complainant's claims to the word "Anchor," and to the symbol of an anchor irrespective of its being red, and inclosed in an oval space, were properly rejected.

The complainant registered twice in this country,—once in 1885, as already mentioned, and again in 1889. The mark was not the same in both instances. The registry of 1885 is not set up in the bill, and that, if it had been, it could not have availed the complainant is apparent from what has already been said, inasmuch as the defendants have not marked their goods with anything which, in the sense of the law of trade-mark, is at all like a red anchor in an oval space. The registry of 1889 was made after defendants' rights had accrued and this suit had been threatened. Furthermore, as is said by the learned judge below, the defendants never used the device covered by this registry, or any design in imitation or simulation of it. This disposes of the matter, and no further discussion of it would be profitable.

The courts of the United States take judicial notice of its treaties with other countries, but, where a treaty is relied on the burden is on the party asserting it to inform the court, when, in fact, without knowledge of the subject, of its existence and terms. In this case it does not appear that the point was considered by the court below, but the brief for the complainant informs us that the treaty which he invokes was made between the United States and Germany, in 1871, "to remain in force for ten years, and, in case neither party gave notice, was extended each year for an additional year." The brief adds, "It is therefore understood that its terms are still effective." Article 17 is quoted, as follows: "With regard to the marks of labels of goods, or of their packages, and also with regard to patterns and marks of manufacture and trade, the citizens of Germany shall enjoy in the United States of America, and American citizens shall enjoy in Germany the same protection as native citizens." We accept this statement and the quotation, but what stipulation does the latter disclose, of which the complainant has not had the benefit? His right to enjoy the same protection as, under the laws of the United States, is enjoyed by citizens of the United States, has been fully recognized; and the question raised by him as to the effect in this country of his alleged acquisition of a right in Germany to the mark which he claims in this suit, has been adjudicated in the manner, and under the laws of this country, precisely as any similar question would be adjudicated if presented to the same court for decision, by one of our own citizens. To more than this the complainant was certainly not entitled. The plain intent of the treaty is to reciprocally assure to the citizens of the respective countries the protection of the laws of the other. It was not intended to give to the official acts, or laws, of either country any peculiar extraterritorial effect.

It follows from what has been said that the mark used by the defendants is not used in violation of any right of the complainant; and, therefore, the decree of the circuit court dismissing his bill, with costs, is affirmed.

WESTINGHOUSE et al. v. NEW YORK AIR-BRAKE CO. et al.

WESTINGHOUSE AIR-BRAKE CO. v. SAME.

(Circuit Court, S. D. New York. November 20, 1893.)

Nos. 4,976, 4,977, and 5,315.

1. PATENTS—ANTICIPATION—AIR BRAKES.

A patent for a device to be used in connection with a quick-acting automatic air brake is not anticipated by a prior patent for a somewhat similar device, used in combination with the old direct-action air brake, which patent contained no suggestion of how the device could be adapted to the automatic system; it appearing further that, if it were so reorganized and reconstructed as to be used in the automatic system, it would be utterly inoperative for accomplishing its purpose.

2. SAME—INVENTION.

Where several patents cover a series of progressive inventions, all tending to the accomplishment of a given result, and it appears that the last of the series contains the first successful embodiment of these inventions, and that the improvement thereby added was only devised after a series of practical experiments for the purpose of obviating previous defects, this shows that the conception of such improvement involved invention.

3. SAME—LIMITATION—"SUBSTANTIALLY AS DESCRIBED."

A claim covering a combination "substantially as described" should not be limited to a construction which does violence to the other wording thereof, and which is not specified either in the description or claim, especially when such construction does not appear to be material, and only affects the apparatus when not in use.

4. SAME—INFRINGEMENT.

Infringement is not avoided by simply dividing one element of the patent into two parts, so arranged that the action of one necessarily causes the action of the other in the same way as though they were one, and their combined operation performs the same function and produces the same results as the device of the patent.

5. SAME—COLORABLE CHANGES.

The fact that defendants have made a different construction of one device, which is concededly inferior to that of the patent, while retaining all the other elements thereof, suggests that the difference is only a colorable one, merely designed to avoid the claims of the patent.

6. SAME—DIVISIONAL PATENTS—ENLARGEMENT OF CLAIMS.

Where a device covered by a divisional patent is described in the original application therefor as capable of being employed in connection with and supplementary to another device, which generally accomplishes the same purpose, but is not claimed in such connection, a subsequent amendment, so as to claim it only in combination with such other device, is not an enlargement, and does not render the claim invalid.

7. SAME—COMBINATION—WHAT CONSTITUTES.

When a supplementary device is only intended to operate in case the main device fails to work, but the two are so related that the very failure of the latter so directs a force that it causes the former to act, there exists the co-operation which constitutes a true combination.

8. SAME—LIMITATION.

Claims for an air-brake emergency valve "controlled" by a "piston connected to said valve," and for a "piston stem, a valve on the piston stem controlling the passage," etc., call for a piston mechanically connected with the valve, and are not infringed by a device in which the valve is unseated by a piston whose stem merely rests against it, but which cannot be reseated by the piston for want of actual connection therewith.

9. SAME—INFRINGEMENT.

A claim in an air-brake patent for a combination containing a port through the center of the piston, described as substituted for a side port,

with which the patent dispenses, is not infringed by a device having no such center port, but using a side port in combination with different elements which are admitted by the patent to be part of the prior art.

10. SAME—ESSENTIAL SIMILARITY—APPARENT DIFFERENCES.

If a device has all the vital elements of a combination essential to the operation of a patent and to the achievement of the result sought, working in substantially the same way, infringement is not avoided by a method of construction which, owing to a different relative arrangement of the parts, the substitution of mechanical equivalents, and variations in matters not covered by the claims, is in appearance utterly unlike the patented device, and in some respects apparently superior thereto.

11. SAME—PARTICULAR PATENTS.

The Westinghouse quick-acting automatic air brake, No. 376,837, was not anticipated or limited by the previous patents, Nos. 162,465, to Ford, Welsh & Westinghouse, and 360,070, to Westinghouse; and is valid as to the first, second, and third claims, but void as to the sixth, for want of invention.

12. SAME.

The Westinghouse divisional air-brake patent, No. 448,827, shows invention, and is valid.

13. SAME.

The Westinghouse air-brake patent, No. 172,064, is limited to a combination having a port through the center of the piston.

14. SAME.

The first and second claims of the Park patent, No. 393,784, are limited to an air-brake emergency valve mechanically connected with the piston which operates it.

15. SAME.

The Westinghouse patent for an improvement in operating cocks for fluid-pressure brakes, No. 222,803, was not anticipated by the Westinghouse patent, No. 141,685, or by the Fay & Cairns patent, No. 141,685.

In Equity. Suits for infringement of railroad air-brake patents. Decrees for complainants as to some of the claims in suit and dismissing the bills as to others.

Kerr & Curtis, Geo. H. Christy, Frederic H. Betts, and J. Snowden Bell, for complainants.

John D. Kernan, (J. E. Maynadier and Causten Browne, of counsel,) for defendants.

TOWNSEND, District Judge. These are three bills in equity for the alleged infringement of letters patent No. 376,837, granted to George Westinghouse, Jr., January 24, 1888; patent No. 393,784, granted to Harvey S. Park, December 4, 1888; patent No. 172,064, granted to said Westinghouse, January 11, 1876; patent No. 222,803, granted to said Westinghouse, December 23, 1879; and patent No. 448,827, granted to said Westinghouse, March 24, 1891. All of these patents are for improvements in railroad brakes. They describe and claim various devices used in the operation of automatic quick-action freight brakes, including the valve on the engine, operated by the engineer, and different forms of emergency valve apparatus on the cars.

The main defenses interposed to the chief patents in suit are non-infringement and lack of patentable novelty, upon the theory that the inventions therein claimed have been already described by said Westinghouse in other patents not in suit. The parties in interest are the same in each case, but a difference in the ownership of the

patents sued upon necessitated separate suits in the two earlier cases. The patent sued upon in the third case is for a modification of the invention claimed in one of the other patents which had not been patented when said suits were brought. The three cases will be considered in the order of the relation of the patents to each other.

To understand the scope of the various claims of the patents in suit it will be necessary to examine the state of the prior art. The first practical air brake is known as the "plain brake," and is described in patent No. 88,929, granted to George Westinghouse, Jr., April 13, 1869. It consisted of a pump, operated by steam from the locomotive boiler, which compressed air into a reservoir located under the locomotive cab, which reservoir communicated by a pipe with a cock or valve in said cab, called the "engineer's valve," which was so located as to be readily manipulated by the engineer. From this valve a pipe extended back under the tender, and was connected to a similar pipe under the entire length of the first car by a flexible hose. Each of the succeeding cars had a similar pipe similarly connected. This pipe was called the "train pipe." From the train pipe of each car a branch pipe communicated with the forward end of a cylinder called the "brake cylinder." This cylinder was provided with a piston, the stem of which was connected with the brake levers on the car. When the engineer wished to apply the brakes, he opened the engineer's valve, and the compressed air from the main reservoir flowed back through the train pipe and branch pipes into the brake cylinder on each car, pushing the pistons backward, causing the piston stems to operate the brake levers and force the brake shoes against the wheels. When he wished to release the brakes, he so shifted the valve as to shut off the flow of compressed air from the main reservoir, and to open a port or vent leading from the train pipe to the open air. Thereupon the compressed air in the brake cylinders escaped into the open air, the pressure of the pistons was removed, and the pistons were forced forward again by means of springs, thus moving the brake shoes away from the wheels. The validity of this patent was sustained in *Westinghouse v. Air-Brake Co.*, 9 O. G. 538. The operation of this plain brake was open to certain objections. It was too slow, and was attended by danger of collision in case one part of the train became detached from the other part.

The next brake to be considered is known as the "automatic brake," which appears to have been patented by George Westinghouse, Jr., about 1872 or 1873. It embodied the addition of an auxiliary reservoir and a triple-valve device to each car. Each reservoir was of sufficient capacity to operate its brakes once, and thus to provide for automatic action in case of accident. The triple-valve device was located at the junction of connections between pipes leading to the train pipe, the brake cylinder, and the auxiliary reservoir. In addition to these three ports, there was a fourth port, leading to the open air.

The operation of this brake was radically different from that of the "plain brake." In the former the compressed air was stored

in the main reservoir until required for the application of brakes; in the latter the main and auxiliary reservoirs and train pipe were always charged with compressed air at working pressure, to prevent the application of the brakes. When the engineer wished to apply the automatic brake, he shifted the engineer's valve so as to cut off the flow of compressed air from the main reservoir, and open a port from the train pipe to the open air. The effect of this was to reduce the air pressure in the train pipe, and cause a back pressure from each auxiliary reservoir through the triple valve, which shifted it so as to close the port from the branch pipe to the train pipe, and stop the escape of air from the auxiliary reservoir, to close the port leading from the brake cylinder to the open air, and to open the port leading from the auxiliary reservoir, and connect it with the port leading to the brake cylinder. Thereupon the compressed air in the auxiliary reservoir flowed into the brake cylinder, and applied the brakes. It will thus be seen that, while the former system was operated by pressure from the main reservoir, the latter was operated by withdrawal of pressure. The result was automatic action in case of accidents whereby air was caused to escape from the train pipe, as by bursting of hose, or the train breaking in two. In such cases the release of pressure operated the triple valve, and automatically applied the brakes.

It is necessary here to consider "train-brake graduation" or "service stops," as distinguished from "emergency stops." While for the latter it may be necessary to admit to the brake cylinder the full pressure of compressed air, say 70 or 80 pounds, yet where it is desired merely to slow up without stopping, it may be necessary to admit only, say 10 or 20 pounds, graduating the amount of flow according to the character of service desired. It is important to bear this distinction in mind, because the appliances hereafter to be considered have been so devised as to provide therefor, and that such graduation shall be under the control of the engineer.

The chief objection to this automatic brake lay in the fact that it was not capable of successful operation on long trains of freight cars. The time consumed by the progressive operation of the brakes between the grip on the first and last car allowed of so much slack motion between them as to cause violent shocks. This automatic brake was publicly tested near Burlington, Iowa, in 1886. The growing importance of the subject of automatic freight graduation, the inadequacy of existing systems to protect the lives of railroad employes, and the disastrous results therefrom, had become so evident that in 1885 the Railway Car Builders' Association arranged for a series of experiments known as the "Burlington trials." The Westinghouse Company, and several other companies engaged in the manufacture of brake apparatus, competed at these trials. None of the competitors succeeded in stopping long trains of freight cars without violent and disastrous shocks. In 1887 the trials were renewed. There were five competing parties, including one of the leading experts for the defendants, and the complainant company. The latter then presented an improved apparatus, covered by patent No. 360,070, granted to George Westinghouse,

Jr., March 29, 1887. The report of the committee of the Car Builders' Association shows that they considered "the field for improvement open as wide as in 1886," and concluded that air brakes actuated by electricity were the only ones likely to be capable of successful operation on long trains of freight cars. The improved Westinghouse apparatus, while it reduced the length of time between the application of the first and last brakes, produced greater shocks than did the automatic apparatus of the preceding year.

In this condition of affairs, George Westinghouse, Jr., set himself to work to obviate these difficulties. Upon the conclusion of the 1887 trials he renewed his investigations and experiments, and by certain changes and improvements in the old apparatus, and the introduction of new elements, he succeeded, in the latter part of the year 1887, in constructing a quick-action automatic brake, capable of being successfully applied to a train of 50 freight cars, and operative under all conditions of practical railway service. On October 1, 1887, he applied for a patent for this apparatus, and on January 24, 1888, the patent was granted. Said patent, No. 376,837, is the first of the patents in suit. Before proceeding to consider in detail the claims of this patent, it should be stated that the following were among the requirements for the practical operation of air brakes: (1) The regulation of the force to be applied to the brake shoes so as to secure all necessary graduations from the mere slackening of speed to the service stop, and from the service stop to the emergency stop; (2) the automatic operation of the brakes in case of accident; (3) the practically simultaneous operation of the brakes on each car, so that, in long trains of freight cars, shocks might be avoided; (4) the control of all these operations by the engineer; (5) certainty of operation under all conditions.

It is not denied that George Westinghouse, Jr., was an original and meritorious inventor, the first inventor of the plain brake, the first to put an air brake into successful use, and the first to graduate air pressure in the brake cylinders. These facts appear in the opinion of the court in *Westinghouse v. Air-Brake Co.*, supra. It is not denied that he was the first inventor, both of the Westinghouse automatic brake, and of the Westinghouse quick-action automatic brake. It appears that he was the first to provide an operative brake system without the use of electricity, and a device whereby the operation of the apparatus was controlled by the engineer. It is admitted by the expert for defendants that the Westinghouse quick-action automatic brake was the first practical system on long trains. It is not denied that immediately after its introduction it went into successful extensive use, and that 125,000 of said brakes have been furnished to the railroad companies of this country within a period of a little more than three years. But defendants claim that by patent No. 162,465, to said Westinghouse and two associates, and by said patent No. 360,070, to said Westinghouse, he showed how practical air brakes could be made, and successfully operated. They admit that they have adopted these confessedly great inventions; but they deny infringement on the

ground that said patents Nos. 162,465 and 360,070, which imperfectly disclosed said great inventions, are not in suit. They further claim that the patents in suit are for mere minor improvements upon and modifications of said inventions, which did not require any exercise of creative thought. Further defenses will be considered later.

We will now examine these other great inventions. They are comprised in what is known as the "Westinghouse quick-action automatic brake" apparatus. The devices embodied therein are covered by said patent No. 360,070, and by patent No. 376,837, the patent in suit. The claims of defendants as to the scope of patent No. 162,465 will be considered in this connection. It may be said in a general way that the "quick-action" element was added to, or the quick action was secured in, the automatic apparatus by such an arrangement of the triple valve in connection with vents on each car as to make the opening of such vents, and the consequent reduction of train pressure, practically simultaneous on each car. Its efficiency was increased by the utilization of the vented air to hasten the action of the ordinary brake force. Patent No. 376,837 was issued to George Westinghouse, Jr., January 24, 1888, for improvement in fluid-pressure automatic brake mechanisms. Its object, as stated by the patentee, was "to facilitate the application of brakes with great rapidity, and full or approximately full force, as from time to time required, by the provision of means whereby the admission of air from the brake pipe to the brake cylinders may be effected as directly as practicable, and through passages of as large capacity as may be desired." The apparatus comprises a casing, or air chamber, containing the triple-valve device already referred to, which governs communication between the train pipe, the auxiliary reservoir, and the brake cylinder, and also an emergency apparatus. The patentee states that the construction and operation of the triple-valve device, except as to certain improvements therein, accord substantially with other such devices previously patented by him in patents Nos. 220,556 and 360,070. It is not necessary to consider it in this connection further than to say that it consists of a slide valve and free moving piston, so arranged as to be operated by variations of pressure in the train pipe. When a service stop is desired, a slight reduction of train pipe pressure is made by the engineer. By reason of this withdrawal of pressure, the free moving piston, which has heretofore been forced forward against the auxiliary reservoir by said train-pipe pressure, is now forced backward by the excess of pressure in the auxiliary reservoir, until its movement is arrested by the decrease in auxiliary reservoir pressure, or by the striking of its stem against another stem which is backed up by a spring. It has then, as already described, closed the charging port from the branch pipe, closed the port from the brake cylinder to the open air, opened the port leading from the auxiliary reservoir into the brake cylinder, and thereby caused the brakes to be applied.

The quick-action element, which is the subject of the claims alleged to be infringed, is only called into action for emergency stops.

This emergency action is secured in the patent in suit by means of a separate supplemental piston and valve in a supplemental valve chamber below the main slide valve of the triple-valve device. This chamber connects the train pipe with the brake cylinder, communication between them being regulated by the supplemental valve, opening outwardly, or downwards, and a check valve, opening inwardly, or upwards. These valves are held upon their seats, under ordinary conditions, by a spring bearing upon their stems. In the bushing which forms the valve face of the main slide valve, are four ports, governed by said slide valve. One of these ports leads to the brake cylinder, two lead to the supplemental valve chamber on the upper or inner side of the supplemental piston, and one leads to an exhaust port. When an emergency stop is to be made, the engineer throws his engineer's valve wide open, thereby causing a sudden and material reduction of pressure. The excess of auxiliary reservoir pressure then forces the main piston stem against said other stem, overcoming the tension of its spring, drives the main piston to the extreme limit of its stroke, and thereby uncovers the ports leading from the auxiliary reservoir to the supplemental valve-chamber. This pressure drives the supplemental piston outwardly, or downwards, against the stem of the supplemental valve, and forces it from its seat. Thereupon the preponderance of train pipe pressure in the brake pipe opens the check valve, and the air from the train pipe rushes directly from the brake pipe to the brake cylinder. The result of this operation is twofold. It hastens the application of the brakes on the car on which it is operated; and, by venting the train pipe, it hastens a similar reduction of pressure, and consequent similar operation in the next succeeding triple-valve device on the next car. The release of the brakes is accomplished by the admission of air from the main reservoir.

It is alleged that defendants have infringed claims 1, 2, 3, and 6, of this patent. The first of these claims is as follows:

"In a brake mechanism, the combination of a chamber or casing having direct connections to a brake cylinder and to a brake pipe, respectively, a valve controlling communication between said connections, and a piston or diaphragm which is independent of and unconnected with a triple-valve piston, and is actuated by pressure from an auxiliary reservoir in direction to impart opening movement to said valve, substantially as set forth."

The second claim includes:

"A check or nonreturn valve controlling communication between said valve and the brake-pipe passage of the chamber, substantially as set forth."

The third claim is as follows:

"In a brake mechanism, the combination, with a triple valve, of a supplemental chamber or casing having passages leading to a brake cylinder and to a brake pipe, respectively, a supplemental valve controlling communication between said passages, a supplemental piston operating independently of the triple-valve piston and adapted to impart opening movement to said supplemental valve, and a passage establishing communication between said supplemental piston and an auxiliary reservoir, substantially as set forth."

These three claims will be considered together. The defense to these claims is noninfringement. Defendants have used two devices, each of which complainants claim is an infringement. The

earlier device is known as "defendants' quick-action triple valve;" the later is "defendants' modified quick-action triple valve." Each of these devices has a chamber, or casing, with direct connections to brake cylinder and train pipe, and a controlling valve, as in complainants' patent. Each has an emergency piston and valve and check valve. The first form of defendants' apparatus has two emergency pistons and valves, or rather one emergency piston and valve, actuated by a sudden or large reduction of pressure, as in complainants' apparatus, and connected by means of a port with a supplemental piston and valve and check valve, like the single emergency piston valve and check valve of complainants. The second, or modified, apparatus differs from the first in the elimination of one of the pistons with its valve and port of the emergency attachment, and modification of the check valve. It is not claimed that this modified check valve is an infringement of the second claim of the patent in suit.

The general questions of infringement claimed to be applicable to both devices will first be considered. Defendants claim that their emergency apparatus, as well as that of the patent in suit, is merely a combination of the invention described in the automatic relief valve of one patent, not in suit, with the invention, whereby reservoir pressure was utilized to operate an emergency valve, described in a certain other patent not in suit. The first of these patents is patent No. 162,465, issued to Messrs. Ford, Welsh, and said Westinghouse, April 27, 1875, for an improvement in automatic air escapes for railway air brakes. At the date both the old plain-brake apparatus, depending for its braking operation upon the transmission of compressed air from the engine to the brake cylinders, and the automatic system, depending upon the release of the pressure of compressed air to apply the brakes, were in use. Patent No. 162,465 was only designed for use in connection with the plain-brake apparatus. The object of the invention was "to provide for the more immediate escape of the compressed air from the brake cylinders after it has done its work." It was a patent for an invention, not for applying brakes, but for quickening the release of the brakes in the plain-brake system. The invention comprised an auxiliary reservoir connected with the brake pipe, and having a lift valve controlling vents from the train pipe into the open air. This valve was so arranged that when there was an equilibrium of pressure it remained on its seat. Through the center of the valve was a small hole, leading to said reservoir. When air was transmitted from the engine, to apply the brakes, it flowed through said hole into said reservoir, making the same pressure there as in the train pipe; but when the air was discharged from the train pipe to release the brakes the excess of pressure of the air within said chamber unseated said valve, and allowed the air to be rapidly vented from the brake cylinder and brake pipe into the open air.

The defendants claim that they took their relief valve from this patent, and that Westinghouse embodied this idea in patent No. 376,837, and that it was not first conceived in said patent. They say that the first result in each case was to quicken the action of each

succeeding automatic relief valve; and the difference in secondary results—that in one case it released, in the other applied, brakes—is immaterial.

I do not think this patent anticipates or limits, in this connection, patent No. 376,837, for the following reasons: The sole object of the invention was to quickly release brakes in the direct system. It was intended to obviate the difficulty arising from the fact that in the direct system the escaping air, being expelled simply by its own expansion, came out very slowly. It was not adapted to the application of brakes, or in any way to the automatic brake system, although that system had then been invented. Counsel and experts for defendants admit that radical and material modifications were required before it could be practically applied to railroad service under the automatic system. There is no suggestion in the patent of any way in which it could be adapted to the automatic system, nor, if so adapted to apply the brakes, does it appear how it could then be operated to release them. No provision is made for graduation for ordinary service stops in any case. In *Electric Light Co. v. Westinghouse*, 55 Fed. 504, Judge Green, citing cases, says:

"And for this cause alone the Khotinsky patent cannot be relied upon in this case as an anticipation of the plaintiff's patent. It does not anticipate, because it neither describes, nor deals with, nor certainly provides for the difficulty, nor prescribes with precision the remedies, which form the subject-matter of Edison's invention."

It appears from the evidence that if patent No. 162,465 were so reorganized and reconstructed as to be used to apply brakes in the automatic quick-action system, it would then be utterly inoperative for accomplishing the purpose of the original invention. But, say counsel for defendants, given the solution of the problem how to release pressure quickly in a long pipe, its application to a different system, for a different purpose, in a different way, and producing a different result, is a mere double use. The considerations already suggested would seem to be a sufficient answer to this claim.

It may be added, as is forcibly urged by counsel for complainants, if this was merely a thing that "any competent mechanic could do," why was George Westinghouse the only person to whom it occurred to do it, and how to do it? The claim of defendants that all this was done in patent No. 360,070 will be considered in connection with that patent. Even if Mr. Westinghouse, in patent No. 376,837, did, as claimed by defendants, throw his mind back to patent No. 162,465, and use it as a basis for a part of the contrivance of patent No. 376,837, he did not reinvent patent No. 162,465, but he invented and created a new device, adapted to new conditions, and developed in new combinations, which produced new and different results. These facts would seem to bring this branch of the case within the rule as stated in *Ansonia Brass & Copper Co. v. Electrical Supply Co.*, 144 U. S. 11, 12 Sup. Ct. 601:

"If an old device or process be put to a new use which is not analogous to the old one, and the adaptation of such process to the new use is of such a character as to require the exercise of inventive skill to produce it, such new use will not be denied the merit of patentability."

In Walk. Pat. (2d Ed.) p. 54, § 68, it is stated that:

"Novelty is not negated by anything which was neither designed nor apparently adapted nor actually used to perform the function of the thing covered by the patent, though it might have been made to perform that function by means not substantially different from that of the patented invention."

It seems to me, therefore, that the invention described in patent No. 162,465 did not anticipate the invention described in the patent in suit.

As was said by Mr. Justice Brown, in *Topliff v. Topliff*, 145 U. S. 161, 12 Sup. Ct. 825:

"It is not sufficient to constitute an anticipation that the device relied upon might, by modification, be made to accomplish the function performed by the patent in question, if it were not designed by its maker nor adapted nor actually used for the performance of such functions."

The next patent to be considered is No. 360,070, granted to George Westinghouse, Jr., March 29, 1887, for fluid-pressure automatic brake mechanism. This was the first patent issued for the Westinghouse automatic quick-action system. The defendants say that this patent fully disclosed another confessedly great invention, namely, the utilization of the air vented from the train pipe, to quicken the application of brakes. They further urge, with great force that, even if certain modifications were required in patent No. 162,465, before it could be adapted to act in the automatic quick-action system, yet that, in connection with patent No. 360,070, it shows the combination of everything vital and essential in the patent in suit. The complainants deny these claims, and urge that the facts already stated as to the defects developed at the Burlington trials in the apparatus constructed in accordance with this patent call for the application of the rule laid down in *Loom Co. v. Higgins*, 105 U. S. 591, where the court, in disposing of a similar claim said:

"This argument would be sound if the combination claimed by Webster was an obvious one for attaining the advantages proposed,—one which would occur to any mechanic skilled in the art. But it is plain from the evidence, and from the very fact that it was not sooner adopted and used, that it did not for years occur in this light to even the most skillful persons."

In patent No. 360,070, Westinghouse sought to secure both service and emergency action by the use of a single piston,—the piston of the triple valve already described. This piston was so arranged as to have only a slight range of motion for a service stop. A great reduction of pressure for an emergency stop would cause the piston to travel through its entire range of motion, and to uncover an emergency port, through which train-pipe pressure passed from the train or brake pipe into the brake cylinder. The radical difference between this patent and the patent in suit consists in the differences of construction and operation involved in the addition to the latter of the separate emergency apparatus.

The defendants claim that the secret of the success of the patent in suit lies not in the use of a separate piston to operate the emergency valve, but in the substitution therein of a lift valve, such as was used in patent No. 162,465, in place of the slide valve of patent No. 360,070. One of the experts in one of the

other cases, and all the counsel in this case, refer to the tendency of the slide valve of patent No. 360,070 to stick to its seat, especially if used in connection with a large port, such as is found necessary for the successful operation of patent No. 376,837. Figure 8 of the patent in suit shows a slide valve as interchangeable with a lift valve. The device shown in complainants' exhibit of its automatic brake system has a lift valve. The experts for complainants testify fully as to the advantages secured by the use of the separate emergency valve and piston, and in this testimony they are not contradicted by the experts for defendants.

In this connection, and as having an important bearing upon this question, the evidence as to the practicability of patent No. 360,070 will be considered. It appears that the apparatus constructed thereunder did not operate satisfactorily in the Burlington trials. But it also appears that these defects were not occasioned by any inherent defects in the construction of the device shown in patent No. 360,070, and that, when the accessory parts were afterwards adjusted, and, as testified by Mr. Westinghouse, "when the passages through the quick action portion of the triple valve were made sufficiently large, practically the same results were obtained in train stopping as were subsequently obtained by the kind of valve shown in patent No. 376,837." It seems to me that this uncontradicted evidence is entitled to great weight as against the contention of defendants' counsel that "the essential matter in patent No. 376,837 is the use of the lift valve instead of a slide valve." This conclusion is strengthened by the evidence of Mr. Massey, one of the experts for defendants, and the patentee of defendants' quick-action triple valve. As complainants' counsel agree that the cause of the difficulty in patent No. 360,070, and the way in which it was obviated in patent No. 376,837, are fully and clearly stated by Mr. Massey, I give his evidence in full upon this point. Mr. Massey was asked on direct examination as follows:

"Int. 4. Mr. Henry B. Stone, in his deposition, says that he has no doubt that the Westinghouse quick-action automatic brake was the first practical quick-action triple valve which made the automatic brake system practical on long trains; and, as I interpret the testimony of Mr. H. Herman Westinghouse, he says the same thing. What is the practical objection, if any, to the quick-action triple valve of 360,070, and how is that remedied by the apparatus of 376,837? Before answering, state what is meant by the 'Westinghouse quick-action automatic brake.' A. The term 'Westinghouse quick-action automatic brake,' as used by Mr. Stone, undoubtedly refers to the quick-action triple valve described in patent 376,837, and illustrated on sheet 2 of that patent. It is also the quick-action triple valve which is illustrated in the Westinghouse catalogue of 1890. In the quick-action triple valve described in 360,070, in addition to the triple valve, the stem of the piston came in contact with an emergency valve, and the extreme motion of the triple-valve piston caused the emergency valve to open a small passage between the train pipe and the brake cylinder, thus causing a local exhaust of the air from the train pipe, and therefore reducing the pressure in the train pipe quicker than would be done by the vent through the engineer's valve. The port which was opened by the emergency valve was necessarily restricted in size, as, in order to be effective, the piston of the triple valve must be able to open it within a moderate reduction of train-pipe pressure, and therefore with but little force in addition to that consumed by the piston in moving the ordinary triple-valve mechanism. If the emergency valve had

been arranged to open a very large port, the time required to exhaust the train pipe through the engineer's valve sufficiently to allow the piston to open the emergency valve would be materially increased. This defect in the emergency valve of 360,070 would not be serious in trains of moderate length, as under, say 25 cars; but in the 50-car train used at Burlington in May, 1887, the effect was disastrous. This defect is remedied in 376,837 by using a supplemental piston to open the emergency valve, and actuating that piston by fluid pressure from the reservoir through a passage controlled by a valve which is actuated by the triple-valve piston. In this case the triple-valve piston has only to open a comparatively small port in addition to its regular function, and fluid pressure in the auxiliary reservoir then causes the supplemental piston to open the emergency valve."

The length of time required in the use of the single valve of patent No. 360,070 to open a sufficiently large port, above referred to, appears to have been in the mind of Westinghouse in providing a separate piston of the patent in suit to open the emergency valve, for in the description of this improved invention it will be remembered he states that:

"Its object is to facilitate the application of brakes with great rapidity, and full or approximately full force, as, from time to time, required, by the provision of means whereby the admission of air from the brake pipe to the brake cylinders may be effected as directly as practicable, and through passages of as large capacity as may be desired."

It seems to me, in view of this testimony of defendants' expert, and the other evidence already considered, that the defendants have failed to sustain the burden of proving that the conceded success of the patent in suit was due to the substitution of a lift valve instead of a slide valve.

But certain other considerations are suggested by counsel for defendants in this connection, namely, that in patent No. 360,070 Westinghouse describes a combination whereby auxiliary reservoir pressure is utilized so as to impart opening movement to the emergency valve, and vent the air from the train pipe to the brake cylinder; and that in patent No. 376,837 the operation of such apparatus was through a passage controlled by a valve actuated by the triple-valve piston. And defendants further claim that this patent is limited, by the words and figures of the specification, to a construction where the emergency valve is only exposed to auxiliary reservoir pressure by the excess stroke of the triple valve opening a passage.

Upon these claims, among others, is laid the foundation of the main defense, namely, that this broad fundamental conception of the inventor having been disclosed to the world in patent No. 360,070, they are now entitled to avail themselves of it, and to use it in connection with the suggestions contained in patent No. 162,465 in making their apparatus. They admit that patent No. 376,837 describes an improvement on patent No. 360,070, but they claim that said improvement is merely a minor invention.

The consideration of the general questions of pioneership involves the inquiry as to whether the patented device contained an invention which, for the first time, enabled "a law of science, or force of nature, to be used so as to accomplish a practical and beneficial result." Judge Shipman, in *Dederick v. Seigmund*, 1 U. S. App.

227, 2 C. C. A. 169, 51 Fed. 233; *Machine Co. v. Lancaster*, 129 U. S. 263, 9 Sup. Ct. 299. In this inquiry is necessarily involved the determination, in this case, of the question as to whether this great invention was so disclosed to the world in patent No. 360,070 as to make it available without a further exercise of the inventive faculty. The argument of counsel for complainants and defendants on this question seems to assume that whether the defendants are infringers or not largely depends upon whether patent No. 376,837 is or is not a pioneer patent. It is questionable whether a court may safely depart from the ordinary rules in the construction of a patent because it may seem to bear the brand of pioneership. In the present case, too, the application of the principle is not without difficulty, because the inventor is confessedly a pioneer, the question being whether he had not already blazed a pathway through the forest before he laid out or opened the practicable public highway. I have therefore attempted to dispose of the questions herein by a consideration of the prior art, and a comparison of defendants' devices with the patent in suit, independently of the doctrine of pioneership. If this doctrine is applicable, the case seems to fall within the principle stated and followed by Judge Coxe in *Mergenthaler Linotype Co. v. Press Pub. Co.*, 57 Fed. 502. In either case, "a strict construction should not be resorted to if it becomes a limitation upon the actual invention, unless such construction is required by the claim, it being understood that the construction should not go beyond and enlarge the limitations of the claim." *Smead Warming & Ventilating Co. v. Fuller & Warren Co.*, 6 C. C. A. 481, 57 Fed. 626.

It will be remembered that the provision for a separate emergency piston to open the emergency valve, and for the operation of that separate piston by pressure from an auxiliary reservoir in direction to impart opening movement to the emergency valve, was new with Westinghouse in patent No. 376,837. But it will be remembered that in patent No. 360,070 Westinghouse had provided for the utilization of reservoir pressure, to cause the single piston of the triple valve to make an extreme travel for an emergency stop, and to thereby uncover an emergency valve. The considerations already suggested, seem to show that each of the patents already discussed—patents Nos. 162,465, 360,070, and 376,837—marked a forward step in the progress of the freight brake system, and that each contributed an important and essential element of invention thereto. The scope of these patents has been already considered. If all that is claimed as to the inventions disclosed in the patents not in suit be admitted, it still appears that the patent in suit describes an improvement on patent No. 360,070, which was not applied for until more than six months after patent No. 360,070 had been granted, and after a series of practical experiments, undertaken for the purpose of obviating the difficulties encountered and defects developed in the Burlington trials of 1887. "Experiments made to ascertain the practicability of the new use are strong evidence to prove that invention was required to conceive of it." *Merwin*, Patentability, 92. v.59f.no.5—38

It further appears that the apparatus constructed under said patent was the first successful embodiment of these great inventions, and furnished the first and only practical solution of the problems of automatic quick-action freight brakes. It further does not appear that the success of the invention embodied in the patent in suit is not due to the use of the separate emergency piston and valve. It seems to me most significant that with patent No. 360,070 before the world for six months, and under the pressure of competitive trials, no one so grasped the inventions claimed to be disclosed in patent No. 360,070 as to embody them in a successful working apparatus until after the patent in suit had been applied for; and that, when defendants constructed an apparatus, they adopted the separate emergency piston and valve of the patent in suit. And, as patent No. 376,837 accomplished this result by the use of a separate piston, and as defendants' apparatus has accomplished this result, also by the use of one or two separate pistons, they must be held to have infringed the first and third claims of said patent, unless said claims are to be so limited in terms, or by the information disclosed in patents Nos. 162,465 or 360,070 or both, as to show that defendants' device is not embraced therein.

In this connection it will be necessary again to examine the first claim of the patent in suit, which is as follows:

"In a brake mechanism, the combination of a chamber, or casing, having direct connections to a brake cylinder and to a brake pipe, respectively; a valve, controlling communication between said connections; and a piston or diaphragm, which is independent of, and unconnected with, a triple-valve piston, and is actuated by pressure from an auxiliary reservoir in direction to impart opening movement to said valve, substantially as set forth."

Defendants claim that complainants' emergency piston is not "independent of, and unconnected with, a triple-valve piston," except in the sense that there is no dependence or connection by direct mechanical action, and that complainants are, in fact, limited to a construction in which the emergency piston is dependent upon, and connected with, the triple-valve piston, and in which the emergency valve is not exposed to auxiliary reservoir pressure, except by the excess stroke of the triple valve opening a passage.

These propositions will be considered together. In the drawings of the patent it appears that, while the emergency piston is distinct and separate from the triple-valve piston, yet that it is operated by reservoir pressure, admitted by means of an excess stroke of the triple-valve piston. In this sense the action of complainants' emergency device may be said to be dependent upon the action of the triple-valve piston. A similar element of dependence is to be found in the operation of defendants' device, for, before their emergency piston can operate to apply the brakes, some movement of the triple-valve piston is necessary in order to shut off the exhaust from the open air. In neither of said devices is there any direct mechanical connection between the triple-valve piston and the emergency piston,—in each there is an indirect communication,—although it is mechanically more remote in the first device of defendants. Under these circumstances it is questionable whether

such incidental communication is material upon the question of infringement. I do not think the language "independent of, and unconnected with," should be construed to mean "dependent on, and indirectly communicating with," so as to necessarily cover such indirect dependency, or to make it an essential feature of the invention, and thus do violence to the language of the claim.

But the learned senior counsel for defendants assumes that the second form of defendants' apparatus contains all the parts covered by claim 1 of patent No. 376,837, but he forcibly claims that the parts do not operate "substantially as set forth" in the patent. It was claimed by him that the description and all the drawings of said patent showed an emergency valve, not exposed to auxiliary reservoir pressure except by the excess stroke of the triple valve opening the passage; and that, in that event, the case would fall within the rule laid down by Judge Wallace, and affirmed by the United States supreme court in *Snow v. Railway Co.*, 121 U. S. 617, 7 Sup. Ct. 1343. But counsel for complainants having called my attention to figure 12 of said patent, and the description thereof, I have carefully examined and considered the same, and, while I cannot find therein any description of the particular way in which the requisite air is to be admitted, it does not appear that the emergency piston is not there shielded from auxiliary reservoir pressure except by the excess stroke of the emergency piston, because, in ordinary braking, where there is no excess stroke, such reservoir pressure is directly exerted upon said piston. In the description of the invention by the patentee there is no statement that the emergency valve is to be shielded from reservoir pressure until it is brought into operation. No such limitation is stated in the claim; no movement of the triple-valve piston is described in Fig. 12. The emergency piston may or may not be shielded from auxiliary pressure. Therefore, when the patentee claims the combination "substantially as described," he ought not to be held to a construction not specified, either in the description or claim, especially where such construction does not appear to be material, and where it only concerns the apparatus when not in use, and does not affect it at all when in operation. *Rob. Pat.* 517, 750. The rule that the claim must be limited to the invention does not necessitate reading into the claim something not specified or necessarily implied therein, *Lake Shore & M. S. Ry. Co. v. National Car-Brake Shoe Co.*, 110 U. S. 229, 4 Sup. Ct. 33; *Electric Light Co. v. Westinghouse*, 55 Fed. 498. The distinction between this case and *Snow v. Railway Co.*, *supra*, appears from the opinion of Judge Wallace in said case, where he says:

"The plain and explicit language of the specification requires a construction of the first claim which will enable the defendant to escape liability as an infringer. * * * The specification states that 'the piston is disconnected from its rod to prevent any lateral strain being communicated to it.' * * * The drawings show a detached piston rod, and all the co-operative devices are conformed and adjusted to a detached rod."

And in said case Judge Wallace held, and the United States supreme court, affirming his decision, held, that it was "impossible

to ignore the particular construction of these two parts which is thus pointed out as material." In said case the claim stated the combination where "constructed and operated, substantially as described." In *Van Marter v. Miller*, 15 Blatchf. 562, Judge Wallace states the rule as follows:

"In construing a patent, it is, first, pertinent to ascertain what, in view of the prior state of the art, the inventor has actually accomplished, and, this having been found, such a construction should be given as will secure the actual invention to the patentee, so far as this can be done consistently with giving due effect to the language of the specification and claim."

The words "substantially as set forth" mean "substantially as set forth in regard to the combination which is the subject of the claim," and they should be given a construction commensurate with the real invention so as to protect the inventor. *Lake Shore & M. S. Ry. Co. v. National Car-Brake Shoe Co.*, supra; *Winans v. Denmead*, 15 How. 330; *Grier v. Castle*, 17 Fed. 523. A patentee may, of course, by the language of his claim, restrict the scope of his rights under his invention; but, as no such restriction is to be found in said claim, we are limited to a comparison of the operation of the structural law of the patented machine with that of the alleged infringing machine. *Rob. Pat. 962*.

It remains to further consider certain suggestions in regard to the piston and supplemental piston of defendants' earlier device. When this emergency piston is called into operation by a sufficient reduction of pressure it is not, as in complainants' device, so driven by auxiliary reservoir pressure as to act directly on the emergency valve, but, when so forced down, it opens a port whereby train pressure is admitted to the upper side of the other piston, which, being thereby forced down, imparts opening movement to an emergency valve leading to the brake cylinder. We have here the triple-valve piston and two other pistons used to accomplish the work of the one piston in complainants' device. And defendants claim that in their device there is not the combination of triple-valve piston and emergency valve, because the first of these two pistons does not impart opening movement to the emergency valve, its only function being to uncover a port whereby air is admitted to the brake cylinder, and the train pipe is vented. They further claim that the second supplemental piston in said device is not actuated by reservoir pressure, but by train pressure. Of the two separate or emergency pistons of the defendants, one opens a port which admits train pressure to the other. The former is directly actuated by pressure from the auxiliary reservoir. The latter is directly actuated by train pressure. But the latter is indirectly actuated by pressure from the auxiliary reservoir in the sense that such pressure necessarily results in operating it through the intermediate operation of the former. The question is whether this combination of devices is the same as the device of complainants. It seems to me that it is. The component parts of the combination operate together "to perform the same function, and to produce the same result." It is merely dividing complainants' piston into two parts, so arranged that the action of one necessarily causes the

action of the other in the same way as though they were one. "A patent for a device cannot be avoided by dividing it into two parts, which, when combined, produce the same result in substantially the same way. * * * With reference to the object in view,—the raising and lowering of the fingers, which is the useful purpose contemplated,—the effect is identical. The means * * * are substantially the same, and they operate, * * * in substance, in the same manner. To hold otherwise would be to give to immaterial variations capacity practically to destroy the value of any patent whatever." Judge Woodruff, in *Wheeler v. Reaper Co.*, 10 Blatchf. 181. In the case of *Strobridge v. Lindsay*, 6 Fed. 510, a case somewhat similar to the one at bar, was presented. The complainant was the owner of a patent for a coffee mill. The claim in suit was for "a detachable hopper and grinding shell, formed in a single piece," etc. The defendants, having been enjoined, made a new mill in which the hopper and grinding shell were cast separately. Judge Acheson held that this did not avoid infringement, and said:

"The change is but colorable. Although cast in two pieces, yet, when put together for use, the hopper and grinding shell are substantially, and for all practical purposes, 'formed in a single piece.'"

The same view was held by the supreme court of the United States in *Robertson v. Blake*, 94 U. S. 728.

I have not overlooked the distinction between the atmospheric pressure on both sides of the emergency valve of complainants, and the auxiliary reservoir pressure on one side, counterbalanced by train pressure on the other side, of defendants' device. This difference does not affect the operation of the emergency piston. The concession by defendants that complainants' valve is for this reason a better valve does not seem to me to help the defendants. If the defendants have made a different construction in this respect, which is inferior to that of the patent in suit by reason of its tendency to leak, while retaining the other elements of the combination of complainants, it seems to me that this fact suggests that the claimed difference is only a colorable one, merely designed to get rid of the claims of the patent in suit. *Strobridge v. Lindsay*, supra. Besides, these advantages of complainants' construction over that of defendants, suggested by counsel for defendants, were not what the inventor was seeking to obtain. He was not trying to invent a nonleakable valve, nor a valve which should necessarily be limited in arrangement, or shielded in a particular way, while not in operation. The object of his invention was to provide an emergency valve which should act certainly and effectively in an emergency. The question is whether the operation of defendants' device, when in action, is the same, and produced the same results, as that of complainants. "In determining the question of infringement the court or jury * * * are to look at the machines, or their several devices or elements, in the light of what they do, or what office or function they perform, and how they perform it, and to find that anything is substantially the same as another, if it performs substantially the same function in substantially the same

way to obtain the same result." Justice Clifford, in *Machine Co. v. Murphy*, 97 U. S. 120; *Cantrell v. Wallick*, 117 U. S. 689, 6 Sup. Ct. 970; *Brass Co. v. Miller*, 9 Blatchf. 77. In regard to all these alleged differences of construction, the language of the supreme court in *Sessions v. Romadka*, 145 U. S. 45, 12 Sup. Ct. 799, seems to be directly in point, where Mr. Justice Brown, speaking for the court, says:

"In view of the fact that Taylor was a pioneer in the art of making a practical metallic trunk fastener, and invented a principle which has gone into almost universal use in this country, we think he is entitled to a liberal construction of his claim, and that the Romadka device, containing, as it does, all the elements of his combination, should be held an infringement, though there are superficial dissimilarities in their construction."

What has already been said has been directed chiefly to the combination described in the first claim of complainants' patent. The additional check valve claimed in the second claim is found in the defendants' first device. The elements of the third claim are in the main the same as in the first claim, and the additional element—a passage between the supplemental piston and auxiliary reservoir—is found in defendants' device. As a result of these considerations, I have reached the conclusion that the first form of defendants' apparatus, the "quick-action triple valve" infringes the first three claims of the patent in suit, and that the second form, the "modified quick-action triple valve," infringes the first and third claims of the patent in suit.

The sixth claim of patent No. 376,837 reads as follows:

"In a brake mechanism, the combination of a triple-valve casing, a supplemental valve chamber composed of an inner section which is formed integral with the triple-valve casing, and a separable outer section, each having a lateral air pipe or passage, and a supplemental valve seat formed in a division plate or partition, interposed between, and secured to, the two sections of the supplemental valve chamber, substantially as set forth."

The alleged invention herein consisted in so arranging the triple-valve casing as to include therein part of the chamber of the emergency valve, leaving the other part to be made separately. In this way it is claimed that the construction of the apparatus was simplified. It is admitted that the construction of defendants' casing is the same as that claimed by complainants. The defense is lack of invention. I think the defense is fully made out. If it required any inventive talent to suggest the details of construction, they are found in the Massey patent, No. 358,867. But it seems to me that it is merely a convenient way of putting the parts together, which would have occurred to any one. "It is but the display of the expected skill of the calling, and involves only the exercise of the ordinary faculties of reasoning upon the materials supplied, by a special knowledge and the facility of manipulation which results from its habitual and intelligent practice, and is in no sense the creative work of that inventive faculty which it is the purpose of the constitution and the patent laws to encourage and reward." Justice Matthews, in *Hollister v. Manufacturing Co.*, 113 U. S. 59, 5 Sup. Ct. 717; *Deere & Co. v. J. I. Case Plow Works*, 6 C. C. A. 157, 56 Fed. 841.

As already stated, the third case is based upon a patent which had not been granted when the other suits were brought. As it involves a further consideration of the devices and defenses already discussed, it will be disposed of in this connection. This suit is for the alleged infringement of claims 1 and 2 of patent No. 448,827, granted to George Westinghouse, Jr., March 24, 1891, for an air brake. This is a divisional patent, having been originally applied for as part of patent No. 376,837, which has just been considered. Said claims are as follows:

"(1) In a fluid-pressure brake apparatus, normally operated by a triple-valve device, the combination, with such an apparatus, of a valvular appliance having a casing provided with supply and discharge passages or connections, and a valve controlling an exhaust port from the supply passage to the discharge passage for quickly releasing pressure in the supply passage, said valve being actuated to open the exhaust port by a greater than normal reduction of pressure in the supply passage, independently of the action of the triple-valve device, substantially as set forth."

"(2) The combination, with a triple-valve mechanism, of a discharge valve controlling an exhaust port from a supply passage to a discharge passage for quickly releasing the pressure in the supply passage, said valve being actuated to open the exhaust port by fluid pressure in an auxiliary reservoir on reduction of pressure in the supply passage below the normal degree, in whatever position the slide valve of the triple-valve mechanism may be brought by such reduction, substantially as set forth."

It appears from the specification that the object of said invention was "to provide means for effecting the rapid admission of fluid under pressure to a desired delivery receptacle, by means of, and coincidentally with, a reduction of pressure in the receptacle of a fluid supply," and that the means by which this object was to be attained could be used with or without a triple-valve apparatus. All the drawings except the first show the appliance as connected in operative relation with such triple-valve apparatus. The alleged invention consists of a valve controlling communication between a supply passage from the train pipe and a delivery passage to the open air, or a brake cylinder. This valve is held in position by a spring, so as to close ports leading to the delivery passage, and not to be moved from its seat by ordinary reductions of pressure for service stops. There is also a diaphragm and valve stem interposed between the supply passage and a passage to a special reservoir or an auxiliary reservoir. Said controlling valve is connected to said valve stem. Train-pipe pressure passes through a small passage in said diaphragm into said reservoir, thus equalizing pressure on the opposite sides of said diaphragm. Upon a sudden reduction of pressure, sufficient for an emergency stop, the excess pressure on one side of said diaphragm moves it and its valve stem and the said controlling valve, downwardly, so as to open said ports, and allow the compressed air to pass through the delivery passage to the open air or brake cylinder.

Defendants admit infringement of claims 1 and 2; but they urge that said claims are void, alleging the following reasons:

"(1) They must be construed to cover (a) the mere transfer of the automatic relief valve of 162,465 from the direct system to the automatic system, which is a mere double use, and not an invention; (b) the mere substitution for the automatic relief valve shown in 360,070 of the automatic relief valve of 162,465,

which is a mere substitution, and not an invention. (2) There is no invention described in 448,827, in view of 162,465 and 360,070. (3) The alleged amendments of April 26, 1890, and all of later date, are 'enlargements,' and not amendments. (4) The claims were designedly made far too broad, and must be construed to cover (a) the double use, and (b) a relief valve, whether controlled by a piston or its equivalent, or controlled in any other way, known or unknown."

Most of the claims in support of the second defense have already been discussed; but, as they are forcibly renewed upon a different aspect and in a different connection in this case, they seem to call for a further consideration. Irrespective of the question of the effect of the so-called "amendments," and the action of the patent office thereon, which will hereafter be considered, it seems to me that this divisional patent fairly represents an invention distinct from those which preceded it. The problem presented was how to provide for a certain, sure operation of the emergency valve, and how to rapidly apply brakes for an emergency stop, upon or by means of an emergency reduction of pressure. The solution was accomplished by a valvular appliance so arranged as to operate independently of the triple valve, although capable of being used in combination with it. The essence of the invention lies in providing a means whereby the emergency apparatus may be directly brought into efficient operation, although the triple valve may be stuck fast. I do not find in the argument of defendants anything which renders it necessary again to discuss patents Nos. 162,465 or 360,070, nor do I see any reason for changing the views already fully stated,—that patent No. 376,837 embodies a valuable invention, and that the patent, therefore, is valid. The domain of the conception, as stated by complainants' counsel, consists in the elimination from the apparatus of patent No. 448,827 of all mechanical connection between triple valve and emergency valve whereby the movements of the latter may be controlled by the former. The distinct invention in patent No. 448,827 is the combination of the valve with the triple-valve mechanism, under such relations that it does not need any movement on the part of the triple-valve mechanism in order to operate it. If the invention embodied in patents Nos. 360,070, 376,837, and 448,827 be considered in its entirety, we shall see that it is for the fluid-pressure car brake, consisting of various combinations operating in different ways. The object to be attained by such invention is the successful, practical operation of the brakes on all occasions. One of the exigencies to be guarded against in providing for all contingencies is the possible sticking or wedging of the triple valve. While, therefore, the apparatus covered by patent No. 448,827 is adapted to be used in connection with the triple-valve device, and in combination with a brake apparatus normally operated by such device, yet it is designed to be so constructed that, upon a considerably greater reduction of pressure than that required for a service stop, the pressure from the reservoir on top of the diaphragm will cause it to work in any case. By this means the mechanical dependency of the emergency part of the apparatus upon the movement of the other part is eliminated. This subject will be further discussed in the consideration of said claims.

The defendants claimed, in connection with the proceedings in the patent office, that Westinghouse falsely swore that said improvement had not been patented with his knowledge or consent, and that his application did not contain any description of the invention, patented in patent No. 448,827, until after he had knowledge of the apparatus made by defendants, and that because of such knowledge he made the alleged amendments. The first point was not referred to in the briefs or arguments of counsel for defendants. Even if true, it does not seem to be material. *Hoe v. Cottrell*, 17 Blatchf. 546, 1 Fed. 597. The second point is unsupported by proof. It was not pressed upon the argument of the case. The record shows that the second claim for the combination with a triple-valve mechanism of a "discharge valve," etc., was made before any record evidence of the existence of defendants' valves. I therefore have not considered the matter. The history of the patent is important in the consideration of the defenses that the alleged amendments are enlargements, and not amendments. I understand counsel to mean, by "enlargement," such an alteration of the claim of a patent as to enlarge the scope of, or make a total change in, the invention as originally described. It appears from the evidence, and is agreed by the parties, that Fig. 1 of patent No. 448,827 was originally Fig. 13 of patent No. 376,837, and that patent No. 448,827 contains a paragraph which was originally in patent No. 376,837. In the original application, therefore, as a part of patent No. 376,837, the subject-matter of this divisional patent was described in connection with a triple-valve apparatus. It further appears that, when patent No. 448,827 was first applied for, there was but one sheet of drawings, and but one figure, which is Fig. 1 of the present patent, and that the new sheets were inserted in compliance with an express requirement of the patent office. It is further agreed that the record does not disclose any action of the patent office requiring or requesting that Fig. 13 of patent No. 376,837 should be taken out of that application. It further appears from the file wrapper and contents that in the original specification of this divisional patent the valve mechanism therein claimed was described as capable of being employed in connection with, and supplementary to, the automatic triple-valve apparatus, although it was not claimed as so connected. Afterwards, on citation of anticipations, the claims were amended so as to be restricted to a combination of triple-valve and emergency-valve apparatus.

If the original apparatus was an invention, and was described as capable of use independently or in a combination, I do not see how a subsequent amendment, restricting the claim to such combination, can constitute a new invention. The combination was not one where the triple-valve and emergency apparatus acted together in ordinary braking, but one wherein the latter was only operated by a greater than normal reduction of pressure, without requiring for such operation any movement or co-operation on the part of the triple-valve device. It seems to me that the inventor acted clearly within his rights under the law in this regard, and that said amendments were not enlargements of the invention already described. In

Railway Register, etc., Co. v. North Hudson Co., 24 Fed. 793, Judge Nixon said:

"The question is not, as the counsel of the defendants seem to imagine, whether everything which appears in these three claims was incorporated in the fifth claim of the original application, but whether the specifications of that application fairly indicate all that was put into these claims. I do not understand that an inventor applying for a patent and before it is issued, may not amend or enlarge his claims from time to time, in order to embrace everything which was specified at the start."

To the same effect is **Singer v. Braunsdorf**, 7 Blatchf. 521. In cases of reissue I find the rule laid down as follows:

"It must appear by the description in the original patent that it was the purpose of the patentee to secure the thing specified in the claim of the reissue." **Featherstone v. Cycle Co.**, (1893,) 6 C. C. A. 487, 57 Fed. 631.

A reissue must be for the same invention intended to be embraced in the original patent, and cannot be substantially changed, either by the addition of new matter, or the omission of important particulars, so as to enlarge the invention as intended to be originally claimed. **Plow Co. v. Kingman**, 129 U. S. 299, 9 Sup. Ct. 259. "If the amended specification does not enlarge the scope of the patent by extending the claim so as to cover more than was embraced in the original, and thus cause the patent to include an invention not within the original, the rights of the public are not thereby narrowed, and the case is within the remedy intended by the statute." **Eames v. Andrews**, 122 U. S. 40, 7 Sup. Ct. 1073. See, also, **Leggett v. Oil Co.**, 149 U. S. 287, 13 Sup. Ct. 902; **Railway Register Manuf'g Co. v. Broadway & S. A. R. Co.**, 26 Fed. 522. If the rule laid down in the foregoing cases be applied herein, and the original specification contained in patent No. 376,837 and in the original divisional application be examined and compared with the claims in suit, it will be found that all the elements and the combination covered by said claims were described in, or embraced within the scope of, said original specification.

The considerations already suggested seem to raise a question as to the co-operation of the elements of the combination as claimed. Where subordinate "elements are so united that by their reciprocal influence upon each other, or their joint action on their common object, they perform additional functions, and accomplish additional results, the union is a true combination." **Rob. Pat. 155**. Whether the elements act successively or simultaneously is of no consequence, provided they coact to produce a new and useful result, in accordance with the co-operative law described in the claim. **Id. 156**; **Holmes Burglar Alarm Co. v. Domestic Tel. Co.**, 42 Fed. 220. In **Hoe v. Cottrell**, 1 Fed. 597, Judge Shipman sustained the patent for a combination because the beneficial results involving a new mode of operation were "the product of the successive action of all the elementary parts." **Newbury v. Fowler**, 28 Fed. 454, holds that a claim for supplemental mechanism, so adapted to a time lock as to remain inert until the time lock was broken, and to be brought into action by such breaking, is a valid claim for a combination. **Electric Light Co. v. Westinghouse**, *supra*. In this combination,

when the slide valve of the triple valve gets stuck, instead of acting as a port, it acts as a plug to the port, and thereby causes the emergency valve to be directly operated through its own passage way between the train pipe and the brakes, by the direct reduction of pressure by the engineer. In this view, at least, the parts may be fairly said to act separately to contribute to a unitary result. Such co-operating action is confessedly found in the function of speeding the action of the next succeeding triple valve.

Furthermore, the combination is not denied by the expert or counsel for defendants. In *Yale Lock Manuf'g Co. v. Norwich Nat. Bank*, 6 Fed. 395, the court, speaking of the independent action of the time lock and bolt lock, says:

"Each mechanism strengthens the weakness of the other, and by its positive advantage fills up the deficiencies of the other. The result is a product of greater efficiency than is fairly represented by the sum of the two results. The result is not a combination of two results, but a result from the combined action of two locks upon the bolt work, each acting independently, but the action of each supplying the lack of the other."

The considerations already stated would seem to cover all the defenses raised by defendants. This patent covers a useful invention. Some such contrivance would seem to be indispensable to the practical operation of the system in emergencies. But, in view of what Westinghouse had already done, it has seemed to me that the history, construction, and claims of this patent, and the state of the art, should be critically examined. The questions involved herein were most forcibly presented by the ingenious and able arguments of counsel. In the consideration of these questions I have had in mind the limitation suggested by Judge Shipman, in delivering the opinion of the circuit court of appeals in *Electrical Accumulator Co. v. Brush Electric Co.*, 1 U. S. App. 320, 2 C. C. A. 682, 52 Fed. 130, where he says:

"When one inventor makes a generic invention, and also subordinate specific inventions, and presents the whole series in a set of contemporaneous applications, the patentee must not be enabled, by an ingenious use of general terms, to enlarge the boundaries of each invention, to extend each into the borders of another, and obtain a series of overlapping patents."

But I am forced to the conclusion that George Westinghouse described, in the original specification of this patent, an improvement upon previous inventions which was capable of use independently, or as part of a combination, but which owed its utility in such combination to its independency of operation in emergencies in supplying the lack of the other part of the combination, and that this useful element involved invention, in order to adapt it to such combination, and to the exigencies of the automatic quick-action freight-brake system.

In suit No. 4,976 it is claimed that defendants, by their first form of quick-action triple valve, have infringed claims 1 and 2 of patent No. 393,784, granted to Harvey S. Park, December 4, 1888. This patent having been assigned to the Westinghouse Air-Brake Company alone, its alleged infringement is for that reason made the basis of a separate suit. The essence of this invention is the

combination of elements for operating the separate emergency valve by train-pipe pressure, instead of by auxiliary reservoir pressure, as in patent No. 376,837. This result was accomplished by providing a separate emergency piston and valve, ordinarily exposed to train-pipe pressure, above said piston, which pressure served to hold the valve on its seat, and was not affected by ordinary reductions of pressure for service stops. But the considerable reduction of pressure necessary for an emergency stop caused air from the train pipe to be vented into the space below said piston, equalizing the pressure on both sides, and acting on the under side of said valve, causing it to be unseated, and to thus allow the train-pipe pressure to be vented directly into the brake-pipe cylinder. The claims alleged to be infringed are as follows:

"(1) In a brake mechanism, the combination of a valve controlling the direct passage of pressure from a train pipe to a brake cylinder, a piston connected to said valve and actuated wholly by train-pipe pressure, and a valve controlling the train-pipe pressure on the piston for opening and closing the communication between a train pipe and a brake cylinder through the direct action of train-pipe pressure, substantially as specified.

"(2) In a brake mechanism, the combination of a train pipe, a brake cylinder, an interposed chamber communicating with the train pipe and brake cylinder, a piston in said chamber, a piston stem, a valve on the piston stem controlling the passage from the interposed chamber to the brake cylinder, and a controlling valve and passages for the admission of pressure from the train pipe to move the piston and open the valve, substantially as and for the purposes specified."

It does not seem necessary to further consider the details of construction of this device, whereby the emergency apparatus is called into operation, because they are not material to the defense of non-infringement. The defendants' first form of quick-action triple valve contains all the elements specified in said claims. But the piston of the emergency valve, in the first claim of said patent, is claimed as "connected to said valve, and actuated wholly by train-pipe pressure." It will be remembered that in defendants' said device there are two pistons which operate the emergency apparatus, instead of the single emergency piston of patent No. 376,837, and of the patent in suit. Of these two pistons, the one which corresponds in construction with the single emergency piston of the patent in suit, and which may therefore be called "defendants' emergency piston," is not fastened to the emergency valve, but merely presses upon it through its spindle, which rests on top of said valve. From this difference in construction there results a difference in the operation of the two devices. In complainants' device said valve is held to its seat by train-pipe pressure on one side of said piston, and upon an emergency application is unseated by means of train-pipe pressure admitted to the other side of said piston. In defendants' device, upon an emergency application, train-pipe pressure upon the emergency piston causes it to unseat said emergency valve. But, as said piston stem is not fastened to said valve, train-pipe pressure on the under side of said piston does not close said valve, but it is seated by combined spring, train-pipe, brake-cylinder, and auxiliary-reservoir pressure.

These differences are material only upon the question whether the defendants have the "piston connected to said valve and actuated wholly by train-pipe pressure," covered by complainants' first claim, so that train-pipe pressure, acting first on one side of said piston, and then on the other side, would operate said valve. "Connected to" means "bound or fastened together," "united, or joined, or coupled to,"—like a "connecting rod." Cent. Dict. I do not think defendants' piston is "connected to" the valve in a mechanical sense. It is certainly not so connected as to close the emergency valve. It therefore seems to me that said device does not infringe said first claim. *McClain v. Ortmyer*, 141 U. S. 419, 12 Sup. Ct. 76. In the second claim, Park does not claim the piston connected to said valve, and actuated wholly by train-pipe pressure, but claims "a piston stem, a valve on the piston stem controlling the passage from the interposed chamber to the brake cylinder, and a controlling valve and passages for the admission of pressure from the train pipe to move the piston and open the valve, substantially as and for the purposes specified." The description shows that the said valve is controlled in both opening and closing by train-pipe pressure admitted into the piston chamber above and below the piston, and moving the piston. Now, if the valve were disconnected from said piston, as in the first form of defendants' quick-action triple valve, said train-pipe pressure, acting on the piston, would not close the valve, because the piston would have no control over the valve.

Applying the considerations already suggested as to the scope of the claim, it seems to me that the construction described by the patentee embodies, as an essential to its successful operation, a valve connected to said piston, and that therefore it must be covered by said second claim. *Rob. Pat. 523*; *Ex parte Richardson*, 7 O. G. 1053. Inasmuch as the means employed by defendants thus differ from those described and claimed as essential in the patent in suit, it seems to me that the complainants' patent is not infringed. I am therefore of the opinion that defendants' first form of quick-action triple valve does not infringe said second claim. It is not claimed that defendants' second or modified form of quick-action apparatus infringes said claims.

Complainants, in suit No. 4,977, further allege infringement of claim No. 3 of patent No. 172,064, issued to George Westinghouse, Jr., January 11, 1876, for an improvement in air-brake valves. This invention was designed to be used in connection with the form of automatic-brake apparatus employed prior to the invention of the quick-action apparatus. The object of the invention of 172,064 was to provide means for the application and release of the brakes by the admission of air from the auxiliary reservoir and the discharge of air from the brake cylinder as in the automatic-brake apparatus. The patent in suit is for an improvement on No. 168,359, granted to said Westinghouse, October 5, 1875. The defense is noninfringement, chiefly on the ground that the defendants have adopted the construction of the said original patent, No. 168,359, which is not in suit. I shall therefore consider these patents together. Patent No.

168,359 provides for a piston and slide valve so arranged that air pressure transmitted through the train pipe shall pass on the under side of the piston, and hold it in an upward position, and thence pass through a side port in the piston-valve case, and certain other ports and passages, into the auxiliary reservoir. The effect of this pressure is to hold the slide valve in position above two connected ports, one leading to the brake cylinder, the other to the open air, so that any pressure in the brake cylinder will escape to the open air, and the brakes will be off. When the pressure is reduced in order to apply the brakes, the back pressure from the auxiliary reservoir depresses said piston so that it passes down and closes the supply ports, and shifts the slide valve so as to open the port leading to the brake cylinder and expose it to auxiliary reservoir pressure, and so as to close the port leading to the open air.

In patent No. 172,064, the inventor dispensed with said side port in the valve case, and substituted therefor a port through the piston itself. The piston was so arranged, in connection with this port, that said port could be opened or closed without moving the slide valve. This was accomplished by having the stem of the piston fitted to the port in the piston, so that it would close the port when moved into it, and open it when removed, and by further providing that the slide valve should be made shorter than the distance between the collars on its stem, thus insuring the necessary slack motion for closing the supply port before the slide valve begins to move. Claim 3 is as follows:

"(3) The slide valve, H, made shorter than the distance between its end bearings, in combination with the port, s, and stem, c', relatively arranged with reference to the operation of the valve, H, while the port, s, is closed, substantially as set forth."

Defendants' device, as illustrated by "defendants' plain triple valve," contains the slide valve, made shorter than the distance between its end bearings on the piston stem. It is also provided with two ports, one of which leads from the train pipe, through the piston chamber, and by other passages, to the auxiliary reservoir. The other port leads from the auxiliary reservoir to the brake cylinder. This port is closed by having the end of the piston stem slide onto it, and cover it, like a valve upon its seat. There is no port through defendants' piston, and consequently no piston stem fitted to enter such port. The two combinations are so arranged as to provide the lost motion in the same way, and to close the supply port before commencing to open the slide valve, and without having to overcome any resistance from the slide valve.

But defendants contend that the port leading from the train pipe to the piston chamber is the equivalent of the port, s, in complainants' claim; that this is the side port of patent No. 168,359; and that patent No. 172,064 was designed to get rid of a side port, and substitute a central port. The inventor states that his invention dispenses with the side port which is found in defendants' device and in patent No. 168,359, and substitutes therefor a port directly through the center of the piston; and the claim in suit is for a combination of valve, port, and stem, "substantially as described."

The defendants accomplish the same result by a combination which contains a port, not through the center of the piston, which does not connect the train pipe and the auxiliary reservoir, but does connect the auxiliary reservoir with the brake cylinder, while the port in their device, which connects the train pipe with the auxiliary reservoir, is the side port of patent No. 168,359, which was dispensed with in patent No. 172,064.

Two further objections are suggested to the claim of complainants that the end port between the auxiliary reservoir and the brake cylinder, is the equivalent of their port through the center of the piston. In the operation of complainants' device the single port is open for the free passage of air from the brake pipe to the auxiliary reservoir, when the train is in running condition, and is closed to apply the brakes. In defendants' device the side port is closed, and the end port is then opened to apply the brakes. Furthermore, the stem of complainants' device is so arranged as to close the central port in the piston, by entering it while the piston is still free to move; while in defendants' device, the moment the piston stem strikes the end port and covers it, the motion of the piston is arrested. I do not decide the question, however, upon these grounds. But inasmuch as complainants claim a combination which contains a port through the center of a piston, described as substituted for a side port, with which said improvement dispenses, and as defendants' device depends upon the use of a side port, and has no port through the piston, but is made up by a combination of different elements, which are admitted in patent No. 172,064 to be a part of the prior art, the combination claimed in claim 3 of said patent is not infringed. A correct construction of the claim must include the port through the center of the piston, substituted for the side port of patent No. 168,359. *Perrin v. Railroad Co.*, 56 Fed. 503. The defendants had the right to use other parts of the combination claimed, provided they substituted for the port through the piston another mechanical structure substantially different in its construction and operation, although it served the same purpose. *Eames v. Godfrey*, 1 Wall. 78. The patentee is bound by the explicit language of the claim. *McClain v. Ortmyer*, supra.

In suit No. 4,976, complainants also allege infringement of patent No. 222,803, granted to George Westinghouse, Jr., December 23, 1879, for an improvement in operating cocks for fluid-pressure brakes. This device is known as the "engineer's valve." It is intended to be operated by the engineer on the locomotive engine, "to admit the fluid pressure to the brake pipes and cylinders, fast or slow, as may be desired, to cut off automatically, or stop, such admission of fluid pressure, to hold or retain automatically such pressure, with little or no increase or diminution, and also to permit the escape of the fluid pressure previously admitted or charged into the brake cylinders; and it is important, for convenience in use, that all these functions be performed by movements of a single stem, handle, lever, or crank, so that, so far as the working of the device is concerned, the engineer need give his attention to but a single device." The contrivance described in the patent consists

of a piston case, containing a piston governing a charging valve held up to its seat partly by fluid pressure, and partly by a spring, and an escape valve held down to its seat partly by gravity, and partly by a preponderance of fluid pressure on its upper end. This governing piston is exposed on its under side to fluid pressure, and on the upper side to pressure from a spring. A screw stem worked by a crank arm is so arranged in connection with said spring that by the revolution of the crank arm the downward pressure of said spring upon said piston is increased or lessened. The effect of such change of pressure is to cause the piston to be moved upwards or downwards, according as it is acted upon by an excess of fluid or of spring pressure, and to open or close the charging and escape valves. Beneath the lower end of the escape valve, provision is made for a certain amount of slack motion, so that the governing piston may be moved up or down for a short distance without unseating the escape valve. The effect of this arrangement is to prevent the possibility of both valves being open at the same time.

The operation of said apparatus is as follows: In order to apply the brakes or to open the charging valve, the crank arm is screwed down, and this increase of pressure, transmitted through the stem of the piston head to the charging valve, unseats it, and permits fluid pressure to pass from the boiler or storage reservoir to the train pipe and brake cylinders. This fluid pressure also passes upward to the space below the piston head, and exerts the same pressure upon it as in the train pipe or brake cylinders. The engineer knows, from his engineer's gauge, just how far to screw down his crank, so that when the necessary amount of pressure has passed through to the train pipe or brake cylinder the same pressure will automatically lift the piston and close the charging valve. The crank arm is screwed up in order to open the escape valve, and, after the proper amount has been discharged, the escape valve automatically closes in the same way as already shown in the case of the charging valve.

Complainants claim infringement of claims 2, 3, and 4 of said patent. Said claims read as follows:

"(2) As a means for automatically cutting off the fluid-pressure supply when the desired pressure has been charged into the brake cylinders, a piston head, P, movable by the operative brake pressure or any excess thereof, in combination with the charging valve and a connection from one to the other, substantially as set forth, whereby such movement of the piston head will result in the automatic closing of the charging valve, substantially as set forth.

"(3) The combination of piston head, charging valve, interposed stem, and escape valve, substantially as set forth, with reference to the opening and closing of the charging valve without necessarily opening the escape-valve, substantially as set forth.

"(4) The combination of piston head, charging valve, interposed stem, escape valve, and a single operating stem, adapted by independent connections with both valves to shift both by independent successive motions, substantially as set forth."

Defendants' engineer's valve has a single operating lever and stem, which is worked by moving a handle having a reciprocating motion from one side to the other. It also has a piston case, containing a piston governing a charging and an escape valve, so ar-

ranged that, acting together, they have practically the same functions as complainants' valve. The governing piston is exposed to fluid pressure on both sides. It is also acted upon from below by a bell-crank lever, or bent lever with vertical arms, connected by links to said piston and to a second lever, which second lever is connected with a light spring, the resistance of which corresponds to a uniform variation in the pressures on the opposite sides of said piston as it rises. The marked difference, as claimed by defendants, between the two contrivances, is that, while in complainants' device the turning of the crank arm compresses or relaxes a spring, in defendants' device the moving of the handle directly and positively opens the valve without the interposition of a spring. This is accomplished by having the main lever, which is fastened to said handle, carry an eccentric pin, which passes through said lever, and which moves in the arc of a circle. The right end of the lever is held stationary by a jaw and fulcrum pin; the left end, when said handle is moved to the right, is lifted by the rock-shaft motion imparted by said pin, and strikes against another pin attached to the escape valve, and raises and opens said escape valve. This lever has also an upper jaw, which moves in a pin attached to a bell-crank lever, the arm of which is directly beneath the charging valve. In order to open this valve, the handle is moved to the left, which causes the main lever and pin to move to the left, and to raise the arm of the bell-crank lever, and open the charging valve. Provision is made for slack motion by a space between the top of the escape valve and said pin attached thereto, whereby the left end of the main lever is permitted to have a certain amount of play before it strikes said pin.

In view of these alleged differences of operation the defendants deny infringement. The complainants support their contention by a consideration of the features embraced in their claims, which are common to the two combinations; the defendants rely upon the differences in construction and operation. It appears that George Westinghouse, Jr., was the first inventor of an engineer's valve wherein the charging and exhaust valves could be automatically closed. It is necessarily an important element in the operation of the fluid-pressure brake system, because it sets in motion and controls all the other appliances of said system. Even if originally designed for the direct system, it was described by the inventor as capable of being applied to other systems, and it has been successfully used to operate automatic brakes in regular service. The essential result which the inventor seems to have intended was not, as claimed by defendants, "that the piston shall be pushed in one direction by train-pipe pressure, and in the other direction by a spring only, and that the tension of the spring shall be variable by means under control of the engineer." The spring is not mentioned in any of the claims alleged to be infringed. The essential result aimed at and accomplished was the operation of both valves by a single stem, and their automatic closing after said operation had accomplished the desired result. The claims show the combinations embodied in the invention.

In this connection, reference may be made to the defense that all the elements of these combinations were old, because shown in the patents No. 129,015, granted July 16, 1872, to Messrs. Fay and Cairns, and No. 141,685, granted August 12, 1873, to said Westinghouse. The former patent is for an apparatus for regulating the supply of water and preventing the bursting of pipes in houses. The latter patent is for a triple valve. An examination of these patents confirms the admissions made by defendants' expert, that neither of the structures is capable of performing the functions of the patent in suit, or could be substituted therefor. In view of these admissions, and of the manifest invention involved in the combination of the single elements described in said patents with other elements, and in their adaptation to manual operation for totally different purposes, I have not considered it necessary to consider the construction of said patents in detail.

Returning, now, to the invention embodied in the patent in suit, and bearing in mind the object which the inventor had in view, let us compare the claims in suit with the apparatus of defendant. The piston head, the charging and escape valves, the interposed stem, and the single operating stem of said claims are all to be found in defendants' apparatus. Their combination to form a device for admitting fluid pressure to the train pipe, and automatically cutting off the supply while retaining the necessary operative fluid pressure, and by means of such a connection between said single operating stem and said valves that independent successive motions of said handle shall move them independently of each other, is also found in defendants' apparatus. In each the piston automatically closes the escape valve when the desired pressure is reached, and in each the piston is movable by operative brake pressure, or any excess thereof, as specified in claim 2 of the patent in suit.

But the elements of defendants' device differ from those of complainants in the following particulars: The piston head of defendants, as already stated, is exposed to fluid pressure, alone, on one side, and to fluid pressure plus a spring on the other side, while in complainants' structure the piston head is exposed to fluid pressure, only, on one side, and to spring pressure on the other side. The defendants' device positively and directly opens the valves, as they claim; complainants' device pushes the spring which opens it. It is not necessary to determine whether the fluid pressure is the equivalent of the spring, because the presence or absence of the spring seems to me immaterial, it not being claimed as an element of the combination. The essential similarity seems to consist in the fact that in each contrivance fluid pressure is always practically constant on one side of the piston, and the movement of the piston is regulated by the variations of pressure on its other side, and in each case the piston automatically closes the escape valve when the desired pressure is reached. Defendants' valve is an operative device without the use of the piston. It would only be necessary for the engineer, after he had sufficiently reduced the pressure by opening the exhaust valve, to move the handle back and close it, and vice versa. The piston is essential to the operation of com-

plainants' device. Defendants' device has also a greater capacity for automatic closing of the escape valve than that of complainants.

It follows from the above differences that in the operation of complainants' apparatus the engineer has no control over the valves, except by moving the abutment on the spring. But while, in these respects, the device of defendants may be an improvement upon that of complainants, it does not seem to me to show that defendants have not appropriated the invention of complainants. It is well settled that one has no right, in making an improvement on another's device, to appropriate his invention. 3 Rob. Pat. 894, and cases cited. Furthermore, one of the experts for defendants testifies as follows, on cross-examination:

"Cross-Int. 28. Referring you to defendants' engineer's valve, as shown in plates 2 and 3 of defendants' catalogue, is it not the fact that you find therein a shell or case marked 31, 38, 40, and 41, and containing a piston chamber closed at top by the head, 41, and a valve chamber closed at top by the cap, 38? A. Yes. Cross-Int. 29. You also find in it, do you not, a piston head, 32, adapted to work in the piston chamber, and to be moved by the operative pressure or any excess thereof? A. Yes. Cross-Int. 30. You also find therein, do you not, a charging valve, 39? A. Yes. Cross-Int. 31. You also find therein, do you not, a connection between the piston head, 32, and charging valve, 39, consisting of a bell-crank lever, 49, a pin, 48, a lever, 43, and a stem or projection on the piston head, 32? A. Yes. Cross-Int. 32. You also find, do you not, that in defendants' engineer's valve, by reason of the connection from the piston head to the charging valve, movement at the piston head under the operative pressure or any excess thereof, will result in the automatic closing of the charging valve? A. Yes. Cross-Int. 33. You also find, do you not, in defendants' engineer's valve, a piston head, 32, a charging valve, 39, and an escape valve, 42, and interposed connections, 49, 43, and 48, so arranged that the charging valve may be opened and closed without necessarily opening the escape valve? A. Yes."

The effect of this testimony seems to be to admit that substantially all the elements of complainants' claims are found combined in defendants' engineer's valve, except the "single operating stem, adapted, by independent connections with both valves, to shift both by independent successive motions." The piston of defendants' device which corresponds with this claim is the spindle of the handle, the eccentric pin, and the lever which opens the escape valve. It performs the same functions as are claimed in the patent. It accomplishes the same results. That it is a handle, spindle, and lever, instead of a single stem, is immaterial, for the patentee says in his description that these functions may be performed by a single stem, handle, lever, or crank. The essential thing about this part of the invention, as stated by the patentee, is that "the engineer need give his attention to but a single device."

A careful examination of the testimony, and comparison of the claims 2, 3, and 4 of the patent in suit with defendants' engineer's valve, and consideration of the close and accurate analysis of the differences between them, made by the counsel for defendants, seems to show that defendants have contrived and constructed a most ingenious device, apparently, in some respects, superior to that of complainants. They have evidently sought to avoid infringement of complainants' patent, and have succeeded, as to some of its claims. With this end in view, they have constructed an apparatus

which is, in appearance, utterly unlike that of complainants, and in which the parts are so relatively combined that they either appear to act, or do act, differently from the corresponding parts of the patent in suit.

But it seems to me that the apparent differences of operation result either from the use of mechanical equivalents, as in the case of the handle and levers, instead of the crank and screw, or in different relative arrangement of the parts towards each other, as in the case of the screw, or the motions of the valves in opposite directions. The actual differences, such as greater automatic action, direct and positive opening of valves, and operativeness of apparatus independent of the piston, as found in defendants' devices, are matters not covered by the claims in suit, not essential to the accomplishment of the results aimed at in the invention, and not necessarily involved in, or excluded from, the operation of complainants' invention. On the other hand, the elements which are common to the combination claimed by complainants and to defendants' device are the vital elements, essential to the operation of the patent, and to the achievement of the result sought to be accomplished, namely, the combination of piston head, stems, charging and escape valves, arranged so as to be independently operated by the engineer by a single contrivance, and so as to automatically close when the desired pressure is reached.

And because of these conclusions, supported by the admissions of defendants' expert that the device of defendants contains the elements combined, as claimed by complainants, I am of the opinion that defendants' device infringes claims 2, 3, and 4 of patent No. 222,803. "Though there are differences in the form and structure of the intermediate mechanism, tending to simplicity, and perhaps improvement, and in the form of the casting mechanism, still each of these mechanisms, as it is embodied in the defendants' machine, performs the same function as the corresponding mechanism in the Mergenthaler machine, in substantially the same way, and they are combined to produce the same result. The combination which is covered by the claim is the same in both." Judge Lacombe, in *National Typographic Co. v. New York Typograph Co.*, 46 Fed. 114.

In suit No. 4,976, let a decree be entered dismissing the bill as to patent No. 393,784, and for an injunction and an accounting as to claims 2, 3, and 4 of patent No. 222,803. In suit No. 4,977, let a decree be entered dismissing the bill as to claim 3 of patent No. 172,064, and claim 6 of patent No. 376,837, and for an injunction and an accounting as to claims 1, 2, and 3 of patent No. 376,837. In suit No. 5,315, let a decree be entered for an injunction and accounting.

MASSETH v. JOHNSTON et al.

(Circuit Court, W. D. Pennsylvania. January 15, 1894.)

No. 8, Nov. Term, 1892.

1. PATENTS—INFRINGEMENT SUITS—DEFENSES.

The use of an infringing device is not justified by the fact that defendant had previously attempted to use one made under complainant's patent, which proved to be useless.

2. SAME—ABANDONMENT.

The failure of a patentee, for some years, to manufacture his device, does not defeat the rights vested in him by the patent.

3. SAME—ACTIONS—WITNESSES—CONSTITUTIONAL LAW.

The vendor of an infringing device, who is not a party to the suit, may be compelled to testify to the purchase and use thereof by defendant, without violating the constitutional provision that no witness shall be compelled to testify against himself in any criminal case; for Rev. St. §§ 4919, 4921, do not subject an infringer to penalties or forfeitures, but merely authorize the court in its discretion, and "according to the circumstances of the case," to impose additional damages.

In Equity. Suit by Benjamin Masseth against Johnston Bros. & Stanfield for infringement of a patent. Decree for complainant.

W. Bakewell & Sons, for complainant.

T. C. Campbell, for defendants.

BUFFINGTON, District Judge. This is a bill in equity for an accounting for alleged infringement of letters patent No. 167,400, for improvement in packers for shutting off water from oil and gas wells, granted April 21, 1875, to James P. Gordon, and assigned to complainant, Benjamin Masseth. The answer admits the use at the time of filing, and for two years previous thereto, by the respondents, of what is known as the "Palm Device," but denies infringement thereby, and further denies the patentability of Gordon's device. Since answer filed, this court has sustained the Gordon patent, (*Masseth v. Palm*, [No. 16, May term, 1891,] 51 Fed. 824,) and has held the Palm device, which the answer, by specific reference to the said suit, describes as the one respondents use, to infringe the Gordon patent; so that these defenses, however available when the answer was filed, cannot now avail.

The respondents further allege that they had complainant put in for them one of his packers, constructed under the Gordon patent; that it failed to shut off the water, and was useless, and they afterwards procured the Palm packer. We cannot see how this affords any defense to the present bill. The failure of the Gordon packer did not justify the respondents in replacing it with an infringing one, nor can the alleged failure of Gordon, for some years, to manufacture his device, avail to defeat his or his assignee's rights vested in them by the grant of the patent. *Campbell Printing-Press & Manuf'g Co. v. Manhattan Ry. Co.*, 49 Fed. 930. But it is alleged the only evidence of infringement is that of Palm, the vendor of the infringing device, which was taken under protest, and subject to the opinion of the court as to competency. It is contended that

Palm cannot be compelled to give evidence on behalf of complainant, because thereby he may subject himself to penalties and forfeitures hereafter in an accounting with the present complainant. In *Roberts v. Walley*, 14 Fed. 167, the right of the complainant to call a respondent seems to have been assumed, the contention being simply to restrict such examination within proper limits. Assuming, for present purposes, that infringement is not admitted by the answer, we see no reason why Palm was not competent to prove the purchase and use, by the respondents, of the infringing device. He is not a party to the present bill, and we do not regard Rev. St. §§ 4919, 4921, as subjecting him hereafter to penalties and forfeitures. They do not vest a right in a complainant to recover any penalty or forfeiture; they simply empower the court, in its discretion, and "according to the circumstances of the case," to impose additional damages against an infringer. See *Untermeyer v. Freund*, 58 Fed. 210. The calling of Palm to testify was a violation neither in letter nor spirit of the constitutional provision (see amendment 5) that "no person * * * shall be compelled in any criminal case to be a witness against himself."

We are of opinion the complainant is entitled to a decree.

MASSETH v. REIBER.

(Circuit Court, W. D. Pennsylvania. January 15, 1894.)

No. 16, Nov. Term, 1892.

PATENTS—INFRINGEMENT SUITS—DEFENSES.

The refusal of a patentee to furnish his device, when requested, does not justify the use of an infringing article.

In Equity. Suit by Benjamin Masseth against Ferd. Reiber for infringement of a patent. Decree for complainant.

W. Bakewell & Sons, for complainant.

T. C. Campbell, for defendant.

BUFFINGTON, District Judge. This case is governed by that of *Masseth v. Johnston*, (No. 8, Nov. Term, 1892,) 59 Fed. 613, to the opinion in which we refer. One additional matter is set up in defense. It is alleged that respondent requested complainant to put in one of his packers, and that he arbitrarily refused to do so until respondent would direct the payment of a contested bill by a company of which he was superintendent. These facts, however, would not justify the respondent in using an infringing device. "The exclusive right to his discovery" is what the law confers on a patentee. Whether he exercises that right or not, by manufacturing his device, cannot affect his exclusive right under the patent. *Roller-Mill Co. v. Coombs*, 39 Fed. 805; *Campbell Printing-Press & Manuf'g Co. v. Manhattan Ry. Co.*, 49 Fed. 930. We are of opinion the complainant is entitled to a decree.

THE WILLIAM SMITH.¹

CLYDE STEAMSHIP CO. v. THE WILLIAM SMITH.

(District Court, S. D. New York. December 8, 1893.)

SALVAGE—DERELICT—STRANDING DURING SALVAGE SERVICE ONE OF SALVOR'S RISKS.

The sum of \$8,336.23 represented the entire net proceeds of a schooner found derelict at sea, and brought safely into Southport, N. C., by libellant's large and valuable passenger steamship, and afterwards towed, by agreement, to New York for sale. After deducting the necessary expenses of the last-named towage, there was left \$5,450.77 of the proceeds of sale in New York as the true net proceeds. Of this, 70 per cent., or \$3,815.54, was allowed as salvage. During the salvage, stranding of the schooner occurred, which cost the steamer \$1,000. *Held*, that this item was not taxable as an expense, being a salvor's risk, and, as such, to be taken into account incidentally only.

In Admiralty. Libel for salvage. Decree for libellant.

Mr. Ward and Mr. Hough, for libellant.

Wing, Shoudy & Putnam and Mr. Burlingham, for respondents.

BROWN, District Judge. The whole net proceeds of vessel, cargo and freight amount to \$8,336.23. From this should be deducted, first, the expenses of bringing the schooner to New York from Southport, N. C., where the salvage service proper was completed. From there she was brought by the libellant, at the request and for the benefit of all parties in interest, and the result has been, doubtless, advantageous to all. This expense amounts, as I find, to \$2,885.46, after excluding therefrom certain charges incidental to the salvage proper, and also the sum of \$1,000, paid to a tug at Southport for getting the schooner off the bar, where she had grounded in the course of the salvage enterprise. This was an expense incident to the risk of the salvage operation, and was, therefore, at the risk of the salvors. This risk, however, is an element which is considered and allowed for in the percentage hereafter given to the salvors, and is covered by that allowance. Deducting the \$2,885.46 from \$8,336.23, leaves \$5,450.77, as the true net proceeds.

The schooner was a derelict; she had drifted in the ocean about 120 miles before she was picked up by the libellant's steamer *Seminole*. She is a large passenger steamer, worth about \$225,000, and had on board a cargo worth about \$370,000, as well as passengers impatient for the completion of the voyage. She was detained about 15 hours by the salvage service. The personal services of most of the ship's company in this case were comparatively small, and without danger; the expense and risk were chiefly on the part of the ship, and her owners. The salvage award, therefore, should go mainly to the latter. Seventy per cent. will, I think, be a proper allowance for the salvage service, which, computed upon \$5,450.77, makes \$3,815.54. Of this latter sum, \$200 should be reserved for

¹ Reported by E. G. Benedict, Esq., of the New York bar.

the master; \$150 for the first officer, Chichester; \$50 for the three seamen who were put aboard the schooner; \$200 for the other officers and men on board the steamer, to be distributed in proportion to their wages; and the residue, \$3,215.24, to the owners of the Seminole, besides the \$2,885.46 expenses above mentioned.

A decree may be entered in accordance herewith.

THE S. W. MORRIS.¹

PETRIE v. THE S. W. MORRIS.

NEWARK CHEMICAL WORKS v. SAME.

(District Court, S. D. New York. December 16, 1893.)

TOWAGE—STRANDING—OUT OF CHANNEL.

For getting upon rocks outside of the channel way at low tide without excuse, a tugboat is liable to her tow.

In Admiralty. Libels to recover damage to a tow and her cargo. Decree for libelants.

Goodrich, Deady & Goodrich, for Chemical Works.

Stewart & Macklin, for Petrie.

Hyland & Zabriskie, for claimants.

BROWN, District Judge. About noon on the 9th of August, 1893, the steam tug S. W. Morris, in towing the canal boat J. B. Devine alongside through the Kills towards Newark bay, ran upon a rock, or rocks, at low water, from 150 to 200 feet south of Bergen Point light, to the damage of the tow and cargo, for which the above libels were filed.

The evidence leaves no doubt that the shore off the Bergen Point light was known to be rocky and unsafe for loaded canal boats at low tide. The place of stranding was north of the proper channel course, which was at least 300 feet from the lighthouse. In the channel there was plenty of water, and plenty of space for navigation. Navigation out of the channel is at the risk of the tug, and not of the tow, which is without fault. It is not necessary that the pilot should have knowledge of the particular rock on which he strikes. His business is to keep the usual course, according to the time of tide, when he is navigating. For getting upon rocks out of the channel way without excuse, the tug is answerable. The Mascot, 48 Fed. 917, affirmed 6 C. C. A. 465, 57 Fed. 512; The Robert H. Burnett, 30 Fed. 214; The Ellen McGovern, 27 Fed. 868; The Ceres, 53 Fed. 667.

Decree for libelants.

¹ Reported by E. G. Benedict, Esq., of the New York bar.

MAYOR, ETC., OF CITY OF NEW YORK v. WHITE et al.¹

(District Court, S. D. New York. December 26, 1893.)

PRACTICE—JOINDER IN REM AND IN PERSONAM—REVIVAL OF SUIT AGAINST EXECUTOR—ANCIENT CLAIM.

When process in a collision case was issued against both vessel and owner, and the owner afterwards died, and his executor qualified, and was thereafter discharged, and some 19 years after the collision the libelant moved to revive the suit against the personal defendant by bringing in the executor, it was *held* that the motion should be denied.

In Admiralty. Motion to revive suit denied.

Jas. M. Ward, Asst. Corp. Counsel, for libelant.

John C. McGuire, for defendant.

BROWN, District Judge. An examination of the libel, filed January 14, 1874, shows that it was brought for a collision between the steamboat *Americus*, then belonging to the defendant, R. Cornell White, and the libelant's steam propeller *Hope*, used by the department of public charities and correction.

The process was in rem against the vessel, and in personam against the owner. The vessel was arrested, and released on stipulation. The defendant in personam answered, among other things, that he was improperly joined as a defendant. The owner afterwards died; his executor qualified in 1884, and was discharged by the surrogate in 1886. The libelant now moves that the action be revived as respects the personal defendant, by bringing in his executor. Had the joinder of the defendant in personam been excepted to after the arrest and release of the vessel in rem, the exception would have been sustained, as such a joinder is not allowed by the rules of the supreme court in an action for collision. This is a sufficient reason, aside from the discharge of the executor long since, why no order for the revival of the action as against any executor should be allowed. The action in rem can proceed upon notice to the former executor and to the sureties, unless on their motion it be dismissed for laches and want of prosecution.

THE ITALIA.¹

KANTER v. THE ITALIA.

(District Court, S. D. New York. December 28, 1893.)

1. SHIPPING — DAMAGE TO CARGO — RATS — NOTICE TO SHIPOWNER — DUTY TO TAKE DUE PRECAUTIONS.

Considering the well-known liability of lead pipe to be gnawed by rats, when a vessel has already suffered from such cause, and it is found that the rats cannot be subdued, reasonable prudence requires that the pipes which run amidst cargo liable to suffer water damage, and not open to inspection during the voyage, should be protected by a hard metal covering, or be replaced entirely by iron pipes. Failing such precaution, the liability to such water damage is at the risk of the ship.

¹ Reported by E. G. Benedict, Esq., of the New York bar.

2. SAME—NOTICE OF THE PRESENCE OF RATS — DUTY TO EXTERMINATE THEM TO PROTECT LEAD PIPE.

Cargo was damaged on the steamship I. by water which escaped through a hole in lead piping, gnawed by rats. Rats had twice before injured the lead piping of the ship. Prior to the departure of the vessel, the usual precautions against rats, by washing and fumigating with sulphur, were taken; but it was known that they were not subdued. *Held* that, in view of the previous damage done by rats, special efforts should have been made to exterminate them, in the absence of which efforts the ship would be liable.

3. SAME—BILL OF LADING—EXCEPTIONS—"VERMIN"—TIMELY PRECAUTIONS TO PREVENT DAMAGE.

A bill of lading contained the usual exceptions, including "vermin." Cargo shipped under such bill of lading sustained water damage caused by rats gnawing the lead pipes of the ship. *Held*, not deciding whether the word "vermin" in a bill of lading should be understood to include rats, that the exception did not absolve the vessel from the lack of reasonable diligence in its equipment before the commencement of the voyage, or in due precautions to prevent injury to cargo.

In Admiralty. Libel for damage to cargo. Decree for libellant.
Shipman, Larocque & Choate, for libellant.
Wheeler, Cortis & Godkin, for respondent.

BROWN, District Judge. The libel was filed to recover for water damage to a cargo of cement brought to this port by the steamship Italia, on her voyage from Stettin in June, 1893. The damage was caused by fresh water, which, in the refilling of the fresh-water tank during the voyage, had escaped through a hole gnawed, doubtless, in the fresh-water pipe by rats. The pipe led from the top of the water tank in the hold upwards through the deck above. The pipe was encased in a box of wooden plank, to protect the pipe from the cargo which was stowed around it. To supply the passengers with an abundance of water during the warm weather of the passage, the fresh-water tank was refilled during the latter part of the voyage, on the night of 17th to 18th June. When the pumps were sounded at 6 A. M. of the following morning, four feet of fresh water were found in the hold of that compartment. On examination after arrival in port, a hole about three inches long was found gnawed in the lead pipe, just above the fresh-water tank, and a dead rat lying by it. There is no doubt that the water in the hold escaped through this hole while the tank was filling during the night of the 16th. The ship during the voyage was infested with a very unusual number of rats. Twice before, as the evidence shows, lead pipe encased in a similar way, had been eaten by rats, on the same ship.

The claimants' evidence is to the effect that the usual precautions were taken to free the ship from rats before she sailed from Stettin, by washing, and by fumigating the ship with sulphur. This was not considered, however, as wholly effective, as appears from the testimony of the chief officer:

"Q. Did you believe she was pretty free from rats in Stettin after you finished fumigating her? A. No, I don't think so.

"Q. Isn't it possible to get all rats out? A. No, that is impossible. The

rats travel along on ropes on the stages, get aboard all the time. There is no ship in the harbor without rats. This is not the only pipe they have eaten through."

The bill of lading contains the usual exceptions, including perils of the seas, vermin, and negligence of the master or other servants of the shipowner; but it does not except rats by name.

Whether the term "vermin" in a bill of lading should be held to include rats, it is not necessary here to decide; because none of the exceptions in the bill of lading absolve the vessel or her owners from the lack of reasonable diligence in the equipment of the ship before the commencement of the voyage, or in due precaution to prevent injury to the cargo. *Steel v. Steamship Co.*, 3 App. Cas. 72; *Tattersall v. Steamship Co.*, 12 Q. B. Div. 297; *Stevens v. Navigazione*, etc., 39 Fed. 562; *The Caledonia*, 43 Fed. 681; *The Rover*, 33 Fed. 515, affirmed 41 Fed. 58. Considering the well-known liability of lead pipe to be gnawed by rats, when present, of which previous examples are not wanting in the reported cases, (*The Euripides*, 52 Fed. 161; *Hamilton v. Pandorf*, 12 App. Cas. 518,) and that on this vessel twice before the lead pipe had been eaten by rats, though encased in similar planking, I think that when it was found that the rats could not be subdued in this ship, reasonable prudence required the owner, before entering upon this voyage, to protect the lead pipe that ran amidst cargo liable to suffer water damage, where the pipe was not easily accessible, nor open to inspection during the voyage, by a hard metal covering either to the pipe or to the box; or else to substitute an iron pipe in place of a lead one. A liability to water damage from such a cause, known to the shipowner, and easily avoidable by him, but neither known to the shipper, nor under his control, ought not to be at the risk of the latter.

The carpenter, whose duty it was to attend to the extermination of the rats, was not produced as a witness, on account, it is said, of his absence. The most satisfactory evidence, therefore, as to the carefulness of the endeavors to exterminate the rats, is wanting. Considering the damage previously done to the lead pipe by rats on this ship, certainly special efforts ought to have been made to exterminate them; and if such efforts were not made, the ship would be undoubtedly liable. *The Isabella*, 8 Ben. 139; *Stevens v. Navigazione*, etc., 39 Fed. 562; *The Timor*, 46 Fed. 859. If, on the other hand, the rats are so abundant at Stettin, or at other ports where the vessel was in the habit of touching, that notwithstanding such previous efforts rats would still infest the ship to such an extent as the testimony shows on this voyage, it seems to me that it was the duty of the owners in the equipment of the ship, and in the preparations for the voyage, to protect the water pipes effectively against rats, wherever they were a manifest source of danger to the cargo. Either of several preventives could have been easily adopted at comparatively small expense, which would have afforded adequate protection.

Decree for libellant, with costs.

THE O. C. DE WITT.

BATES v. THE O. C. DE WITT.

(District Court, E. D. New York, January 11, 1894.)

SALVAGE — EXAGGERATED CLAIM — COSTS — PROPERTY FORCIBLY TAKEN FROM SALVOR.

Where one-half of the value of a boat and cargo worth \$1,700 was claimed as salvage, but on the trial the claim was shown to have been greatly exaggerated, only \$50 salvage being awarded, claimants would have been allowed costs but for the fact that shortly after the service they forcibly took the property from the salvors; and no costs were given to either party.

In Admiralty. Libel for salvage. Decree for libelant, without costs to either party.

Hyland & Zabriskie, for libelant.

T. C. Campbell, for The O. C. De Witt.

Carpenter & Mosher, (Mr. Symmers,) for the cargo.

BENEDICT, District Judge. This is an action to recover salvage compensation for services rendered by the steam canal boat Columbia in towing the canal boat O. C. De Witt back to the slip from which she had drifted on the evening of the 9th of September, 1893.

The service rendered is a salvage service, because it was voluntary, and rendered to a vessel that was adrift, without any person on board, and therefore in some peril. The peril, however, was very slight, as other tugs were present who might have rendered the same service; and, upon the evidence, the probability is that the boat, if left to itself, would have brought up on adjacent mud flats, where she could have remained without injury. The service rendered, although of some value, was very slight, occupying but a short time, and involving no risk and very little labor. The description of the service given in the libel is greatly exaggerated. It is there stated that the boat was derelict, when the fact was that the boat got adrift in the slip during the temporary absence of her master, and because third parties moved her during such absence. It is also stated that the Columbia, at great risk to her own safety, started after the canal boat, when in fact there was no risk whatever. The weight of the evidence is that the service occupied but a very short time, and not two or two and a half hours, as stated in the libel. The libel also untruly alleges a demand and refusal. The value of the canal boat is \$1,000, and the value of the cargo of coal is \$700. The libelant claims half of the value of the canal boat and coal. In my opinion, for such a service, in such a case, \$50 would be an ample salvage award.

In view of the exaggerated claim made, I should feel it my duty to award costs to the claimants in this case, were it not for the fact that shortly after the rendition of the service, and while the boat was in the possession of salvors, she was forcibly taken away from their possession by the master of the canal boat, and others acting

with him. By reason of this circumstance I do not mulct the libellant in costs, but I award \$50 salvage compensation, without costs to either party.

MILLER et al. v. O'BRIEN.

(District Court, S. D. New York. February 5, 1894.)

1. SHIPPING—SHIP-OWNER—INTEREST OF IN VESSEL — DAMAGES FOR TORTIOUS DESTRUCTION—BOTTOMRY—WHEN COVERS DAMAGES RECOVERED.

Unlike insurance moneys, damages recovered from an offending vessel by the owner of a vessel lost in collision are a substitute for the ship, and any such recovery represents the interest of the owner in his vessel. Hence a transfér, under a bottomry bond, of all the owner's interest in the vessel, includes by necessary implication the fund recoverable for her tortious destruction.

2. SAME — BOTTOMRY AND RESPONDENTIA BOND — TOTAL LOSS OF VESSEL IN COLLISION—DAMAGES RECOVERED—LIABILITY OF SHIP-OWNER TO CONTRIBUTE TO PAYMENT OF BOND—CONSTRUCTION.

A ship was totally lost in collision, but a portion of her cargo, previously transshipped upon another vessel, was saved, and the cargo-owner, under a bottomry and respondentia bond previously given on ship and cargo, including the transshipped cargo, was compelled to pay the entire amount of the bond. The ship-owner afterwards recovered large damages from the colliding vessel for the loss of his ship. *Held*, that a bottomry bond conditioned to be void "upon the utter loss of said vessel" was not wholly avoided; that the damages recovered represented the ship lost; and that the ship-owner was liable to the cargo-owner for his pro rata share of the amount paid on the bottomry bond by the cargo-owner, to be determined upon a proper general average adjustment.

3. BOTTOMRY—LIEN—ATTACHES TO SALVAGE OR PROCEEDS.

It is a rule of the general maritime law that, if there be any salvage or proceeds of any of the effects covered by a bottomry bond, the bondholder's lien attaches thereto, although the ship be lost. This is virtually a part of the bond by implication, and it is not necessary that the right thereto be expressly reserved in the bond.

In Admiralty. Libel by Brice Alan Miller and others against Edward E. O'Brien for contribution of payment on bottomry bond. Decree for libellants.

Butler, Stillman & Hubbard and Mr. Mynderse, for libellants.
Sidney Chubb, for respondent.

BROWN, District Judge. The above libel was filed against the respondent in personam as owner of the American ship Andrew Johnson, to recover £1,617.4.3, the defendant's alleged pro rata share of certain moneys which the libellants were compelled to pay at Hamburg, Germany, in order to redeem their cargo from a bottomry bond executed by the master at Callao, Peru, on September 15, 1884.

Most of the facts are stated in the decision upon the argument of exceptions to the libel. 35 Fed. 779. It was there held that the bond remained a valid bottomry lien upon the 1,200 tons of nitrates which had been transshipped from the Andrew Johnson to the Mary J. Leslie, and which reached safely the port of Hamburg, although the Andrew Johnson, to whose cargo all the nitrates had formerly belonged, was lost at sea by collision. The exceptions to the libel

were, however, sustained, on the ground that under the acts limiting the liability of ship-owners, the defendant was not further responsible after the total loss of his vessel,—her total loss being alleged in the libel. The loss of the Andrew Johnson resulted, however, from collision with the ship Thirlmere, through the fault of the latter vessel; and the respondent subsequently recovered from the owners of the Thirlmere in England damages for the loss of the Andrew Johnson to the amount of £5,179.13.6, and £858.6.11, for loss of freight; the value of the ship having been fixed at £10,000. These facts were alleged in the amended libel and established by the evidence.

On the arrival of the Leslie at Hamburg, it was agreed between the representatives of the bottomry claimant and the owners of the cargo that in consideration of the delivery and release of the cargo from the bottomry, the owners of the cargo should pay "whatever proportion of the said bottomry and respondentia bond may be found to be legally due from the said cargo; the question to be submitted" to certain legal counsel as arbitrators; and the cargo was thereupon delivered. Its value was upwards of three times the whole amount of the bond; and the arbitrators having subsequently decided that the cargo was legally subject to the lien of the bond, the whole amount of the bond was paid by the libelants, the owners of the cargo. The bond was given for port of refuge expenses and advances at Callao. Upon an average adjustment afterwards made in London, the amount claimed in the libel was computed to be the pro rata amount of the advances chargeable upon the ship and freight; and the above libel was filed for the recovery thereof against the owners as moneys paid for their use.

1. On careful consideration of the further arguments made in behalf of the respondents, I am not persuaded of any error in the former decision, as to the proper construction of the bottomry bond, or in the conclusion that the cargo that arrived at Hamburg on board of the Leslie was bound by the bond, notwithstanding the loss of the Andrew Johnson. Even if the Andrew Johnson had been an "utter loss," within the language of the bond, that portion of her cargo which had been transshipped on board the Leslie, and which arrived safely, was not lost; and that portion was specifically, and by name, hypothecated in the bottomry bond. It seems to me inconceivable that the parties should thus explicitly have embraced this part of the cargo in the bond without intending it to answer for the bottomry loan on safe arrival at Hamburg, even though the Andrew Johnson might perish. The ambiguous phraseology of the bond in using the term "the said vessel" should be so construed as to effectuate the obvious intention of the whole instrument, by making the words "the said vessel" include both vessels,—i. e. by interpreting the singular for the plural, if necessary, "*ut res majis valeat quam pereat*."

Besides this, however, it is the general maritime rule, as I understand, that if there be any salvage, or any proceeds of any of the effects covered by bottomry, the bondholder's lien attaches thereto, though the ship be lost. *Macl. Shipp.* (3d Ed.) p. 61; *Force v. Insur-*

ance Co., 35 Fed. 767, 771, and authorities there cited. In full instruments of bottomry, like the present, an express clause to that effect is often, perhaps usually, inserted. The Code of Spain, (article 734,) like those of France, Italy, and the Netherlands, provides that "in case of shipwreck the amount chargeable for the repayment of the loan on bottomry is reduced to the product of what is saved, less the expense of salvage." The South American Codes are mainly a reproduction of those of Spain; and that of Peru probably has a similar provision. There is no evidence before me on that point, nor have I that Code at hand. But so general is this provision, and so wholly is it in accord with the nature and object of bottomry, that I cannot help considering it, under the general maritime law, to be virtually a part of the bond by implication, and not necessary to be expressly reserved in the bond. Such is the rule laid down by Emerigon, (Cont. a la Grosse, c. 11, § 22;) and this seems to be approved as the general maritime rule in *Insurance Co. v. Gossler*, 96 U. S. 645, 652, 653, 655, in which the court, per Clifford, Justice, states the general law as follows:

"Where the bond covers the cargo as well as the vessel, the lender, unless the condition is otherwise, is entitled to be paid even if the ship is lost, if enough of the cargo arrives in safety to pay the bottomry loan; the rule being that a maritime lien of the lender attaches to the entire property covered by the bond, or to all that part of it which arrives at the port of destination in safety."

See *Appleton v. Crowninshield*, 3 Mass. 464, 8 Mass. 340.

2. It now appears that the respondent has recovered upwards of \$30,000 for the loss of the *Andrew Johnson*, through the negligence of the *Thirlmere*. These proceeds in the respondent's hands stand as the direct product and representative of the ship; so that the *Andrew Johnson*, even if the words "the said vessel" be held to refer to her only, has not become an "utter loss" within the condition of the bond, or within the presumed intention of the parties. The limited liability acts, for the same reason, are not available to the owner as a defense, because he must surrender those proceeds as a part of his "interest in the vessel" in order to become entitled to the limitation of liability. Such proceeds have no resemblance to insurance moneys recovered after such a loss; for insurance moneys are held not to stand as a substitute for the ship, because they arise out of an independent, personal contract for indemnity; a contract wholly collateral to the ship, and not constituting any interest in the ship. The *City of Norwich*, 118 U. S. 468, 494, 6 Sup. Ct. 1150. The damages recovered for the negligent destruction of the ship are precisely opposite. The right of property in the ship, and the right to damages are identical; the latter is founded directly and exclusively upon the former, and is its necessary legal attendant.

That such damages are to be treated as a substitute for the ship, is a rule often applied in cases of mutual fault, upon a total loss of one of the vessels and her cargo. The vessel that survives is not required to pay the whole loss of the other's cargo in addition to one-half the value of the other vessel lost; but the sum recoverable

by the latter is treated as a fund representing the lost ship, and as such chargeable with half the loss on her own cargo. This is enforced notwithstanding the fact that the statute makes "the interest of the owner in the ship and pending freight" at the close of the voyage, the limit of his liability. For his interest in the ship still remains in the form of a demand against the other vessel for half damages, for which he must account. It is the same with a bottomry bond; for this conveys, in pledge, all the owner's interest in his ship; and under the bond, and under the statute alike, the transfer of his interest in the vessel includes, by necessary implication, the fund recoverable, as the representative of the ship, for her tortious destruction.

I find, therefore, that the bond was a legal lien upon that part of the cargo which arrived in Hamburg, and which was worth more than the amount of the bond. The libelants, having necessarily paid the bottomry loan in full, in order to obtain possession of the cargo, are entitled to be reimbursed so much as upon a proper adjustment was chargeable to the respondent as owner of the ship and freight. The rules of general average being somewhat different in this country from those of England, if the parties are dissatisfied with the adjustment made in London, a reference may be taken to ascertain the proper amount according to our law, there being no evidence that any different law is applicable.

Decree accordingly, with costs.

REARDON v. ARKELL.

(District Court, S. D. New York. February 7, 1894.)

PILOTAGE—LAWS OF NEW YORK AND NEW JERSEY—REV. ST. §§ 4235, 4236—RIGHT OF NEW JERSEY PILOT TO SUE IN NEW YORK.

Section 4236 of the United States Revised Statutes, in conjunction with section 4235, by necessary implication makes applicable, in favor of pilots, the laws of either New York or New Jersey; and hence a New Jersey pilot may, by virtue of such statutes, maintain his action in the United States courts of New York, against the consignee of a vessel, for pilotage services rendered in New York waters.

In Admiralty. On exceptions to a libel filed by John A. Reardon against James W. Arkell to recover for pilotage services. Exceptions overruled.

Carpenter & Mosher, for libellant.

Wheeler, Cortis & Godkin, for respondent.

BROWN, District Judge. On the 17th day of August, 1893, the British steamship Jersey City was piloted into the port of New York by the libellant, a pilot duly licensed under the laws of the state of New Jersey; and on the 23d day of August she was again piloted by him back to sea. The pilotage fees not being paid, the above libel in personam was filed against the respondent, as the consignee of the ship, who entered and cleared her at this port. The pilotage laws of New York and New Jersey alike make the pilotage payable

"by the master, owner, consignee, or agent entering or clearing a vessel jointly or severally," and prescribe the same pilotage rates.

Exceptions to the libel have been filed by the respondent, on the grounds (1) that the laws of New York provide only for pilots licensed under the laws of the state of New York, and therefore are not available to the libelant, (*Brown v. Elwell*, 60 N. Y. 249; *Hopkins v. Wyckoff*, 1 Daly, 176;) (2) that the laws of New Jersey have no extraterritorial force to create a statutory liability in the consignee of the ship entering her on arrival at the port of New York.

Under the construction given to some sections of the pilotage laws of New York by the court of appeals in *Brown v. Elwell*, above cited, I should find difficulty in sustaining the libel if the laws of either state could only be applied to the present case by virtue of their own inherent force.

By section 4235, however, of the United States Revised Statutes, re-enacting the act of August 7, 1789, it is provided that all "pilots in the * * * ports of the United States shall continue to be regulated in conformity with the existing laws of the state respectively, wherein such pilots may be;" and by the following section (4236) the master of a vessel coming into this port may lawfully employ a New York or a New Jersey pilot. See *The Abercorn*, 26 Fed. 877.

The construction of these two provisions with reference to the points taken by the exceptions, is somewhat embarrassing. The well-known intention of section 4236, originally passed in March, 1837, (5 Stat. 153, c. 22,) was to end the conflicts and disputes that arose concerning the right to employ pilots licensed under the laws of different states bounding on pilotage waters. In giving authority to masters to employ a pilot duly licensed by either of such states, it could not have been the intent of congress that the pilots should be without the power to enforce any compensation at all. That act must be read in connection with the provision of the act of 1789, (Rev. St. § 4235,) which is in *pari materia*; and when thus read, the phrase "the laws of the states respectively wherein such pilots may be" must be regarded as applicable to the "employment" authorized by section 4236.

Although a New Jersey pilot may not in terms be provided for by the New York law, when piloting in New York waters, I think a reasonable construction of the act of congress authorizing his "employment" in such waters, and also declaring that "pilotage shall be regulated by the law of the state where the pilot may be," adopts the local law, and makes it applicable to the New Jersey pilot so "employed" as much as if the act said expressly that the rates and other regulations as to the pilotage authorized by the act to be thus "employed," should be those prescribed by the local law of the states wherein the pilots may be. This is the most literal interpretation of the words "wherein such pilots may be," and makes them refer to the place where the service is rendered, or the port to which the vessel is taken, and for which the pilotage service was

employed. The phrase "wherein such pilots may be" may also be interpreted to refer to the place where the pilots are licensed; and if that were the meaning intended, the laws of New Jersey would here be applicable. It is immaterial, in this case, to decide which of these interpretations should be given, since the laws of both states are the same; and both make the consignee liable at the same rates. Considering, therefore, that section 4236, in conjunction with section 4235, by necessary implication makes applicable in favor of pilots the laws of the one state or the other, I am of the opinion that the pilot may maintain his action in a case like the present against the consignee by virtue of these acts of congress.

The exceptions are, therefore, overruled.

THE BOLIVIA.¹

DEEHAN v. THE BOLIVIA.

(District Court, S. D. New York. December 18, 1893.)

NEGLIGENCE—PERSONAL INJURIES—FELLOW SERVANT—WINCHMAN'S ERROR.

Where cargo was being loaded into a hatch of a steamship by means of three whips, and certain boxes fell from one of the loads upon libelant, who was working in the hold, not by reason of the improper use of three whips in one hatch, whereby two of the loads interfered, as the libelant claimed, but, as the evidence showed, because the winchman prematurely let go of the brake of the winch, it was held that libelant could not recover, as the injury was occasioned by the negligence of a fellow servant.

In Admiralty. Libel for personal injuries. Dismissed.

S. B. Johnson and Joseph Fettretch, for libelant.

Wing, Shoudy & Putnam, for claimant.

BROWN, District Judge. At about 11 o'clock in the forenoon of March 3, 1893, the libelant, while at work in the lower hold of the steamship Bolivia, lying at the foot of East Twenty-Sixth street, and engaged in loading barrels of resin, was seriously injured by the fall of several boxes of logwood, which were at the same time being loaded, through the same hatch, upon the orlop deck, next above the hold. He was struck in the back by one or more of the boxes, and the spine so injured that the lower part of his body became paralyzed.

For the libelant it is contended, that the accident arose in consequence of the improper use of three falls or whips in the same hatch, so that the load of boxes collided with the draft of resin barrels which were descending at the same time, a little below the former; whereby some of the boxes on top were knocked off, and fell upon the libelant.

For the claimant it is contended, that the use of three whips at the same time is justifiable, being a frequent practice, where there

¹ Reported by E. G. Benedict, Esq., of the New York bar.

is need of haste in loading; that the accident did not arise from the use of three whips, and that there was no collision between the two drafts; that the fall of the boxes of logwood was caused by the inattention or mistake of the man at the winch, who controlled the descent of the boxes of logwood, and that the latter were allowed to strike too suddenly and too heavily upon the platform on the orlop deck, where they were landed; and that the sudden blow knocked off the upper boxes, and thus caused the accident.

The case of the libelant has been most carefully and thoroughly presented by his counsel, and I have given it the careful consideration which the painful consequences of this accident demand. I am constrained, however, to find that the great weight of testimony, as well as the probabilities of the case from the circumstances detailed, sustain, substantially, the account given by the claimant, viz.: That there was no collision between the two loads; and that the fall of the boxes arose through the fault or error of the winchman, a fellow servant of the libelant, and not in consequence of the use of three whips in the same hatch.

Two of the whips or falls were used for lowering the barrels of resin into the hold; the third whip was for lowering the boxes of logwood to the orlop deck. Both were lowered by the use of a sling or loop of rope, which was passed beneath and around the load of barrels or boxes, and hung at the top in the hook of the fall. There were about eight men employed in receiving and disposing of the barrels to each of the two whips lowering into the hold. The libelant was in the gang working on the port side, and it was his duty to aid in the landing of the loads on that side, to detach the hook from the sling, and while the other men were rolling the barrels away from the sling beneath them, to take the spare free sling from the preceding load, fold it up and hang it upon the hook, which was then drawn up for another load. The libelant testified he was making up the loose sling when he was hit; and that he heard no call to stand from under, which some of the other witnesses testify was heard when the boxes fell.

There is but one witness who, in behalf of the libelant, testifies to any collision of the two drafts. He says that this occurred a little before the draft of logwood boxes had reached the orlop deck, which, coming down more rapidly than the barrels of resin below them, struck the latter. Numerous witnesses for the claimant, however, show beyond doubt, as it seems to me, that at the time when the boxes fell, the draft of resin in the hatch had already reached the bottom of the hold. The head of the gang testifies that he was the person nearest to the libelant when he was knocked down; that he was rolling away one of the barrels of that draft; heard the shout to stand from under; jumped aside; then turned and saw the libelant knocked down; and that the spare sling was then hanging in the hook. The other resin whip was not at that time in the hatch, but over the side of the ship and in the lighter for another load of barrels. These two main facts, that at the time when the boxes fell one of the resin whips was over the side of the ship, and the other in the bottom of the hold with the draft partly

unloaded, is established by so much testimony, as against the single witness for the libelant, that it is impossible for me to find the libelant's theory on that point sustained, viz. that the fall of the boxes was occasioned through any collision with the descending load of barrels; since any such collision must have occurred before the resin barrels reached the bottom of the hold.

The testimony of the winchman who attended on the boxes of logwood, furnishes a simple explanation of the accident. The descent of the load was regulated by a brake, managed by the foot. He says that when the draft of logwood boxes was part way down, he felt it ease, as though it had touched; and that he let his foot slip from the brake, when the draft immediately ran away from him, with five or six more turns of the axle, equivalent to about fifteen or eighteen feet. The gangman who was attending that whip also says that load went down too fast. Of the latter there is no doubt. It is not entirely certain from the testimony of the winchman, whether this was through an unintentional slip of the foot, or from his voluntarily easing it, at the moment when he says he thought the load had touched the deck. If the latter is correct, the winchman's mistake might easily be accounted for by the momentary catching of the load on the deck above, there being two decks above the orlop deck, where the logwood was landed. The load was landed upon the platform on the hatch of the orlop deck, where it belonged. It was landed too suddenly, whatever the cause, so that several of the boxes bounded off, and fell into the hold. The too sudden descent plainly arose from the mistake or fault of the winchman. As he was a fellow workman with the libelant, his errors were one of the risks of the libelant's employment. *Quinn v. Lighterage Co.*, 23 Fed. 363; *Steamship Co. v. Merchant*, 133 U. S. 375, 10 Sup. Ct. 397; *The Queen*, 40 Fed. 694, 696.

Deplorable as the results were to the libelant, the law does not afford him any redress, in the absence of any proof of fault in the owners or agents of the ship.

Without considering, therefore, the other matters which have been so ably presented by counsel, I am constrained to dismiss the libel; but without costs.

THE IDLEWILD.¹

THE HAVANA.

ROBINSON et al v. THE IDLEWILD.

SAME v. THE HAVANA.

(District Court, S. D. New York. December 26, 1893.)

WHARFAGE—TITLE OF WHARFINGER—ESTOPPEL.

Vessels which have made use of a wharf, whether under express or implied contract, are not entitled to refuse payment of wharfage on the ground that the wharfinger is not the legal owner of the property.

In Admiralty. Libels to recover wharfage. Decree for libelants.

¹Reported by E. G. Benedict, Esq., of the New York bar.

Owen, Gray & Sturges, for libelants.
Goodrich, Deady & Goodrich, for The Idlewild.
Mr. Hotchkiss and Mr. Middlebrook, for The Havana.

BROWN, District Judge. These libels were filed to recover wharfage charges against the above-named steamships while they lay at the libelants' wharf off the foot of Court street, Brooklyn, in the early part of 1893.

As regards the Havana, I find, that the receipt given on March 24, 1893, to her owners, upon the payment of \$375 "in full for wharfage to April 17, 1893, or date of sale," must be construed in favor of the defendants, and as payment of wharfage up to April 17th, although the sale took place on April 2d; so that there remains unpaid upon the Havana five days' wharfage only, amounting to the sum of \$32.75.

The principal question litigated, is the right of the libelants to recover at all, payment being resisted on the ground that the easterly side of the wharf, where the vessels lay, encroached along its whole length by about six feet beyond the exterior bulkhead line, as established by law; and that the libelants not being the legal owners of so much of the wharf property, could not recover wharfage.

The evidence shows that the libelants' testator became the owner in fee of a strip of land bounded on its easterly side by the established bulkhead line, and that Downing & Lawrence became the owners in fee of the land adjoining on the westward of the libelants' testator; that the latter in 1878, in conjunction with Downing & Lawrence, built the wharf in question, which is 24 feet wide, and from 300 to 400 feet long. The middle line of this wharf was the division line between the two owners. The easterly line of the wharf, as above stated, was built out some six or seven feet beyond the proper bulkhead line. From that time until the present, the libelants, or their testator, have been in the possession and management of the whole easterly half of the wharf, and in the ordinary use thereof for wharfage purposes, and have accommodated vessels there, collecting the usual charges for wharfage. So far as the evidence shows, there has never been any interference by the state, or by the city authorities, with the libelants' possession, or collection of wharfage.

Under such circumstances, I do not see how the claimants are in a situation to raise the question presented. The Havana engaged wharfage under a specific contract with the libelants to pay at specified reduced rates therefor; and it has received the benefit of its contract. No express contract is shown in the case of the Idlewild; but she went there in the ordinary course of business; has had the benefit of the facilities of the wharf built and maintained by the defendants, a part of which wharf is undeniably the libelants' property as against all the world. Vessels had no right to use this wharf as against the libelants' consent. The circumstances import an implied agreement to pay wharfage, if not at the statutory rate of fees accruing to one who was strictly an "owner,"

at least a reasonable charge for such wharfage facilities as the libelants actually furnished to the steamer. A reasonable charge is proved to be not less than the single statutory rate; and no objection is made on this point. No other person makes, or can make, any claim for compensation for the wharfage facilities afforded. So long as neither the state nor city interferes with the libelants' possession, and letting of the wharfage facilities, I see no reason why the vessels enjoying the use of it, should be entitled to dispute the libelants' right to a fair compensation, any more than a tenant should be allowed to dispute his landlord's title, as a defense against the payment of rent. These views seem to me all implied, or directly asserted in the case of *Wetmore v. Gaslight Co.*, 42 N. Y. 384.

There must, therefore, be a decree for the libelants as against the *Idlewild* for 19 days' wharfage at the rate of \$5.43 per day, with interest; and against the *Havana* for the sum of \$32.75, the balance above stated, with costs.

THE ALVAH.

MORRIS v. THE ALVAH.

(District Court, E. D. New York. February 2, 1894.)

1. SHIPPING — MARITIME CONTRACT — PRELIMINARY OR UNAUTHORIZED CONTRACT—CONFIRMATION.

A contract binds the ship when it is confirmed by those who have authority, and the ship has actually entered upon the performance of it, although it may have been a contract preliminary to a maritime contract, or made by brokers acting without sufficient authority.

2. SAME — TRANSPORTATION OF CATTLE — WARRANTY OF SUFFICIENT VENTILATION—DAMAGES FOR FAILURE TO PROVIDE.

In a contract for transportation of cattle, it is implied that the space allotted shall be sufficiently ventilated, and when the ship's brokers reported that the ship would insure, but insurance could not be effected on cattle placed in a certain portion of a ship without additional ventilation, which the shipmaster refused to provide, *held*, that the shipper was justified in not furnishing cattle to fill such portion of the ship, and the ship was liable for the failure to transport the cattle, provided for by contract, but shut out by the ship's refusal to provide further ventilation.

In Admiralty. Libel in rem for damages for failure to transport cattle. Decree for libelant.

Foster & Thomson, for libelant.

Convers & Kirlin, for claimants.

BENEDICT, District Judge. This is an action against the steamship *Alvah* to recover damages for a violation of a contract of affreightment. It appears that Brigham & Pillsbury, shipbrokers, claiming to act on behalf of the steamship *Alvah*, agreed with the libelant for the transportation of 374 head of cattle, in the steamship *Alvah*, from Boston to London. When the *Alvah* was ready to receive the cattle, the fittings for the transportation of the cattle were made, and a space for the transportation of 374 cattle arranged. Of this space a part, being the after part of No. 2 and No. 3 between decks, was declared by the agent of the insurers of the

cattle deficient in ventilation, and the master was required to provide certain additional ventilators. Some of the required ventilators he put in; others he refused to put in. Thereupon the shipper declined to allow his cattle to be placed in the parts of No. 2 and No. 3 between decks. The remainder of the space was sufficient for 332 head only. These were taken and transported to London, and the freight paid thereon. The libellant now seeks to recover damages sustained by reason of the nonshipment of 42 head of cattle, as was provided for in the contract. The amount of the damage is claimed to be about \$2,000.

On behalf of the claimants, it is insisted that the contract made by Brigham & Pillsbury was not a maritime contract, but a contract preliminary to a maritime contract, and did not bind the ship; and, second, that it was made without authority. This point cannot avail, for the reason that the contract made by the brokers was afterwards confirmed by those who had authority to bind the ship, and the ship actually entered upon the performance of the contract by taking on board cattle under the contract. After the performance of the contract had begun, the ship became bound to its performance, and the libellant can recover in admiralty against the ship for a violation thereof.

The next ground of contention is that the evidence is that the master was ready and willing to take on board the number of cattle required by the contract, and the failure to transport the 42 head was owing to the refusal of the shipper to ship them. I think it cannot be doubted that, in a contract for the transportation of cattle, it is implied that the space to be allotted to the cattle for the voyage shall be sufficiently ventilated. If, therefore, the act of the insurance company in refusing to insure cattle placed in the after part of No. 2 and No. 3, without the additional ventilators, was justified by the facts, the shipper was not bound to ship more than 332 cattle, and can recover for the failure of the ship to transport the additional 42 head called for by the contract. The brokers reported that the ship would insure. This undoubtedly meant that 374 head of cattle, if carried in the space allotted by the ship for their transportation, could be insured. As the fact turned out, insurance could not be effected upon cattle placed in the after part of No. 2 and No. 3 between decks without additional ventilation, which the master refused to provide. This, I think, justified the shipper in refusing to ship more than 332 head of his cattle, and rendered the ship liable for the damages sustained by the shipper by reason of the nonshipment of the 42 head of cattle that were shut out by reason of the master's refusal to provide sufficient ventilators for the space allotted to the cattle.

The libellant must therefore have a decree, with an order of reference to ascertain the damages.

THE VIOLA.

HAWKINS v. THE VIOLA.

(District Court, S. D. New York. December 18, 1893.)

1. COLLISION—SAIL VESSELS—BAD LIGHT—BAD LOOKOUT—MISTAKE OF BEARING.

The schooner M., bound east in Long Island sound, came in collision with the schooner V., bound west, about south of Stonington light, the wind being moderate from the northward. Upon conflict of testimony it was found that the M. was closehauled, and a little on the starboard bow of the V., which had the wind two or three points free. The night was clear and starlight. The V.'s lights were seen at a considerable distance, but neither of the M.'s lights were seen before collision, though looked for by both the master and mate, when the M. was first seen by them, only 200 yards away, when the Viola improperly put her helm hard a-port and ran into the M. *Held*, both liable,—the M. for not showing proper lights; the V. for not seeing the M., on such a night, in time to avoid mistake in the bearing of the V., and the consequent erroneous luff.

2. STATUTORY CONSTRUCTION—CARRIERS' ACT OF FEBRUARY 13, 1893—APPLIES ONLY TO CARGO OF THE VESSEL IN FAULT—REPUGNANCY.

The general words of a statute may be limited to the subject-matter to which the statute relates, as indicated by preceding or following words. *Held*, accordingly, that section 3 of the act of February 13, 1893, providing that under certain conditions, "neither the vessel nor her owner," etc., "shall be held responsible for loss resulting from faults in navigation," applies only to the claims for loss to cargo on board the vessel in fault; the preceding and following words indicating that the statute is dealing only with the relations between carriers and the cargo on board. *Held*, also, that this clause of the act is not repugnant to the sixth clause, providing that it shall not modify section 4283 of the Revised Statutes; since the latter applies only to cases where a legal liability exists, and does not prescribe when any legal liability for a loss shall or shall not arise.

In Admiralty. Libel by J. Clarence Hawkins against the schooner Viola for collision. Decree for divided damages.

Owen, Gray & Sturges, for libellant.

Wing, Shoudy & Putnam, for respondent.

BROWN, District Judge. On the 7th of November, 1893, at about 2 A. M., the libellant's schooner Monette, bound east in Long Island sound, was sunk, through a collision with the schooner Viola, bound west, at a point about south of the Stonington light. The above libel was filed to recover for the damages to the Monette and her cargo.

The wind was moderate, from the northward. The Monette had been previously making a course of east half north, and claims to have been closehauled on her port tack. The Viola had been making a course of west half north, admitting that she had the wind a little free. Each was making some four or five knots an hour. If the Monette was closehauled, it was the duty of the Viola to keep out of her way. But the latter contends that the Monette also had the wind two or three points free, and that it was consequently her duty to keep out of the way of the Viola. For the latter it is also contended that the Monette, as she approached,

showed no colored lights, and that the collision was solely the fault of the *Monette*.

The master of the *Monette* was on the lookout forward, and testifies that both the *Viola*'s colored lights were seen at a considerable distance, and continued to be seen a little on the starboard bow, until when about four or five lengths distant the red light was shut in and the green light only seen, still on the starboard bow; that the *Monette* then luffed a very little to the northward, so that her sails trembled, to give the *Viola* a little more room; but that the *Viola*, by a strong luff, turned to the northward and struck the *Monette* between the fore and main rigging, causing her to sink in a few minutes.

On the *Viola* the mate was forward, and the wheelsman and captain aft. Nothing was seen of the *Monette*, according to the testimony of the mate, until she was within two or three lengths; that is, less than 300 feet distant, when she was seen, as he says, about a half a point on the lee or port bow. She was immediately reported to the captain, who at once gave the order "hard a-port," and the wheelsman immediately proceeded to put the helm hard down; but before the wheel was down the vessels struck. No colored lights were seen on the *Monette* at any time.

The conflict of testimony in regard to the lights is embarrassing. Not long before, the mate of the *Viola* had gone forward to relieve the former lookout, who, at the same time, went aft to relieve the mate at the wheel. The first that he saw of the *Monette* was when she was some two or three lengths off, as he estimates; and then he did not see any colored light, nor any light, up to the time of collision, though the *Monette* passed partly across his bow. He reported her to the captain as showing no lights; the captain looked and saw the *Monette*, but no light. Upon this testimony, I must hold that the *Monette*'s colored lights were not properly showing at that time. *The Excelsior*, 33 Fed. 554; *The Eri*, 3 Cliff. 456; *The Monmouthshire*, 44 Fed. 697; *The Drew*, 35 Fed. 791, and cases there cited.

I think the weight of evidence is to the effect that the *Monette* was sailing practically closehauled, and that the *Viola* had the wind several points free. I am confirmed on this latter point by the fact that the sails of the *Viola* were full at the time of collision, though her wheel had been put to port, though not yet hard down. So small a vessel—less than a hundred feet long—would luff pretty rapidly. The sails of the *Monette*, on the other hand, were shaking at the time of the collision, from the effect of a slight luff. I do not lay much stress on the testimony in regard to the angle of collision in the night. It was probably considerably less than seven points.

I am constrained to find that a good lookout was not kept up on the *Viola*. The night was clear and starlight, and the sea smooth. A vessel under sail, without lights, according to the testimony, could be seen a quarter of a mile off; and this is not contradicted. From the testimony before me in other cases, this

seems to me a very moderate estimate. Yet the *Monette* was not seen, or reported, as the mate estimates, till within a few lengths, when there was not time even to put the wheel hard over before collision. Had the *Monette* been seen, as she ought to have been seen, when a quarter of a mile distant, I cannot doubt that the *Viola* could easily have kept out of her way, even though no light was seen on the *Monette*.

There is a conflict of evidence as to the bearing of the two vessels. The *Viola* claims that the *Monette* was seen under her port bow. The witnesses for the latter testify that for a considerable period before the collision the green light only of the *Viola* was visible, showing that she was on the *Viola's* starboard bow. The failure of the *Viola* to notice the *Monette* until she was so near, may well have led to imperfect observation and mistake as to the precise bearing of the *Monette*. I am constrained to find that the latter was in fact on the *Viola's* starboard bow, and that this mistake led to the collision through the order given to port, instead of to starboard, the *Viola's* helm. This mistake was so near collision as not to be itself ascribed as a fault; for it was doubtless the effect of the excitement in extremity. But as this arose in consequence of the *Viola's* fault in not maintaining a good lookout, and of not seeing the *Monette* in time for correct observation of her course, and proper maneuvers, the latter fault precludes the *Viola* from the defense of error in extremis. The *Elizabeth Jones*, 112 U. S. 514, 5 Sup. Ct. 468.

As I find the collision was the result of fault on both sides, the damages and costs are divided.

(January 16, 1894.)

Since the foregoing decision was rendered, the attention of the court has been called to the third section of the act of February 13, 1893, (27 Stat. c. 105, p. 445,) which provides as follows:

"Sec. 3. That if the owner of any vessel transporting merchandise or property to or from any port in the United States of America shall exercise due diligence to make the said vessel in all respects seaworthy and properly manned, equipped, and supplied, (a) neither the vessel, her owner or owners, agent, or charterers, shall become or be held responsible for damage or loss resulting from faults or errors in navigation or in the management of said vessel; (b) nor shall the vessel, her owner or owners, charterers, agent, or master be held liable for losses arising from dangers of the sea or other navigable waters, acts of God, or public enemies, or the inherent defect, quality, or vice of the thing carried, or from insufficiency of package, or seizure under legal process, or for loss resulting from any act or omission of the shipper or owner of the goods, his agent or representative, or from saving or attempting to save life or property at sea, or from any deviation in rendering such service."

The answer alleges that the *Viola* at the time of collision was engaged in transporting merchandise from ports in Canada to New York; and that her owners had exercised due diligence to make her in all respects seaworthy and properly manned, equipped and

supplied. Evidence was given to that effect. Those facts are not denied, but are now admitted by the libellant; they were not referred to on the previous argument.

The defendant contends that the words of the first clause of the third section above quoted, are to be applied generally as respects all claims against the vessel or owner arising from faults of navigation, including claims such as this for damages to other vessels and their cargoes through collision, as well as against claims for damage to cargo on board the vessel in fault.

This construction would annul probably nine-tenths of all the responsibilities of carriers by sea. It would involve a change in the law of shipping so radical and so wide-sweeping in its consequences, that I cannot believe it was the intention of congress to enact a change so revolutionary in the incidental manner, and in the connection, in which this clause appears in this act. Taken as a whole, the act seems to be dealing with the rights, relations and remedies between ships and owners transporting merchandise, and the cargo on board. The first two sections relate solely to bills of lading, and disable the owner from absolving himself or his vessel from responsibility for negligence in the stowage, care or handling of goods; while the third section, treating in part of the same subject of bills of lading, purports to relieve the vessel and owner of part of their liability under the existing law, for faults of navigation.

In the house of lords, Lord Halsbury, in the case of *Insurance Co. v. Hamilton*, 12 App. Cas. 484, 490, refers to "two rules of construction now firmly established as part of our law. * * * One is, that words, however general, may be limited with respect to the subject-matter in relation to which they are used. The other is, that general words may be restricted to the same terms as the specific words that precede them." See, *Per Wallace, J.*, in *U. S. v. Buffalo Park*, 16 Blatchf. 189, 190.

The intention, which forms the governing principle of the law, is to be extracted from the entire enactment. *U. S. v. Collier*, 3 Blatchf. 332.

Upon these maxims of construction, the general words of section 3 should be limited to the subject of the act, as shown by the words that precede and follow the clause in question, viz., the mutual rights and obligations between the carrier, the carrying vessel, and the goods carried. The third section is, moreover, expressly confined to "vessels transporting merchandise;" thus apparently excluding tugs, passenger vessels, and possibly vessels in ballast. Had the statute designed a change in the general principle of maritime responsibility, such an exclusion would not have been probable. See *In re Hohorst*, (Dec. 18, 1893,) 14 Sup. Ct. 221.

The same view is to some extent further confirmed by the saving clause of the sixth section of the act, which provides, "that this act shall not be held to modify or repeal * * * section 4283 of the Revised Statutes, [limiting the whole liability of the

shipowner to the value of his interest in the ship and the pending freight,] or any other statute defining the liability of vessels." For although I do not perceive how section 4283 would in strictness be "modified or repealed" by either the broad or the more limited construction of section 3, the saving clause being as respects section 4283 apparently superfluous; still, there would be less reason for the careful preservation of section 4283 if congress had intended to sweep away nine-tenths of the liabilities to which it is applicable.

There can be no doubt that by section 3 the act intended to absolve the vessel and owner from the claims of the cargo on board arising out of faults of navigation, under the conditions stated. Its plain language requires at least that much. The sixth section is not, I think, repugnant to the third; because section 4283 does not at all define, and was not intended to define, the conditions under which a legal claim arises against the shipowner for any damage or loss therein referred to. It only provides, in effect, that whenever legal claims do arise against him for loss or damage, his liability shall not exceed the value of the ship and freight. To enlarge or to diminish by statute the cases in which legal claims for damage shall be held to arise, is not, therefore, "to modify or repeal" section 4283.

The fact that the *L. Monette* may not be liable for the damage to her own cargo, partly through her faulty navigation, does not affect her right to recover against the *Viola* for that damage; since the *Monette* remains bailee of the cargo, and responsible as such for its proper care and delivery.

A similar oral ruling upon the construction of this statute has been made by Judge Carpenter in the district of Rhode Island, upon the hearing of exceptions to the libel.

Decree accordingly.

THE DOROTHY.

DEVERMANN et al. v. THE DOROTHY.

(District Court, S. D. New York. December 26, 1893.)

COLLISION—EAST RIVER—CROWDING—STATE STATUTE.

The steamboat *H.* was going up the East river, and was overtaking a ferryboat. On the *H.*'s port hand lay, practically stationary, a carfloat, which a tug had hauled out of a slip preparatory to taking it alongside. The *H.*, in passing between the float and the ferryboat at a distance of some 50 feet from the ferryboat, and less from the float, collided with the latter. *Held*, that the *H.* was in fault in needlessly attempting to go between the other vessels, in violation of the state statute which prohibits steamboats from passing each other nearer than 20 yards.

In Admiralty. Libel by William Devermann against the steam tug *Dorothy* for collision. Libel dismissed.

Henry D. Hotchkiss and Mr. Middlebrook, for libelants.
Stewart & Macklin, for claimants.

BROWN, District Judge. On the 9th of May, 1893, at about 5:15 P. M., as the side-wheel passenger steamer Havana was going up the East river in the beginning of the ebb tide, her port side, just forward of the paddle wheel, came in collision with the starboard corner of a railroad float, off pier 41, which the tug Dorothy was taking alongside for the purpose of towing up the Harlem river. The Havana suffered some damages, for which the above libel was filed. The Dorothy had shortly before taken the railroad float, laden with cars, from the slip between piers 40 and 41. The weight of testimony is that she pulled the float out by a short hawser beyond the end of the piers, and headed her up into slack water, abreast of pier 41, pointing nearly straight up river; that the Dorothy had cast off her hawser, and was moving down on the New York side of the float, at a distance variously estimated at from 75 to 300 feet off pier 41, but that she had not yet fully made fast to the float, and was not in condition to commence towing at the time of the collision. The Havana had left passengers at Peck slip, and had thence passed under the bridge, about 150 feet from the New York pier, and was overtaking the Alaska, a Roosevelt ferryboat, going up the river on the Havana's starboard side.

The pilot and master of the Havana testifies that as he passed Catharine ferry, he saw the Dorothy on the port side of the float; that she came straight out of the slip, turned down, and made a complete circle in the river so as to head up; that he at first intended to go on the New York side of her, but, seeing her turn in towards the New York shore, and also seeing two small sloops there, he concluded to go to starboard; that as he approached nearer to the float he saw that she had become still in the water; that he gave her two signals of one whistle, indicating that he would go to starboard, to which he got no answer; and that the collision was caused by the act of the tug in shoving the float's bow out into the river. This account of the navigation of the Dorothy is in such conflict with the statement of the Dorothy's witnesses that I must regard it as mistaken, and the result of some confusion. It is improbable in itself, and could not possibly have been accomplished in the short time occupied by the Havana in going at the rate of 10 or 12 knots an hour from the bridge up to pier 41, viz. in about two minutes. The Dorothy's witnesses show that the float was in the edge of the eddy tide, very nearly still, at the time of the collision, and for a few minutes before. They state that the Havana came very near to the starboard quarter of the stern of the float; and Mr. Devermann, of the Havana, gives the final estimate of a distance sufficient to drive a team of horses between them. This agrees well with the estimate of the man on the umbrella of the float, though the master of the Havana calls the distance 30 or 40 feet.

I am satisfied that there was no shoving of the float's bows by the Dorothy out into the stream. It is contradicted by her witnesses, and there are no circumstances to indicate that there was any need of such a maneuver before she made fully fast. She was in the act of getting made fast in order to take the float up the Harlem river,

and the position of the float was the usual one, and a favorable one therefor. It is not at all improbable that while so heading, in the edge of the eddy, the boat was moving a little, and the bow possibly swung a little to starboard. Some motion in the water is to be expected, and is inevitable. The float was taken from the usual slip of the claimant's line, and the pilot of the Havana knew the usages of those boats in making up their tows at that place.

The real fault was the fault of the Havana in the undertaking to pass at such a speed, amid more or less shifting waters, in the narrow space between the Alaska and the float. A state statute prohibits a steamer from passing another steamer nearer than 20 yards. The Alaska was estimated by the master to be 40 or 50 feet on the starboard side, and the available space on the port side of the Havana was evidently very much less. There was abundant room for the Havana had she chosen to keep astern of the Alaska until she had passed the float, or had she chosen to go to starboard of the Alaska in mid river. The unnecessary attempt to go between the Alaska and the float, which was practically stationary, though probably not entirely so, was at the Havana's risk. The Senator D. C. Chase, 46 Fed. 874; The City of Chester, 24 Fed. 91. The tug and float were not under way. The Dorothy was not required to make any response to the Havana's signals, which were given to her only very shortly before collision; nor was there anything that the Dorothy could have done, in the short interval after the signals were given, that would have been of any use in avoiding collision.

The libel must therefore be dismissed, with costs.

SCOTT v. CORNELL STEAMBOAT CO.

(District Court, S. D. New York. January 22, 1894.)

COLLISION—TUGS AND TOWS — CANAL BOAT FILLED WITH WATER — LIABILITY OF TUGS—DUTY TO RAISE SUNKEN BOAT.

One of a large flotilla of canal boats, while towing, began to take in water, until her decks were almost submerged. Although her condition was known to the tugs in charge of the tow, the towage continued, at the request of the master of the canal boat, until she broke in two, thereby injuring libellant's canal boat, F., which was astern of the broken boat. It being found that the F. was leaking, she was beached, and afterwards removed by respondent to flats, where she remained until sold by her owner for a nominal sum. *Held*, that it was improper to continue towing, in a flotilla, a boat filled with water, after her condition was known, and that such towing was at the risk of the tug owner, and not of the other boats of the tow; that, after the canal boat was temporarily beached, her owner was bound to take charge of her within a reasonable time, and was liable for any damage which may have accrued after the lapse of such reasonable time; that the tug boat owner was liable for some of the damage to the canal boat's cargo; and that, unless the value of the canal boat, as an old boat, was small, libellant was negligent in making no attempt to raise or repair her.

* Reported by E. G. Benedict, Esq., of the New York bar.

In Admiralty. Libel for collision. Decree for libelant.

Goodrich, Deady & Goodrich, for libelant.

Benedict & Benedict, for respondents.

BROWN, District Judge. The above libel was filed to recover damages caused by an alleged collision about 8 or 9 o'clock A. M. on Sunday, the 18th of June, 1893, between the libelant's canal boat Favorite and the canal boat Petrie, both loaded with ice, and both a part of a flotilla of boats in tow of the respondents' tugs, coming down the Hudson river. Both boats were outside boats, on the port side of the third and fourth tiers, the Petrie being about 12 feet ahead of the Favorite. These boats had been taken into the tow on Saturday, the day previous. During the following night the Petrie, which was an old boat, had gradually filled with water, so that by 6 o'clock in the morning of Sunday, her decks were level with the water. Her condition at that hour, or previous, was known to the pilots in charge of the respondents' tugs. The Petrie's captain, however, desired that she should continue in the tow until it arrived at Rondout, about 15 miles below the place where the tow was at 6 A. M., and be run upon the flats at Rondout. The towing continued until between 8 and 9 o'clock; when only about six miles above Rondout, the Petrie broke in two. The forward part of her deck came off (Cornwall v. The New York, 38 Fed. 710, affirmed), probably from the lift of the ice beneath, combined with the weakness of the boat, and the strain of the hawser upon the bitts attached to the deck, so that the lower part of the Petrie drifted back, and her stern struck the Favorite's bow, the Petrie's bow at the same time plunging down. The Favorite and the Petrie thereupon broke away from the rest of the tow, and drifted astern. The Favorite was soon picked up by one of the helper tugs and brought again to the tow; but before she was fully made fast to it, she was found to be rapidly filling, having then some three feet of water in her, and she was consequently immediately detached from the tow and taken to the bulkhead at the Ulster ice dock landing. She was so deep in the water that she touched bottom before she got quite alongside the bulkhead; but she was made fast thereto by lines, and by 1 o'clock of that day was filled with water. Her captain remained with her until Tuesday, when he went to Rondout to request the respondents to put her in a more comfortable position, as she was affected at the ice dock by the swell of passing steamboats, and on Tuesday morning had pulled down some spiles of the bulkhead to which her bow was fastened. She was thereupon removed by the respondents, either on Tuesday or Wednesday, first to the breakwater near Rondout, and afterwards to the flats, a mile or two below, at Port Ewen, where she remained several months, and in September was sold by the libelant for \$25. About that time a hole some six inches in diameter was found on the bilge of her starboard bow, and a slanting splice fast in the mud was near the position of the hole.

Upon all the evidence in the case, I come to the following conclusions:

1. That the Favorite filled with water as a consequence of the blow she received from the Petrie, whether the hole on the star-board side of the bow was, or was not, made by the Petrie, or by any possible unevenness of the bottom at the ice dock, or by the spile at Port Ewen.

2. That the Favorite, though an old boat, and not in first-class condition, was reasonably fit for the voyage, and is, therefore, not to be held in fault for filling with water.

3. That it was improper, and hazardous to the other boats in the tow, to continue to tow such a boat as the Petrie was known to be, loaded with ice, and filled with water, at least 15 miles after her condition was known at 6 o'clock on Sunday morning; and that the continued towing of the Petrie, instead of detaching her and leaving her at one of several places where she might have been left, was at the risk of the respondents, and not at the risk of the libelant's boat.

4. That the accident to the Favorite was such as to break up her voyage, and render the delivery of the boat and cargo of ice at New York, where she was bound, impracticable.

5. That the ice dock was a suitable place for the temporary landing of the Favorite, until her owner could take charge of her; that the respondents are answerable for any additional damage which she may have sustained while lying there until the lapse of a reasonable time for the owner to take charge of her; and that the owner cannot recover for any additional damage after the lapse of such reasonable time.

6. That some loss on the cargo of ice on board the Favorite was a natural result of the collision, for which the respondents are liable; whether partial or total, may be determined on the reference. The New York, 40 Fed. 900.

7. The evidence before me indicates that the Favorite could have been raised and repaired at a moderate cost, and does not justify the conclusion that she had sustained damages equivalent to a total loss at the time when she was landed at the ice-house dock, or within a reasonable time thereafter for her removal by the libelant, unless her value, as an old boat, was small, and that, if valuable, the libelant was negligent in practically abandoning the boat and cargo and making no attempt to raise or repair her. *Towboat Co. v. Pettie*, 1 U. S. App. 62, 1 C. C. A. 314, and 49 Fed. 464; *The Havilah*, 1 U. S. App. 138, 1 C. C. A. 519, and 50 Fed. 333; *Railroad Co. v. Washburn*, 50 Fed. 336.

Decree for libelant, with reference to compute the damages on above principles.

KNAPP v. KNAPP.

(District Court, D. Alaska. June 5, 1893.)

FEDERAL COURTS—JURISDICTION—ACTION AT LAW ON DECREE OF DIVORCE.

An action at law will lie in a federal court, upon a decree of divorce rendered by a state court of equity, to recover all alimony accrued at the time of filing the complaint.

At Law. Action by Gertrude Knapp against George E. Knapp on a decree of the superior court of the state of Washington, for Skagit county. Heard on demurrer to complaint. Overruled.

C. S. Johnson, for plaintiff.

Lyman E. Knapp, for defendant.

TRUITT, District Judge. This is an action at law for debt, and is based on a decree of said superior court, which is set out in haec verba in the complaint, as follows:

"In the Superior Court of the State of Washington for the County of Skagit.

"George E. Knapp, Plaintiff, vs. Gertrude Knapp, Defendant. (No. 1,538.)

"Decree.

"On this 1st day of February, 1893, this cause having been tried upon the issues raised by the pleadings, and after such trial the court having made and filed its findings of facts and conclusions of law, whereby it appears: First. That both parties to this cause are entitled to a decree of divorce. Second. That the defendant is entitled to the custody of the child, Matilda, until it should arrive at the age of five (5) years, and thereafter until the further order of the court. Third. That plaintiff assign to the defendant a certain mortgage on land in Lincoln county, Wash., and coupon note collateral thereto, guarantied by the Vermont Loan & Trust Company, of the face value of five hundred dollars, and that the defendant also have decree for an additional sum of three hundred (\$300) dollars, and that the plaintiff pay the sum of ten (\$10) dollars per month for the support of said child: Now, therefore, it is hereby adjudged and decreed that a divorce from the bonds of matrimony be, and the same hereby is, granted to both parties; and that the marriage contract existing between them be, and the same hereby is, dissolved, as to both parties. (2) That the defendant have the care and custody of the child, Matilda, until it shall arrive at the age of five (5) years, and thereafter until the further order of the court. (3) It is further decreed that the plaintiff assign to the defendant the coupon note, and collateral mortgage thereto on lands in Lincoln county, Wash., and guarantied by the Vermont Loan & Trust Company, of the face value of five hundred dollars. (4) It is further decreed that the defendant have and recover from the plaintiff an additional sum of three hundred (\$300) dollars, and that defendant have execution therefor. (5) It is further decreed that the plaintiff pay the defendant, in monthly installments, and payable on the first of each and every month, the sum of ten (\$10.00) dollars, for the support and maintenance of said child, commencing on the 1st day of March next, and that defendant have execution therefor. (6) It is further decreed that each party pay his or her own costs of this suit.

"Henry McBride, Judge."

The complaint, after setting out this decree, then states that the plaintiff has duly complied with the directions thereof as to assigning to defendant the note and mortgage therein mentioned, but has wholly failed and neglected to pay said \$300, or any part thereof, to plaintiff, and has failed to pay, or make provision for payment of, said sum of \$10 per month, as provided in said decree; that said

sum of \$300 is now due and owing, together with interest thereon from the 1st day of February, 1893. The complaint further alleges "that before the hearing on this complaint can be had, to wit, on the 1st day of March, 1893, the first of said monthly payments of \$10 will be due, and that on the 1st day of each succeeding month a payment of \$10 will be due from defendant to plaintiff." It also alleges that said superior court had the jurisdiction and power to make said decree, and that the same is in full force and effect, and has never been reversed, satisfied, or otherwise vacated. The prayer is for judgment for the sum of \$300, with legal interest since February 1, 1893, and for the further sum of \$10 per month, to be paid on the 1st day of each and every month, beginning on the 1st day of March, 1893, so long as said decree of said superior court shall remain in force, and for the costs and disbursements of the action. This complaint was filed on the 21st day of February, 1893, and the defendant has filed a demurrer thereto, in which the following grounds therefor are specified: (1) That the court has no jurisdiction of the person or subject-matter of the action; and (2) that the complaint does not state facts sufficient to constitute a cause of action.

The question of jurisdiction of the court that rendered the decree upon which this action is based is not raised by this demurrer, for that can only be done by a plea in the way of an answer. This court has jurisdiction of the person of the defendant, because he has not only been regularly served with process, but has also appeared in the case.

The only question, then, which could be raised by this demurrer, and the only question presented in arguing it, is as to whether or not a complaint in an action at law for debt, based upon a decree of a court of chancery in a state court of general jurisdiction for a specific amount of money, states a cause of action in a federal court in another state or territory. Upon first approaching this question, I was somewhat surprised to find that Mr. Bishop, in his very learned work on Marriage and Divorce, in treating of it, says, "The doctrine is believed to be general, that an action at law will not lie for money decreed in a court of equity." 2 Bish. Mar. & Div. § 499. But the case of *Hugh v. Higgs*, 8 Wheat. 697, to which he refers as authority, has been overruled in *Pennington v. Gibson*, 16 How. 65, where it is expressly held that in all cases where an action of debt can be maintained upon a judgment at law, to recover a sum of money awarded by such judgment, the like action may be maintained upon a decree in equity, provided it is for a specific amount, and the records of the court are of equal dignity and binding obligation. The other cases cited are from the courts of Massachusetts, and I have not been able to examine them; but under the clear statement of the law on the subject in *Pennington v. Gibson*, *supra*, which is reaffirmed in *Nations v. Johnson*, 24 How. 203, I consider the question settled in the federal courts. I do not, therefore, feel called upon to investigate a line of decisions made by a state court, which, if not modified or overruled by the court that made them, are certainly at variance with most of the other state

courts, as well as the federal courts; for Black, in his very exhaustive treatise on the Law of Judgments, (volume 2, § 962,) gives the following statement and rule of law:

"The English law has always sanctioned the maintenance of actions at law upon decrees in chancery rendered in foreign countries, or in the colonies, when such decrees were merely for the payment of a specific sum. But, in regard to the decrees of their own court of chancery, the rule in that country is fixed to the contrary. The law courts refuse to take cognizance of actions on such decrees, for the reason that the court which made the decree can, within its own jurisdiction, enforce it, and for this reason the action would be unnecessary. In the United States, some of the earlier cases manifested a disposition to follow the English rule in this respect. But those decisions have been overruled, and it is now well settled that an action of debt will lie in a court of law upon the decree of a domestic court of chancery, in all cases where such decree directs the payment of a fixed, liquidated, and absolute debt in money."

Freeman also gives the rule in equally emphatic language. (Freem. Judgm. § 434.)

The constitution of the United States declares that:

"Full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state; and the congress may, by general laws prescribe the manner in which such acts, records, and proceedings shall be proved, and the effect thereof."

And section 905 of the Revised Statutes provides the mode of authenticating the records and judicial proceedings of any state, territory, or county, and then declares that:

"The records and judicial proceedings, so authenticated, shall have such faith and credit given to them in every court within the United States as they have by law or usage in the courts of the state from which they are taken."

In 1813 the celebrated case of *Mills v. Duryee*, 7 Cranch, 481, was decided by the supreme court, and in the decision the act of May 26, 1790, is construed, and it is held that a judgment of a sister state is conclusive on the merits; that, for the purposes of pleading and evidence, it is entitled to the full dignity of a record; and that the defendant cannot, when sued on the judgment, deny the indebtedness which it recites, or the obligation it establishes, or impeach its justice. Following the rule given in *Pennington v. Gibson*, supra, I hold that an action of debt can be maintained on the decree set out in the complaint in this case, and that under the authority of *Mills v. Duryee*, supra, this decree is conclusive on the merits of the suit in which it was obtained, when admitted by demurrer or failure to answer, or established by proof on the trial of the issues raised by a plea of nul tiel record, or such other plea as may be made. Black, in the Law of Judgments, (volume 2, § 958,) says:

"At the common law, an action of debt will lie on a judgment as soon as it is recovered, and without any regard to the plaintiff's right to take out execution; for the remedy by execution is cumulative, merely, and the statute which gives this remedy does not impair the common-law right of action on the judgment as a debt of record. Accordingly, in a majority of the states, the owner of a judgment may bring suit thereon in the same or any other court of competent jurisdiction, and prosecute it to final judgment, notwithstanding the collection of the original judgment might still have been enforced by execution, and even although an execution is then outstanding."

Freeman, in his *Law of Judgments*, (section 432,) shows the weight of authorities to be in support of the common-law rule. Both of these authors refer to the case of *Pitzer v. Russel*, 4 Or. 124, where it is determined—

"That the plaintiff cannot claim a strict right to sue his judgment as often as he may choose, without showing any necessity for such course."

But this case was entirely different from the one at bar. It was an action brought in the county court of Benton county, Or., upon a judgment in a justice's court of Grant county, in that state; and the laws of Oregon have a provision by which a judgment given by a justice of the peace may be docketed in the circuit court, and thereafter it must be enforced as a judgment of such circuit court. The judgment of a circuit court of said state can be enforced in any county thereof by execution issued and sent to the sheriff of such county; and the law expressly provides that "executions may be issued at the same time to different counties." Code Or. § 274. There is also a provision for making the lien of a judgment in one county of the state effective in any other. Therefore, it would seem to be entirely unnecessary to annoy a judgment debtor, and put him to heavy costs, by multiplying domestic judgments within the state of Oregon, unless some valid cause therefor can be shown. But the same reasoning would not apply there against maintaining an action on a judgment or decree of a sister state. The complaint in this action alleges that the decree sued on is in full force and effect, and has never been revised, satisfied, or otherwise vacated, and I think it presents a cause of action which this court has jurisdiction to try. The demurrer must therefore be overruled. But, in holding that the complaint alleges a cause of action, I do not decide that the plaintiff is entitled to all she demands. It seems to me that, when sued on, the same general rules of law should apply to this decree that would apply to an instrument of writing for the payment of money to become due in installments, except that it has greater dignity, and must be given more faith and credit, than a written obligation to pay could have. No action at law can be maintained upon such an instrument for any greater sum than the amount of the installments due at the time of commencing the action, and the statute of limitations begins to run from the expiration of the period fixed for the payment of each installment as it becomes due. *De Uprey v. De Uprey*, 23 Cal. 352.

The case of *McCracken v. Swartz*, 5 Or. 63, was a proceeding in the nature of *scire facias*. The verified motion, which, under the Code of Oregon, takes the place and answers the purpose of a declaration, set forth that on March 18, 1867, a decree was rendered by the circuit court for Marion county, in favor of the plaintiff and against the defendant, for the sum of \$100 per annum from the date of said decree, to be paid said plaintiff as alimony for the support of herself and family. The first payment or installment of \$100 fell due March 18, 1868, and each succeeding year a like sum had become due, but no payment had ever been made upon the de-

cree. The motion alleged that, at the date of filing it, the amount due upon said decree was \$500 and interest. This was all that was due then, and it was not claimed that an order for an execution in any greater sum could be made. In Oregon, when such an order is made, it is entered in the journal of the court, and docketed as a judgment, and, to all intents and purposes, becomes a judgment.

The elementary principles of the laws, and such authorities as I have found touching the question, all negative the claim that the plaintiff in this action should have any greater relief than a judgment for the amount shown to be due upon the decree sued upon at the date of filing the complaint. The amount of interest allowed upon a judgment or decree of a sister state, when it is the basis of action in another forum, is determined by the laws of the state where the judgment or decree was obtained. In this case, judgment will therefore be entered in favor of the plaintiff and against the defendant for the amount due upon the decree set out in her complaint at the date of filing, together with interest thereon according to the laws of Washington, and for costs and disbursements, unless an answer be filed within such reasonable time as may be granted therefor.

CHICAGO TRUST & SAV. BANK v. BENTZ et al.

(Circuit Court, E. D. Louisiana. December 9, 1893.)

No. 12,226.

1. COURTS—STATE AND FEDERAL—CONFLICTING JURISDICTION.

The claim of mortgage bondholders of a corporation to an equitable lien on the proceeds of insurance policies on the corporate buildings, by virtue of a stipulation in the mortgage for insurance for their benefit, may be determined in a federal court, notwithstanding the pendency in the state courts of suits wherein other bondholders seek the same relief.

2. SAME—INJUNCTION.

A federal court has no jurisdiction to interfere, by injunction against either party, with a suit previously brought in a state court by the liquidators of a corporation, upon insurance policies in their possession and covering the corporate buildings, although the complainants in the federal court claim an equitable lien on the proceeds thereof. *Rev. St. § 720; Whitney v. Wilder, 4 C. C. A. 510, 54 Fed. 554.*

In Equity. Suit by the Chicago Trust & Savings Bank against H. Bentz and others, liquidators of the Home Brewing Company. On demurrer to the bill. Sustained in part, and overruled in part.

Lazarus, Moore & Luce and F. B. Thomas, for complainant.

A covenant in a mortgage, to keep the mortgaged premises insured for the benefit of the mortgagee, creates a special equitable lien upon the insurance money, good against the mortgagor, privies, or third persons. *Wheeler v. Insurance Co., 101 U. S. 439; In re Sands Ale Brewing Co., 3 Biss. 175; Cromwell v. Insurance Co., 44 N. Y. 42; Ames v. Richardson, 29 Minn. 330, 13 N. W. 137; Miller v. Aldrich, 31 Mich. 408; Bank v. Benson, 24 Pick. 204; May, Ins. §§ 380, 391; 2 Wood, Ins. § 119; 1 Hil. Mortg. §§ 29, 30.*

The United States circuit court has jurisdiction to proceed against a liquidator or receiver appointed by a state court, and fix and determine such equitable lien. *Payne v. Hook, 7 Wall. 425; Lawrence v. Nelson, 143 U. S. 215, 12 Sup. Ct. 440; Dwight v. Railroad Co., 9 Fed. 785; Linton v. Mosgrove, 14 Fed. 543; Ball v. Tompkins, 41 Fed. 486.*

Not indispensable that all holders of mortgage bonds, secured under the mortgage act, should be made parties. *Payne v. Hook*, 7 Wall. 425; *Story*, Eq. Pl. § 89; *West v. Randall*, 2 Mason, 193; *Wood v. Dummer*, 3 Mason, 308; *Campbell v. Railroad Co.*, 1 Woods, 369.

Dinkenspiel & Hart, for defendants.

BOARMAN, District Judge. This is a suit in equity, for specific performance and injunction. It is now being heard on demurrer filed by defendants. The Home Brewing Company, a corporation domiciled in the city of New Orleans, Louisiana, as an insolvent, went into liquidation, through process of the state courts, at New Orleans, in August, 1893. Previously, the plant and buildings had been destroyed by fire. Its principal assets consist of values evidenced by several insurance policies in several companies named in the bill. H. Bentz and August Habernicht were made liquidators by the state court. The insolvent company, in order to secure funds for the construction of its buildings and plant, issued a first and second series of bonds, amounting to about \$80,000. The payment of these bonds was secured by a mortgage covering all the buildings and plant of the company. The mortgage recites that the buildings and plant should be insured for the benefit of the holders of these bonds, and the buildings and plant were insured in the several companies named in this bill. The complainants allege that, in pursuance of said recital in the mortgage act, the said insurance policies were to be, and should have been, turned over to the holders of bonds, and that such was the intention of all the parties to the mortgage contract; but that, through neglect or omission, on the part of the said company, said policies were not so turned over. Complainant alleges, further, that, under the terms of the mortgage act, an equitable assignment of said policies was intended to be made, and was, in law, made, to complainant and all other holders of similar bonds, and that they are entitled to possession and custody of said policies.

It is conceded that, at the time this bill was filed, the building and plant of the defendant company had been destroyed by fire, and that the said liquidators had begun suits in the state court to collect the indebtedness, as shown by the several policies, and to subject the proceeds thereof to their administration as liquidators. It is shown that several creditors of the said insolvent had intervened, in those pending suits, to secure certain equitable liens which they claim on the insurance fund, because they are holders of certain bonds similar to those sued on by the complainants in this suit. It is conceded, too, that the said several insurance policies had not been turned over to the complainant, or any of the bondholders, and the said several policies were found in and among the assets of the defendant company, when liquidators were put in charge of the insolvent property. It seems that the bill asks no judgment for any sum of money. Possession of certain insurance policies, on which complainant seems to have an equitable lien, is sought by a decree for specific performance and injunction; i. e. the bill asks that the liquidators be prohibited and enjoined

from making any disposition of money collected by them on the policies of insurance, and complainant asks to have the several insurance companies enjoined and restrained from paying said liquidators any of the sums adjusted and found to be due the defendant insolvent company by said insurance companies. It is further sought to have the court direct the issuance of subpoena and orders to the liquidators, commanding them to come before this court at a certain time, under penalty for disobedience, and then and there make full and true answer in the premises, and to conform to all directions and orders of this court.

The authorities cited by counsel for complainant show, abundantly, that this court has jurisdiction to entertain and pass upon the equitable lien claimed on the fund arising from the several insurance policies. This jurisdiction is in the federal court, notwithstanding the pendency of the suit brought in the state court by the interveners, who hold and sue on some of the same series of bonds as those of which complainant now seeks possession. But no authority is shown which authorizes this court to grant the injunctions against the insurance companies, or to stay, or in any way control, the proceedings by the liquidators in the state courts. Section 720 of the Revised Statutes says that "a writ of injunction shall not be granted by any court of the United States to stay proceedings in any court of the state except where such injunction is authorized by any law relating to proceedings in bankruptcy." The appellate court for the fifth circuit has recently held, in the case of *Whitney v. Wilder*, which went up from the eastern district of Louisiana, that the prohibition in section 720 "extends to all cases over which the state court first obtains jurisdiction, and applies, not only to injunctions aimed at the state court itself, but also to injunctions issued to all parties before the court, its officers, or litigants therein." 4 C. C. A. 510, 54 Fed. 554, 555; *Peck v. Jenness*, 7 How. 625; *Dial v. Reynolds*, 96 U. S. 340; and other authorities.

It appears that the case presented by the complainant should be controlled by the principles laid down in the cases just cited, and that this court is without power to grant an injunction restraining the insurance companies from responding to any judgment of the state court, or to issue orders or directions to the state court, to the liquidators, or to the litigants in the several suits pending in the state court. So much of the bill as seeks relief by injunction against the insurance companies, or by orders to the liquidators, is denied and dismissed, and the restraining order heretofore granted set aside.

The bill will be heard, at the instance of the attorneys for the complainants, on any matters not disposed of in this order.

ROBINSON v. HALL et al.

(Circuit Court, E. D. North Carolina. January 4, 1894.)

No. 11.

1. NATIONAL BANKS—INSOLVENCY—DIRECTORS—PERSONAL LIABILITY.

Directors will not be held personally liable for losses except in cases of active or passive fraud or extreme negligence.

2. SAME—PLEADING—NEGLIGENCE.

An allegation that the directors "permitted" loans to be made to one person in excess of 10 per cent. of the bank's capital is not equivalent to an averment that they knowingly permitted it, or that they could have ascertained the existence thereof by an examination of the books, and is insufficient to charge them with personal liability for resulting losses.

3. SAME—EQUITY JURISDICTION.

An allegation that a director withdrew \$1,000 from the bank, after knowledge of its insolvency, and immediately before its suspension, states a matter rendering him liable to an action at law, but is not a matter of equity jurisdiction, and cannot be considered in an equity suit to charge him with personal liability.

4. SAME—DUTIES OF DIRECTORS—CONCEALING BANK'S EMBARRASSMENT.

It is no ground of personal liability, or even of censure, that directors, knowing of the bank's embarrassment, conceal the fact from creditors; for such is their duty, unless the embarrassment is such as to imperatively demand suspension.

5. SAME—REQUIRING BONDS OF OFFICERS.

Directors have a discretion, under Rev. St. § 5136, whether or not to require bonds of their officers; and the omission to take a bond of a cashier who is a man of good repute and character, and of some visible property, does not of itself render them personally liable for losses caused by his misconduct.

In Equity. Bill by W. S. O'B. Robinson, receiver of the First National Bank of Wilmington, N. C., against B. F. Hall, James Sprunt, D. G. Worth, G. Herbert Smith, and James H. Chadbourn, directors of said bank, to charge them with personal liability for certain losses alleged to have occurred through their negligence. Heard on demurrer to the bill. Sustained, and bill dismissed.

Daniel L. Russell, for complainant.

Marsden Bellamy, Junius Davis, E. S. Martin, Ricaud & Weill, and Du Brutz Cutlar, for defendant.

SEYMOUR, District Judge. This is a bill brought by the receiver of a national bank against its directors, one of whom was also its president, calling them to account for alleged negligence. It is heard upon demurrer. All the allegations, distinctly made by the bill as amended, are to be considered as true, and the question to be answered is whether, upon his own showing, plaintiff has made a case for equitable relief.

The extent of the duty owing by national bank directors to their banks and to the creditors of such banks has not been accurately ascertained. Directors are not trustees, or insurers of the fidelity of the agents appointed by them. On the other hand, they are undoubtedly liable if personally guilty of fraud, or if they connive in the fraud of others, or permit it by criminal neglect of duty. They are also liable for failure to give ordinary attention to their

official duties. What the ordinary attention required of them may be is the question that remains to some extent undetermined. "The degree of care required," says Fuller, C. J., in *Briggs v. Spaulding*, 141 U. S. 132, 11 Sup. Ct. 924, "depends upon the subject to which it is to be applied, and each case has to be determined in view of all the circumstances." "One must be very careful, in administering the law of joint-stock companies, not to press so hard on honest directors as to make them liable for constructive defaults, the only effect of which would be to deter all men of any property, and perhaps all men who have any character to lose, from becoming directors of companies at all. On the one hand, I think the court should do its utmost to bring fraudulent directors to account, and, on the other hand, should also do its best to allow honest men to act reasonably as directors." Sir George Jessell, in *Re Forest of Dean Coal Min. Co.*, 10 Ch. Div. 450, 451, cited by Fuller, C. J., in *Briggs v. Spaulding*, *supra*.

Directors are not required to manage the affairs of their banks personally. Rev. St. § 5136, subd. 8. The powers given them by the legislature are, to appoint officers of their banks, define their duties, fix the amount of their bonds, when bonds are required, and prescribe by-laws. *Id.* subds. 6, 7. They may also be directed, presumably by their by-laws, to personally exercise such incidental powers as shall be necessary to carry on the business of banking, or such powers may be exercised by the duly-authorized officers of the bank. *Id.* subd. 8. They are not required to reside at the bank's place of business, although they must live in the same state. Unpaid, and usually engaged in other occupations, they are not expected to give any large portion of their time to their duties as directors. The paid officers of the bank are hired to attend to its business, and intrusted with all its details. In practice, directors usually have periodical times of meeting, when they discuss the bank's business, and perhaps personally, or as members of a committee appointed for that purpose, pass upon paper offered for discount. Usually, however, the matter of ordinary discounts is intrusted to either the president or cashier, or both. Directors are deemed to have done their duty if they select officers reputed to be competent and trustworthy, and exercise a very general supervision over them. Courts will not ordinarily give relief against directors to the extent of holding them personally liable, unless in cases of active or passive fraud or extreme negligence. Mere neglect to fully inform themselves of the affairs of the bank, even to the extent that they could be ascertained by an inspection of its books, is not held to be gross negligence, unless, perhaps, in cases where grounds of suspicion of the good conduct of their officers exist, and have come to their knowledge, or may reasonably be supposed to have been known to them. They are pecuniarily interested as stockholders in the faithful conduct of their officers, and it would be considered unjust for any slight reason to hold them further liable to what in many cases would be the total ruin, by liability for the losses of the bank in case of its failure.

In the case before us, there is no charge of fraudulent acts com-

mitted by the directors. I pass over the allegation that defendant Smith withdrew \$1,000 from the bank after becoming acquainted with its insolvency, and immediately before its suspension. This, if true, renders him liable for an action at law to recover such payment on the part of the receiver, but it is not a subject of equity jurisdiction.

Some general charges are made against the directors which do not profess, in the form in which they are stated, to be causes of equitable interference. That the defendants, although knowing of the bank's embarrassment for some months before its failure, carefully concealed the fact from creditors, is not ground of censure. Such was their duty, if the embarrassment was not such as to imperatively demand the bank's suspension. The averment that defendants withdrew a large part of their balances from the bank before its failure is too indefinite in its statement of time to be worthy of serious consideration. They knew that the bank was embarrassed some months before its failure, the bill says. The only averment that gives dates is one which compares their balances a year previous to the failure with those at its date. Whether, in a forum of conscience, it should be held that the duty of a bank director, as does that of the captain of a vessel, requires him to be the last one to leave his ship, need not be considered; nor need I notice what the bill seems to state, but does not, that defendants informed certain favored creditors and stockholders of the financial condition of the bank.

I come to the averments relied upon by plaintiff; viz. that the directors are liable because they failed to require Bowden, the cashier, to give bond; because they did not immediately upon the bank's suspension record three mortgages held by it, and because they permitted two loans to be made in excess of 10 per cent. of the bank's capital. All of these defaults, it is claimed, resulted in loss to the bank, and for the full amount of such losses the bill asks that the directors be held liable.

1. An examination of the facts connected with the defalcations of Bowden, the cashier, shows that there was nothing in them that would have been likely to have attracted the attention of the directors. The total capital of the bank—\$250,000—was in some way dissipated. An assessment on stockholders of 100 per cent. is required, in addition, to make good the bank's losses. The amount that Bowden took was \$9,783.90; and it was taken in such a way as apparently not to give an easy opportunity for detection. In February, 1889, Bowden paid one Field a debt owing to him by himself, by crediting him with the sum of \$2,320 on his amount in the bank, without drawing his own check for the amount. A similar transaction took place in July, 1889, the amount this time being \$2,170. In April, 1889, and in November, 1890, Bowden let one Ford have, in the aggregate, \$3,000 bank money, as a loan, and took the notes and accompanying mortgages in his own name. In May, 1891, Bowden, having received a check for \$15,312.79 from a third party to pay a judgment of \$14,000 and an overdraft of \$1,312.79 due by the Pine Fibre Company to the bank, paid the judgment, and appropri-

ated the amount that should have been applied to the overdraft. It is not claimed that any of these transactions were known to any of the defendants, or that there were any circumstances that should have attracted their attention to them. Plaintiff's contention is that defendants are liable simply because they had required no bond from him. The proposition, therefore, is that, in every case in which a bond is not required by directors from an officer of a national bank, the former are responsible for any loss caused by his conduct; in other words, the directors, by not taking a bond, became themselves the bondsmen of the officer.

But the statute (Rev. St. 5136) does not require them to take bonds of their officers; it only empowers them to, wisely leaving the matter to their sound discretion. The question of whether directors are liable for failure to require a bond from a cashier was raised by the pleadings in *Briggs v. Spaulding*, supra, and was alluded to by the chief justice. If plaintiff's contention be correct, that circumstance, of itself, would have been sufficient to have made the defendants in *Briggs v. Spaulding* liable to the losses arising from the cashier's misconduct. It was not overlooked, and judgment went in favor of all the defendants. Nor was the omission to require such bond mentioned as ground of dissent in the opinion of the minority of the court. Holding that the directors are vested with sound discretion in the matter of requiring, or not, the officers of their bank to give bond, I will consider whether there was anything to call especially for such a requirement to be made of Bowden. The only reasons for doing so alleged, are that he was largely indebted to the bank, and not possessed of any considerable property. I suppose the large indebtedness spoken of is the \$9,783.90 already discussed. No other is charged in the bill to have existed. And of this indebtedness, it is apparent, the directors were not informed. How much property Bowden possessed does not appear. It is fair to take the averment of his inconsiderable means as an admission that he was a person possessed of some visible estate. As the contrary is not alleged, we may suppose him, before the failure of the bank, to have been a man of good repute and character. If the contrary were true, it would have been the duty of the directors, not simply to have required a bond, but to have discharged him. Under the circumstances alleged in the bill, I see no special reason for requiring a bond from him.

2. Three several mortgages, from different parties, had, by arrangement, been allowed to remain unrecorded. The bank suspended on the 24th of November, 1891. Plaintiff avers that it was the duty of the directors, immediately upon such suspension, to have recorded such mortgages, and that they are liable for losses accruing from their failure to do so. But the bank was put in the hands of an examiner by the comptroller of the currency on the 26th of November, as appears by the second article of the amended bill, and the court takes note of the fact that the 25th of November, 1891, was a national holiday. Furthermore, while the bill states that about \$6,000 was lost to the bank by reason of sundry dispositions made of part of the mortgaged property after the bank

failed, it does not state that such dispositions were made on either the 24th, 25th, or 26th of November, the only days during any parts of which the directors had control after the suspension of the bank.

3. It is averred that defendants permitted loans to be made in excess of 10 per cent. of the bank capital to two different persons, and that the bank will lose not less than \$40,000 on such loans. But the permission spoken of seems to have been purely constructive. There is no allegation that defendants knew that such loans had been made, or could have ascertained, by an examination of the books of the bank, their existence, or the fact that they exceeded the permitted percentage of bank capital, or that there was any negligence on their part of any kind. No fact appears in the bill which would fix these defendants with liability for this violation of Rev. St. § 5200. The word "permitted," as used by a pleader, cannot be construed to include knowledge.

This, as I have said, is not a case in which fraudulent conduct is imputed to the defendants. As far as appears from the bill, the defendants may have given reasonable care and attention to the management of the bank. The refusal to require a bond of their cashier was a matter purely of discretion. That they attended to the subject is evident from the fact that they required bonds from some of their officers, and did not from others. If the failure to record the mortgages could be considered an error, it was evidently an inadvertence,—a mere failure, during a period of excitement, to attend to a matter of detail; what is called in admiralty an error "in extremis," which is not counted as a fault. The loans in excess of the percentage allowed were not brought to their knowledge.

In the recent case of *Briggs v. Spaulding*, supra, it appeared that the directors of an insolvent national bank had held no meetings for years, exercised no supervision over the business or officers of the bank, and permitted it to be wrecked by a cashier from whom they had required no bond. Special circumstances were pleaded for each of the defendants,—illness, absence from the country, short term of service of the recently appointed directors,—and the pleas were accepted. I call attention to the case, not because it decides this one, but for the reason that it seems to me a much stronger case of negligence than is averred here, and because it illustrates the amount of care required from the directors of these institutions, and the reasonable excuses admitted for failure to detect the criminal conduct of their officers. In the present case, to hold defendants liable would, it seems to me, be to lay down the obligations of bank directors with a stringency not only inconsistent with the recent adjudication of the supreme court, but inconsistent with the possibility of securing the services of competent and prudent men as directors. I have not thought it necessary to consider the objections made to the bill as a pleading. Without expressing any opinion upon its sufficiency in form or statement, I hold that, upon the merits of the case stated by the bill, the demurrer must be sustained, and the bill dismissed.

CALDWELL v. ROBINSON.

(Circuit Court, D. Idaho, C. D. January 22, 1894.)

1. **PUBLIC LANDS—INDIAN COUNTRY—SETTLEMENTS—INTERCOURSE LAWS.**
The provision in the intercourse act of 1834, (4 Stat. 729, § 11,) forbidding white persons from settling upon any lands "belonging, secured, or granted by treaty" to any Indian tribe, did not prohibit settlement upon lands in the Indian country outside of any reservation, and in which the only Indian right was the original right of occupancy at the will of the government.
2. **SAME—OREGON LANDS—RIGHTS ACQUIRED UNDER PROVISIONAL GOVERNMENT.**
By the provisions of sections 4 and 7 of the Oregon donation act, passed in 1850, all rights to land which accrued under the previous provisional government of Oregon were recognized, but the grant was finally to pass to the settler only by a compliance with the conditions prescribed by the act.
3. **SAME—DONATION ACT—REGION COVERED.**
The provisions of the donation act recognizing claims arising under the provisional government were not limited to lands lying west of the Cascade mountains, but extended to the whole territory as then existing. The provisions for surveys and disposal of public lands were at first so limited, but were afterwards extended to lands east of such mountains. 11 Stat. 293.
4. **SAME—INDIAN RESERVATION—VESTED RIGHTS—CONSTITUTIONAL LAW.**
A settler who acquired rights under the provisional government, and afterwards complied with the conditions of the donation act, in so far as he was not forestalled by the land officers, but who was refused a certificate and patent, acquired a vested right which congress could not afterwards treat as a mere right of occupancy; and, although the land was subsequently included in an Indian reservation, the government officials could not disturb the possession of his grantees.
5. **SAME—COURTS—ENJOINING PUBLIC OFFICERS**
The officers or agents of the interior department may be enjoined from unlawfully ejecting a person having a vested right to the possession of lands.

In Equity. Suit originally brought in a state court by William A. Caldwell to enjoin Joseph Robinson, an Indian agent of the United States, from forcibly ejecting him from the possession of certain lands in the Nez Perce Indian reservation. On motion to dissolve an injunction granted by the state court. Denied.

James W. Reid, for complainant.

Fremont Wood, U. S. Atty., for defendant.

BEATTY, District Judge. This cause was removed from the state court, wherein an order had been made enjoining defendant from ejecting the complainant from certain lands. The motion for dissolution of such order being called, the parties, stipulating to submit the cause upon its merits, agreed to a statement of facts, among which are:

That William Craig, a citizen of the United States, with his wife, an Indian woman, in the year of 1846, settled upon the tract of land in controversy, containing 640 acres, situated within the Nez Perce Indian reservation in the state of Idaho, but at the time of settlement within what was Oregon territory; that they resided upon and cultivated said land from such settlement until 1869; that on June

4, 1855, said Craig filed in the proper land office the notice of his claim to such land, and a description thereof, under the act of September 27, 1850, (9 Stat. 496,) commonly known as the "Oregon Donation Act," and at the same time made and filed in said land office his proof of residence upon and cultivation of such land for four years; that by mesne conveyance complainant is now in the possession of and claims to own the undivided one-half of the land, the legal title being still in the government; that defendant is the Indian agent in charge of such reservation, and that only as such, and under instructions from his superior officers of the interior department, his actions in this matter were taken.

1. The defendant claims that Craig's settlement was void, because at the time made the "Indian title" to the land had not been extinguished. That title was only such as attached to the unsettled and unoccupied public domain which had not been designated by congress for some special purpose, for, so far as appears, the land in question had not been so designated prior to such settlement.

It is unnecessary to now indulge in any reflections upon the systems of ethics which governed the Christian world in the acquisition of this country. Our aggressions upon the rights of the native race may continue to be, as they have been, a subject for pathetic song, and for the casuist's pen, but not one for present consideration. It has long been settled that the Indians had no title to this continent which we felt bound to consider during the process of its acquisition. When the Christian princes of Europe commissioned their subjects upon voyages of discovery, it was not doubted that all lands found by them in the possession only of the heathen could lawfully be taken by the discoverer, and from then until now the Indian heritage has been transferred from one government to another, and to their subjects, in total disregard of any claim or title thereto by the natives. From the Mississippi river to the "South Sea" the country was claimed under an absolute title by the governments of France and Spain. Their title passed to the United States by treaties with France in 1803 and with Spain in 1819. The only right ever conceded to the Indian was that of occupancy, which has generally proven to be the merest shadow of a right when it became inconvenient to the dominant race.

This question is fully reviewed by Chief Justice Marshall in *Johnson v. McIntosh*, 8 Wheat., where, upon page 585, it is said:

"It has never been doubted that either the United States or the several states had a clear title to all the lands within the boundary lines described in the treaty, [with Great Britain, 1783,] subject only to the Indians' right of occupancy, and that the exclusive power to extinguish that right was vested in that government, which might constitutionally exercise it."

And on page 587:

"The United States then have unequivocally acceded to that great and broad rule by which its civilized inhabitants now hold this country. They hold and assert in themselves the title by which it was acquired. They maintain, as all others have maintained, that discovery gave an exclusive right to extinguish the Indians' title of occupancy, either by purchase or conquest; and gave also a right to such a degree of sovereignty as the circumstances of the people would allow them to exercise. The power now possessed by the gov-

ernment of the United States to grant lands resided, while we were colonies, in the crown, or its grantees. The validity of the title given by either has never been questioned by our courts. It has been exercised uniformly over territory in possession of the Indians. The existence of this power must negative the existence of any right which may conflict with and control it."

The land in controversy having never, prior to its settlement in 1846, and, as we shall see, never prior to 1855, been within any government reservation, it would seem clear that the only title the Indians had to it was that of such occupancy as they had to unoccupied public lands in general, and that this right they held only by the voluntary consent of the government, which it might modify or extinguish, as it desired.

Attention has been called to the intercourse act of June 30, 1834, (4 Stat. 729,) defining the country west of the Mississippi river as "Indian Country." By section 11 it prohibits all white persons from settling upon "any lands belonging, secured, or granted by treaty with the United States to any Indian tribe." It does not exclude other lands from such settlement, but, on the contrary, the reservation of certain lands from settlement would imply authority to occupy those not so reserved. Moreover, the act contemplates the residence of whites in the Indian country, for its chief object seems to be to so regulate their intercourse with the Indians as to prevent strife and disorder between the two races.

The two cases—*U. S. v. Cook*, 19 Wall. 591, and *Leavenworth, L. & G. R. Co. v. U. S.*, 92 U. S. 733—cited by defendant's counsel are concerning lands within Indian reservations, and cannot be considered controlling in this case. This right of general occupancy to the public domain is quite different from that given the Indians when a special reservation is by law or treaty assigned to them; this the government treats as something tangible, and of it they are never deprived until they relinquish their claim. All public lands, including any Indian title thereto, being under the control of the government, it must follow that any right which Craig may have obtained to the land must have been through the laws of the government, and any laws which granted him such right must at the same time have operated to extinguish the Indian title thereto. It remains, then, to inquire by what, if any, laws or authority Craig's settlement was made.

2. Prior to our treaty of June 15, 1846, with Great Britain, the territory of Oregon, including what now constitutes the states of Oregon, Washington, and Idaho, was, by treaties of 1818 and 1827 with Great Britain, "open and free to the citizens of both powers." While in this condition, the people of Oregon, in 1845, organized a provisional government, through which any resident of the territory was allowed a land claim of 640 acres. After our government obtained undisputed control of the country, it adopted, in 1848, a territorial organic act for Oregon, by which the land laws of the provisional government were revoked. By section 4 of the said donation act it was provided that "there shall be and hereby is granted" 640 acres of land to married persons who should comply with the

provisions of the act "so as to entitle them to the grant as above provided, whether under the late provisional government of Oregon or since;" and by section 7, that "at any time after the expiration of four years from the date of such settlement, whether made under the laws of the late provisional government or not, shall prove," etc.

Thus congress recognized all rights which had accrued under the provisional government, but the grant was finally to pass to the settler only by a compliance with the conditions prescribed by the donation act.

3. Defendant interposes the objection that this act applied only to lands west of the Cascade mountains, hence not to those in question, which are east of that range. Section 3 provides for the survey only of the lands west of the Cascades; section 10 grants two townships therein for university purposes; section 7 of the amendatory act of February 14, 1853, (10 Stat. 158,) provides for appointment of land officers for the same territory; and by act of May 29, 1858, (11 Stat. 293,) it is directed that "the existing laws relating to the survey and disposal of the public lands in the territories of Oregon and Washington west of the Cascade mountains" are made applicable to the country east of those mountains. These provisions, considered alone, give some support to defendant's view, and possibly indicate that congress, by its last act, so construed its first. Considering, however, the whole act, it clearly appears as intended to apply to the entire territory. It is reasonable to conclude the survey was limited to the west, because most accessible. Neither was it needed then in the eastern part, which was little inhabited, while the purpose of the act of 1858 was to extend the surveys, not the act, to the entire territory. The donation act recognized the claims made under the provisional government, and there can be no pretense that they were limited to the western part of the territory.

In a contest over land lying east of the Cascades, in which the donation act was involved, no claim was made that the act was limited to the west thereof, (*Missionary Society v. Dalles*, 107 U. S. 336, 2 Sup. Ct. 672,) and so far as observed in the administration of the law it was treated by those enforcing it as applicable to the whole territory. It must be held applicable to the land in question.

4. What were the requirements of the donation act, and were they complied with by Craig? As required by section 4, he was a citizen of the United States. He and his wife were residents of the territory, and they "resided upon and cultivated the land for four consecutive years" immediately prior to June 4, 1855. By sections 6 and 7, certain notices were to be served by the settler upon certain officers, one within three and the other within twelve months after the survey of the lands, and "at any time after the expiration of four years from date of settlement shall prove by two disinterested witnesses the facts of continued residence and cultivation required by the fourth section of this act." By section 6 of the amendatory act of 1853 the notices were required "in advance of the time when the public survey shall be extended over the particular land claimed by" the settler, and the time in which to make

them was by another amendatory act of July 17, 1854, (10 Stat. 305,) extended to December 1, 1855. On June 4, 1855, Craig gave the notices required, and at the same time made the proof demanded by section 4 of the original act. By section 7, a certificate for patent should be issued at the time of making this proof, but it appears the register and receiver of the land office, who by law had succeeded the surveyor general, notified Craig of the receipt of his proof; that it was satisfactory, but that his certificate could not be issued until after the public survey, which was not made until 1870, prior to which Craig and his wife had conveyed their title and had died. At the time of this survey the purchaser from Craig had the land surveyed by the government surveyor, and paid him therefor. His subsequent application to the land department for his patent was refused, because—First, the proof was not accompanied by the affidavit required by section 12, to the effect that no sale of the land or contract of sale had been made; and, second, that no certificate, as required by section 7, had been issued. The affidavit required by section 12 (based also upon a provision of section 4) applied only to settlements made subsequent to December 1, 1850, and the provision of section 4 was repealed by section 2 of act of 1854. By *Barney v. Dolph*, 97 U. S. 652, it is held that the settler may, after having performed all the acts required, sell his claim.

From the foregoing it will be seen that by some means Craig had informed himself of the frequent changes in the law, and with which he complied in every particular except—First, his proof of residence and cultivation may have been premature; and, second, that he did not procure his certificate at the time of making his proof. Are these fatal defects? There is nothing in any of the acts that directly indicates that the proof should not be made prior to the survey. Its chief object is to show the settler's compliance with the law. Having done so, why should he not be permitted to show it, and thus, as far as he can, perfect his title? It cannot be seen how the government or others can be damaged by it. The government should have notice of any claim upon its lands, that other disposition may not be made of them. Had it been deferred until after the long-delayed survey, the settler might have been charged with laches. The land department did hold (*Ex. B, Defts.' Ans.*) that "the fact that William Craig filed his notice in 1855, and allowed the matter to rest until 1869, when he died, without making any attempt to perfect his claim under the donation act, is evidence that he intended to abandon his claim." It would be a good reason for delaying the proof until after the survey, had the act required that such claims must be taken by legal subdivisions, but by a fair construction of the acts the settler is not so limited. That the certificate was not issued cannot be charged to the neglect of Craig. He had complied fully with the law. His grantees have asked for the certificate and a patent, and the government has refused. I am unable to see what more the settler could or was required to do.

The question being in the condition shown by the foregoing statement, the government, on the 11th day of June, 1855, (12 Stat. 957,) entered into a treaty with the Nez Perce Indians, by which the

reservation, within the limits of which this land lies, was assigned to them. Article 10 is as follows:

"The Nez Perce Indians having expressed in council a desire that William Craig should continue to live with them, he having uniformly shown himself their friend, it is further agreed that the tract of land now occupied by him and described in his notice to the register and receiver of the land office of the territory of Washington on the fourth day of June, last, shall not be considered a part of the reservation provided for in this treaty, except that it shall be subject in common with the lands of the reservation to the operations of the intercourse act."

This article was subsequently adopted and ratified by congress. It contained a notice to that body that Craig claimed the title, and not a mere right of occupancy, to these lands, under laws absolutely granting him such right by his compliance with their provisions, and the notice referred to in the treaty as filed in the land office with his proof, would show, not only his claim to the land, but also his compliance with the law. Although congress had such notice of the claim, and recognized Craig's rights to the land as claimed by him by excluding it from the reservation, it has since, by two acts, treated the claim of Craig as a mere right of occupancy.

By the treaty of June 9, 1863, (14 Stat. 647,) it was provided that the entire reservation, within which is this said land, was set apart to the Indians for their exclusive use, and that no white man should "be permitted to reside upon the reservation;" and by the act of March 3, 1873, (17 Stat. 627,) Craig's rights are expressly construed as a mere right of occupancy. That congress had the right to thus control the land, even to the cancellation of Craig's right and claim thereto, the cases of *Frisbie v. Whitney*, 9 Wall. 187, and the *Yosemite Valley Case*, 15 Wall. 77, are invoked. It was, in effect, held in those cases that under the pre-emption laws the settler's partial compliance therewith, and his manifested willingness to fully comply, did not give him such a vested right as estopped congress, prior to his full compliance, from making such other use or appropriation of the land as would operate to prevent him from procuring title.

Careful examination of the *Yosemite Valley Case*, where the question is fully reviewed, will show that the rule applicable to pre-emption cases will not hold in one like this. It proceeds upon the theory that under the pre-emption law, the government does not enter into any agreement to convey to the settler the land he locates upon until it shall have allowed him to complete his entry and claim by the payment of the government price for the land, and it also allows him the preference over others to buy the land when it shall be offered for sale, and that at any time prior to that the government may withdraw this privilege, and devote the land to any other use. The court says, (page 87:)

"Until such payment and entry, the acts of congress give to the settler only a privilege of pre-emption in case the lands are offered for sale in the usual manner; that is, the privilege to purchase them in that event in preference to others. The United States by those acts enter into no contract with the settler, and incur no obligation to any one, that the land occupied by him shall even be put up for sale. They simply declare that, in case any of their lands are thrown open for sale, the privilege to purchase them in

limited quantities, at fixed prices, shall be first given to parties who have settled upon and improved them. The legislation thus adopted for the benefit of settlers was not intended to deprive congress of the power to make any other disposition of the lands before they are offered for sale, or to appropriate them to any public use."

And upon page 94:

"It seems to us little less than absurd to say that a settler or any other person, by acquiring a right to be preferred in the purchase of property, provided a sale is made by the owner, thereby acquires a right to compel the owner to sell, or such an interest in the property as to deprive the owner of the power to control its disposition."

The court illustrates the differences between pre-emption cases and those under laws where the government does enter into a direct agreement to convey the title upon compliances with the prescribed precedent conditions, by a consideration of the case of *Lytle v. Arkansas*, 9 How. 314. This was under the act of May 29, 1830, (4 Stat. 420,) which, by its first section, provided "that every settler or occupant of public lands prior to the passage of this act, who is now in possession and cultivated any part thereof in the year 1829, shall be and he is hereby authorized to enter" the same upon making due proof of the pertinent facts. The settler had complied with the law as far as he could, but the land department refused him title, and the court said that "it is a well-established principle that when an individual, in the prosecution of a right, does everything which the law requires him to do, and he fails to attain his right by the misconduct or neglect of a public officer, the law will protect him," and proceeded to award the title to the settler as against the state claiming under a subsequent grant or act of congress; and in the *Yosemite Valley Case*, on page 91, the court says of the *Lytle Case*:

"There is no question about the correctness of the doctrine here announced. It is only a familiar principle which is stated,—that where one offers to do everything upon which the acquisition of a right depends, and is prevented by fault of the other side, his right shall not be lost by his failure. The principle only applies when, by law or contract, the acquisition of a right is made dependent upon the performance of certain specified acts. There can be no such thing as the acquisition of a right of pre-emption—that is, of a right to be preferred in the purchase of property of the United States—until such property is open for sale. In the case from Arkansas the law of 1830 authorized the entry and sale of the land to the occupants and cultivators. It prescribed certain things to be done to entitle them to purchase. These things were done, or would have been done if the officers of the government had not failed in their duty."

It is too evident for discussion that the different conclusions reached in the two cases are due solely to the different statutes upon which they rest. The earlier case is based upon a statute which gave the settler the absolute right to the title upon compliance with certain conditions, while by the statute involved in the later case no such right was granted.

The granting clause in the donation act, while not a grant in praesenti, borders closely on it. It reads: "There shall be and hereby is granted," etc., to every settler who shall comply with the act. If, under the law of 1830, the settler who complied therewith as far as permitted by the officers was entitled to his land even against a subsequent grant by the government, this court is justified

in the conclusion that it has reached,—that by Craig's compliance with the donation act, in so far as he was not forestalled by government officials, his right became a vested one, and thus passed beyond the control of congress.

The plat of the survey of the land made by the government surveyor did not correspond exactly with the description of it as given by Craig. I think it should be surveyed as described in the notices, but substantially as occupied and cultivated; and to the undivided one-half thereof complainant is entitled to retain the possession.

The defendant is the agent of the secretary of the interior. The power of the court to enjoin his agents has not been discussed. Generally the officers of the departments cannot be controlled by injunctions or mandamus while acting in a judicial capacity, in which their judgments are to be based upon a consideration of facts; but in this case the action of the land department involved a construction of law, which is not subject to the same rule. It is held in *Noble v. Railroad Co.*, 147 U. S. 165, 13 Sup. Ct. 271, that such officers may be enjoined from the performance of an unlawful act. If the complainant is lawfully in the possession of the premises, it would be unlawful for defendant to forcibly eject him, and he may be restrained from so doing.

The injunction granted by the state court will be continued as prayed by complainant.

The court appreciates the baneful results that may follow this conclusion. It leaves a tract of land within the reservation subject to the occupation of white men, which is contrary to the wise policy of the government of excluding them as far as possible. Gladly would the court aid the Indian department in such exclusions, for there is nothing in the management of the Indians which results in so much annoyance as the residence among them of the whites, and especially of the lawless and abandoned; but, being convinced that the government, by its laws, authorized this settlement, and afterwards ratified it, my convictions are followed, regardless of consequences. The matter being important, I presume and hope it will be reviewed by a higher court. Therefore, in the absence of counsel, it is directed that defendant have time, until otherwise ordered, in which to file his bill of exceptions, or take any necessary steps for a review of the cause by the proper appellate court.

QUAKER CITY NAT. BANK v. NOLAN COUNTY.

(Circuit Court, N. D. Texas. January 31, 1894.)

No. 1,487.

1. COUNTY BONDS—INNOCENT PURCHASERS—NOTICE OF RECORDS.

When the laws or constitutional provisions relating to the issuance of county bonds point to the county records as evidence of facts required to authorize their issuance, such records, and not the recitals in the bonds, must be looked to by all persons proposing to deal in them.

2. SAME—VALIDITY—CONSTITUTIONAL REQUIREMENTS.

County bonds are invalid, even in the hands of bona fide purchasers, when issued without compliance with a constitutional requirement that

provision shall be made, at the time of incurring any debt, for levying a sufficient tax to create a sinking fund of 2 per cent. in addition to meeting the interest. Const. Tex. art. 11, § 7.

3. SAME—LEGISLATIVE POWERS—VALIDATING INVALID BONDS.

The legislature has no power to validate county bonds issued in violation of constitutional provisions, which are alive and in force at the date of the validating act.

4. FEDERAL COURTS—FOLLOWING STATE DECISIONS.

A decision of a state supreme court, sustaining a statute which validates certain county bonds, is not controlling on a federal court, when it appears that the bonds were void for failure to comply with a provision of the state constitution, but that this point was not called to the attention of the state court, and its decision was based on other grounds.

At Law. Action by the Quaker City National Bank against Nolan County, Tex., on coupons cut from certain county bonds. Tried by the court on an agreed statement of facts. Judgment for defendant.

Williams & Butts, for plaintiff.

Leake, Henry, Miller & Reeves and Cowan & Fisher, for defendant.

RECTOR, District Judge. In this case the plaintiff sues the defendant on 18 coupons, of \$80 each, detached from bonds 6, 7, and 8, of \$1,000 each, issued by Nolan county on or about April 10, 1882, and delivered to Martin, Byrne & Johnson. Plaintiff also sues, in this case, on 24 coupons, of \$80 each, detached from bonds 1, 2, 3, and 4, issued by Nolan county, and delivered to Mathews & Whitaker, each of said bonds calling for \$1,000, and dated April 10, 1882. Plaintiff also sues on 18 coupons, of \$80 each, detached from bonds 24, 25, and 26, for \$1,000 each, issued by Nolan county on June 21, 1882, and delivered to Wernse & Diechman. Plaintiff also sues on 6 coupons of \$80 each detached from bond No. 27, issued by Nolan county, dated June 21, 1882, for the sum of \$1,000, and delivered to Flippen, Adoue & Lobit.

The defendant answered by a general denial, and further pleads that, before any of said bonds were executed or delivered, defendant had already created, and there were then existing and outstanding against it, other debts fully equal to its lawful power to make debts. Defendant charges that, among the debts so existing and outstanding against it, are four bonds, of \$1,000 each, issued on the 5th day of April, 1882, to Martin, Byrne & Johnson, numbers 1 to 4, inclusive, and now owned by the state of Texas, and five bonds, for the sum of \$1,000 each, numbered 10, 11, 12, 13, and 14, referred to in the orders of the commissioners' court of said county, of the dates February 18, 1882, March 22, 1882, and April 15, 1882, and that said five bonds are now owned by the state of Texas. That all of said nine bonds were void in their inception, but they were validated from their original issue, in favor of the state of Texas, by the act of the legislature of said state approved the 25th day of May, 1885. Then defendant says the total assessed value of its taxable property, as shown by its assessment rolls, was as follows: For the year 1881, \$361,770; for the year 1882, \$908,-

276; for 1883, \$1,684,615; for 1884, \$1,953,755; for 1885, \$1,855,278.

2. A jury was waived. The agreed statement of facts in this case is as follows:

"Quaker City National Bank v. Nolan County.

"Now comes the Quaker City National Bank, plaintiff, by Williams & Butts, its attorneys, and Nolan county, defendant, by Leake, Henry, Miller & Reeves and Cowan & Fisher, its attorneys, and, for the purpose of a trial of the above-stated cause, agree to the following facts, to wit:

"(1) The county of Nolan, defendant, was organized in January, (10th,) 1881, and thereupon became, and ever since hath remained, and still is, a body corporate and politic, and the first term of its commissioners' court was held on the 28th day of January, 1881.

"(2) The total assessed value of property, as assessed for the county of Nolan for the year 1881, was \$361,770.00; for the year 1882, \$908,276.00; for the year 1883, \$1,684,615.00; for the year 1884, \$1,953,755.00; for the year 1885, \$1,855,278.00; for the year 1886, \$1,756,814.00; and for the year 1887, \$1,757,061.00.

"(3) By statute law, in force in Texas from 1876 to the present time, the assessment of all property for taxation in the several counties is required to be made by the assessor between the 1st day of January and the 1st day of June of the current year, with reference to the quantity held or owned on the 1st day of January in the year for which the property is required to be listed or rendered. The assessor is required to submit all lists of property rendered to him prior to the first Monday in June to the board of equalization, which is composed of the county commissioners' court of his county, on the first Monday in June, or as soon thereafter as practicable, for their inspection, approval, and correction, or equalization, and, after that board shall have returned the approved lists to the assessor, he shall then make out his rolls in triplicate, one of which is required to be filed in the county clerk's office, and one in the office of the state comptroller, and one to be delivered to the county collector, which must be done on or before the 1st day of October of the year, if possible, at which time the collection of taxes begins.

"(4) On February 14, 1881, the county commissioners' court of Nolan county entered an order of record, levying a tax of one-fourth of one per centum for courthouse purposes, and a tax of one-fourth of one per centum for jail purposes. At this time Nolan county owed no courthouse debt.

"(5) On May 11, 1881, the county commissioners' court of Nolan county ordered that bids to build a jail, to cost not exceeding \$10,000.00, be advertised for. On May 11, 1881, the county commissioners' court advertised for bids to build a jail, not to exceed in cost \$10,000.00; and on June 14, 1881, plans of Martin, Byrne & Johnson for the said jail were adopted, and contract awarded them, at a cost of \$8,755.00, to be paid in coupon bonds of the county, and, on October 4, 1881, a committee was appointed by the county commissioners' court of Nolan county to see that the contract for jail and courthouse combined was properly carried out.

"(6) On April 5, 1882, an order was entered on the minutes of the county commissioners' court, receiving the jail, as built by Martin, Byrne & Johnson, and authorizing the county judge (who was Wm. Barnett) to receive the keys and settle for the same. Some time after this, about April 10, 1882, Wm. Barnett, as county judge, and W. C. Johnson, as county clerk, issued nine bonds in the name of said county, eight of them for the sum of one thousand dollars, and the other for the sum of seven hundred and fifty-five dollars, and delivered the said bonds to the contractors, Martin, Byrne & Johnson, in payment for the said jail. There is no order on the minutes of the commissioners' court of said county, authorizing the county judge and county clerk, or any one else, to issue and deliver the said bonds, unless the above, in connection with the orders mentioned in the fifth clause of this agreement, is construed to be such authority, which is a question left open, to be decided by the court on the trial of this cause. The bonds first mentioned in plaintiff's petition as numbers 6, 7, and 8, being three of these bonds. Following is a copy of one of said bonds, all of which are of the same tenor

and effect, and contain the same recitals, save as to amount, date, time of maturity, and serial number:

“‘United States of America.
 “‘No. 5. \$1,000.00.
 “‘Courthouse Coupon Bond.
 “‘Nolan County, State of Texas.

“‘Know all men by these presents, that the county of Nolan, in the state of Texas, acknowledges itself indebted unto Martin, Byrne & Johnson, or bearer, in the sum of one thousand dollars lawful money of the United States of America, which sum the said county promises to pay, for value received, at Sweetwater, Nolan county, Texas, ten years after the date hereof, but redeemable at any time at the pleasure of said county, together with interest thereon at the rate of eight per centum per annum, payable annually, on the 10th day of April in each year, on presentation and surrender of coupons hereto attached, as they severally become due and payable. This bond is issued in accordance with the provisions of an act of the legislature of the state of Texas, entitled “An act authorizing the county commissioners’ court of the several counties of this state to issue bonds for the erection of a courthouse, and to levy a tax to pay for the same,” approved February 21st, 1879.

“‘In testimony whereof, I hereunto affix my official signature, and official seal of said county, at Sweetwater, Texas, this the 1st day of December, A. D. 1881.

William Barnett,

“‘Judge County Court, Nolan County, Texas.
 “‘[Seal of Commissioners’ Court.]

“‘Countersigned:

“‘W. C. Johnson, Clerk County Court, Nolan County, Texas.

“‘Registered 10th day of January, A. D. 1882.

“‘J. H. Fowler, County Treasurer, Nolan County, Texas.’

“(7) On February 18, 1882, the county commissioners’ court of Nolan county entered an order of record that a courthouse should be built at the county seat, during the year 1882, at a cost of not less than \$20,000.00, and that \$20,000.00, in 15-year coupon bonds, bearing interest at the rate of eight per centum per annum, be issued, and at once sold, and the proceeds applied to the building of the courthouse, said bonds to be redeemable at the pleasure of the county at any time after ten years from date, and J. W. Posey was appointed the agent of the county to sell said bonds at a commission of ten per cent. for his services, which commissions were to cover all costs of lithographing and disposing of said bonds.

“(8) On March 29, 1882, it was ordered by said court that the cost of the courthouse should not exceed \$23,000.00, and said Posey was continued as the agent of the county to sell the bonds, authorized to fill in the blank spaces with the names of the purchasers, and ten per cent. commissions awarded him, which commissions were to cover all discounts and cost of selling, as well as preparing, the bonds. On April 15, 1882, the county commissioners’ court amended the order of February 18, 1882, so as to make the bonds redeemable at the pleasure of the county at any time after ten years, which redeemable clause has been interlined in the previous order also. The \$20,000.00 15-year, 8 per cent. coupon bonds, that had been printed under the original order, were returned and destroyed, and it was ordered that 20 8 per cent. coupon bonds, of \$1,000.00 each, be lithographed and substituted for the bonds returned and destroyed.

“(9) On April 29, 1882, contract for building courthouse was let to J. M. Archer for \$22,000.00. June 19, 1882, it was ordered that seven bonds, of \$1,000.00 each, be issued to complete the courthouse, and that J. W. Posey be continued, to negotiate the sale of the bonds as before.

“(10) May 9, 1882, the county commissioners’ court entered an order of record, levying a tax of one-fourth of one per cent. for jail purposes. At the time this order was entered, Nolan county owed no courthouse debt, except the debt created by the bonds mentioned in this agreement as being issued prior to this time.

"(11) November 20, 1882, it was ordered by the county commissioners' court that J. M. Archer, the contractor, be paid three bonds, Nos. 21, 22, and 23, at ninety cents on the dollar, to cover \$2,700.00, due him as payment for extra work on the courthouse, over and above said contract.

"(12) On June 2, 1883, it was ordered by the county commissioners' court that W. B. Simpson & Co. be appointed agents to sell courthouse bonds Nos. 24, 25, and 26.

"(13) On November 8, 1883, three bonds of \$1,000.00 each, numbered respectively 28, 29, and 30, were, by said court, ordered to be issued to complete the courthouse, and ordered delivered to Thos. Trammell & Co., to be by them sold to the state comptroller for the usual commissions.

"(14) November 15, 1884, report of W. B. Simpson & Co. of sale of bonds Nos. 24, 25, and 26, for \$2,900.00, was received by the county commissioners' court, and three per cent. commission thereon for the sale was allowed them.

"(15) From the county records it appears that, by order of the county commissioners' court of said county, courthouse bonds were issued by the said county as follows: First. Series of \$20,000.00 courthouse bonds, ordered sold by J. W. Posey, consisting of 20 bonds of \$1,000.00 each, being numbered from one to twenty inclusive, dated April 10, 1882. Second. Three bonds, of like tenor and effect as the twenty above named, for \$1,000.00 each, being Nos. 21, 22, and 23, and awarded to J. M. Archer for extra work, and were dated June 18, 1882, and were delivered to J. M. Archer by order of the county commissioners' court, November 20, 1882. Third. Three courthouse bonds of \$1,000.00, being numbers 24, 25, and 26, which were ordered to be issued and delivered to W. B. Simpson & Co., to be by them sold for the county. These bonds bore date of June 21, 1882. Fourth. Courthouse bond No. 27 bore date of June 21, 1882, and was sold to Flippen, Adue and Lobitt, of Dallas, Texas, by the agent of the county, in the latter part of the year 1883, for \$850.00. Fifth. Three courthouse bonds, Nos. 28, 29, and 30, for \$1,000.00 each, were issued about November 8, 1883, and were delivered to Thos. Trammell & Co., and were by them sold to the state of Texas. The first nine bonds, mentioned as delivered to Martin, Byrne & Johnson, were issued for the construction of the jail. The other thirty bonds were sold, and their proceeds applied by the county commissioners' court to the construction of a courthouse for Nolan county, and both the jail and the courthouse herein referred to were erected at the county seat of Nolan county.

"(16) The county's agent, J. W. Posey, had twenty-seven of the courthouse bonds delivered to him. Twenty of these, Nos. 1 to 20, inclusive, he sold to Mathews and Whitaker of St. Louis, Missouri, for 92 cents on the dollar, and delivered the same to them on the 5th day of June, 1882; bond No. 27 was sold to Flippen, Adou and Lobitt of Dallas, Texas, for \$850.00, and delivered to them in the latter part of the year 1883; and he delivered the three bonds, ordered to be delivered by the county commissioners' court, to J. M. Archer, the contractor, on November 20, 1882. W. B. Simpson & Co., agents of the county, sold and delivered to Wernse & Diechman, of St. Louis, Missouri, the three bonds, Nos. 24, 25, and 26, dated June 21, 1882, on June 19, 1883. Thos. Trammell & Co. sold and delivered to the state of Texas the three bonds, being Nos. 28, 29, and 30, about November 8, 1883. Following is a copy of one of the series of courthouse bonds, issued as above, all of which are of the same tenor and effect, save as to date and serial number:

"United States of America, State of Texas.

"No. 20.

\$1,000.00.

"Nolan County Courthouse Bond.

"Interest, 8 per Cent. per Annum. Payable at the City of St. Louis, Missouri.
10/15-Years Bond.

"Know all men by these presents, that, in pursuance of an act of the legislature of the state of Texas, entitled "An act authorizing the county commissioners' court of the several counties of this state to issue bonds for the erection of a courthouse, and to levy a tax to pay for the same," approved February 11, 1881, and in further pursuance of an order of the county commissioners' court of the county of Nolan aforesaid, entered upon the records of the court thereof, at the February term, 1882, authorizing the issue of the

bonds of said county, with interest coupons attached, for the purpose of building a courthouse in said Nolan county, said bonds running not exceeding fifteen, and redeemable at the pleasure of said county after ten, years: Now, therefore, the said Nolan county, in the state of Texas, acknowledges itself indebted, and, for value received, promises to pay to — or bearer, at the Merchants' National Bank, in the city of St. Louis, and state of Missouri, the sum of one thousand dollars, fifteen years after date hereof, with interest at the rate of eight per centum per annum, payable annually, on the 10th day of April of each year, upon presentation of the proper coupons of interest hereto attached, at the Merchants' National Bank, of the said city of St. Louis, and state of Missouri. And, in case of failure to pay any of said coupons at maturity thereof, the same shall bear interest at the rate of eight per centum per annum from maturity, until paid. This bond is payable at any time after the expiration of ten years, at the option of the county commissioners' court of said Nolan county.

"In testimony whereof, the said county of Nolan has executed this bond, by the county judge in and for said county, under the seal of the county commissioners' court thereof, signing his name, and affixing the seal of his office hereto, countersigned by the county clerk, and registered by the treasurer thereof, at the city of Sweetwater, in the county of Nolan, and state of Texas, this 10th day of April, A. D. 1882.

Wm. Barnett,

"[Seal of County Commissioners' Court.] Co. Judge, Nolan County.

"W. C. Johnson, Co. Clerk, Nolan County Court.

"J. H. Fowler, Treasurer."

"(17) The records of the county treasurer of Nolan county show that courthouse bonds were registered, as follows: March 15, 1882, Nos. 1 to 20, inclusive, for \$1,000.00 each, bearing date of March 6, 1882; and seven other bonds, numbered 21 to 27, inclusive, for \$1,000.00, dated April 10, 1882, were registered June 23, 1882. There are no other bonds registered in the county treasurer's office. Said records do not show any registration of the bonds involved in this suit.

"(18) On November 16, 1887, an order was passed by the county commissioners' court of Nolan county, and entered upon the records of said court, repudiating all the aforesaid bonds, the entire 39.

"(19) The first three bonds, Nos. 6, 7, and 8, and coupons for interest thereon, declared on in plaintiff's petition, are of the first set above mentioned, issued to pay for the construction of the jail; the bonds Nos. 1, 2, 3, 4, 23, 24, 25, 26, and 27, each for \$1,000.00, and the coupons for interest thereon, declared on in plaintiff's petition, are of the second series, and were issued and sold as aforesaid, and their proceeds applied to pay for the construction of a courthouse for Nolan county.

"(20) At the time of making the contract with Martin, Byrne & Johnson to build the jail, Nolan county had no jail or courthouse. At the time of making contract with J. M. Archer to build courthouse, Nolan county had no courthouse, except the jail, which it was then using for courthouse purposes.

"(21) Following is a copy of one of the interest coupons, for an installment of interest on one of the first series of bonds, issued to Martin, Byrne & Johnson, all of which coupons are of the same tenor and effect, save as to amount, time of maturity, serial number, and that they recite that they are for interest on different bonds:

"'6.

\$80.00.

"The county of Nolan, state of Texas, promises to pay bearer eighty dollars, at Sweetwater, Texas, on the 10th day of April, 1888, being interest for one year on bond No. 5.

William Barnett,

"Judge County Court, Nolan County, Texas."

"(22) Following is a copy of one of the interest coupons, for installment of interest on one of the second series of bonds, issued to pay for the construction of courthouse, all of which coupons are of the same tenor and effect, save as to time of maturity, and that they recite that they are for interest on different bonds:

"\$80.00.

\$80.00.

"On the 10th day of April, A. D. 1888, the county of Nolan, in the state of Texas, promises to pay to — or bearer, the sum of eighty dollars, payable at the Merchants' National Bank, in the city of St. Louis, state of Missouri, being one year's interest, due to date, on bond No. 20, issued in behalf of the said Nolan county. If not paid at maturity, to bear interest therefrom, at the rate of eight per centum per annum, until paid.

"William Barnett, County Judge Nolan County.

"W. C. Johnson, Clerk County Court, Nolan County."

"(23) At the time the bonds and coupons, hereinbefore mentioned and described, were executed, William Barnett was county judge of Nolan county. W. C. Johnson was county clerk of said county, and J. H. Fowler was the treasurer thereof, and that their respective signatures, appearing on the said bonds and coupons, are genuine.

"(24) That plaintiff is the owner and holder of the bonds and coupons mentioned and described in his petition; that he purchased the same in open market, in ordinary course of trade, before the maturity of any or either of the said bonds or coupons, but that he did not purchase any or either of them directly from Nolan county, or its officers or agents; that he purchased the said bonds and coupons on the 5th day of December, 1885, and paid the full face or par value therefor, and that, when he purchased the said bonds and coupons, and paid the consideration therefor, he had no knowledge whatsoever of any defect, irregularity, or infirmity in the issuance or disposition of the said bonds, or any or either of them, nor of any want of power in Nolan county to issue them, save such constructive notice as the law imputes to him by reason of the recitals in the bonds, the minutes of the commissioners' court of Nolan county, the assessment rolls of said county, and notice of the law authorizing and governing the issue of bonds by counties in Texas, and the limitation placed upon their issuance by the law. And the question, whether or not the law charges plaintiff with notice of the contents of such recitals, minutes, and assessment rolls, is left to the decision of this court, as well as whether or not plaintiff, in making the purchase of said bonds, was bound to inquire into the condition of Nolan county, and the action of the commissioners' court concerning the issuance of the said bonds.

"(25) That the coupons sued upon by plaintiff in this cause were clipped from the bonds mentioned and described in his petition, respectively, and that they represented installments of interest due on the said bonds for the years 1888, 1889, 1890, 1891, 1892, and 1893.

"(26) The county commissioners' court of Nolan county, for the years 1881, 1882, 1883, 1884, and 1885, levied and collected a tax of one-fourth of one per cent. on the assessed values of the county for courthouse purposes and a tax of one-fourth of one per cent. for jail purposes, and, for the years since 1885, one-fourth of one per cent. for courthouse purposes, and has paid all interest falling due on each of the 39 bonds, each year, as the same became due, except one or two years, when there was a few months' delay in the payment of interest on some of the said bonds, up to and including the installment of interest due April 10, 1887.

"(28) The ownership of the respective bonds, issued by Nolan county, as hereinabove recited, is as follows: First. The state of Texas purchased bonds Nos. 1, 2, 3, and 4 of the first series, issued to Martin, Byrne & Johnson, or bearer, and also Nos. 10, 11, 13, and 14 of the first series of regular courthouse bonds, ordered sold by J. W. Posey, as hereinabove stated, and also courthouse bonds Nos. 28, 29, and 30, issued as hereinabove recited. The state of Texas instituted suit upon the coupons attached to these bonds, in the district court of Travis county on the — day of —, 1889, and recovered judgment in said court thereon, on the 25th day of October, 1889, which said judgment was affirmed, on appeal, by the supreme court of Texas, December —, 1891. Second. Plaintiff in this cause, Quaker City National Bank, owns bonds Nos. 6, 7, and 8 of the first series, issued to Martin, Byrne & Johnson, as hereinbefore recited, and also bonds Nos. 1, 2, 3, 4, 24, 25, 26, and 27 of the second series of bonds, issued for courthouse purposes, and ordered sold by J. W. Posey, as hereinabove recited, and the

matured coupons upon said bonds are in controversy in this suit. Third. Alonzo White, of Missouri, is the owner of Nos. 5 and 9 of the first series of bonds, hereinabove recited as issued to Martin, Byrne & Johnson; also Nos. 5, 6, 7, 8, 9, 15, 16, 17, 18, 19, and 20 of the second series of courthouse bonds. Fourth. Bonds Nos. 21, 22, and 23 of the courthouse issue, and disposed of as hereinabove recited, are in the possession of Flippen, Adoue & Lobit, of Dallas, Texas, who claim to be the owners thereof, and no action has been instituted thereon in any court.

"(29) It is further agreed, by and between the parties to this suit, that the foregoing shall be and constitute the facts to be used on the trial of said cause, and that the said cause may be tried and determined by the court upon said facts, and the law applicable thereto, and trial by jury is expressly waived.

Leake, Henry, Miller & Reeves,

"Cowan & Fisher,

"Attys. for Defendant, Nolan County.

"Williams & Butts,

"Attorneys for Plaintiff, Quaker City National Bank."

"Now comes Quaker City National Bank, plaintiff in above entitled cause, by Williams & Butts, its attorneys, and Nolan county, defendant, by its attorneys, Leake, Henry, Miller & Reeves and Cowan & Fisher, and, as a supplement to the agreed statement of facts heretofore made, agree, for the purpose of a trial of said cause, to the following additional facts, to wit: On August 2, 1881, the county commissioners' court of Nolan county, (defendant,) at a special session of said court, examined and approved the assessment rolls of Nolan county for the taxes of the year 1881. On August 14, 1882, the county commissioners' court of Nolan county, at a regular term, examined and approved the assessment rolls of Nolan county for the taxes of the year 1882. On October 11, 1883, the county commissioners' court of Nolan county, at a special session, examined and approved the assessment rolls of Nolan county for the taxes of the year 1883.

"Leake, Henry, Miller & Reeves,

"Cowan & Fisher,

"Attys. for Deft., Nolan County.

"Williams & Butts,

"Attys. for Plaintiff, Quaker City National Bank."

3. Article 11, § 7, of the constitution of the state of Texas, says:

"But no debt for any purpose shall ever be incurred in any manner by any city or county unless provision is made at the time of creating the same for levying and collecting a sufficient tax to pay the interest thereon and provide at least two per cent as a sinking fund."

4. The act of February 11, 1881, is as follows:

"Section 1. Be it enacted by the legislature of the state of Texas that the county commissioners' court of any county which has no courthouse at the county seat, is hereby authorized and empowered to issue the bonds of said county, with interest coupons attached, in such amount as may be necessary to erect a suitable building for a court house; said bonds running not exceeding fifteen years and redeemable at the pleasure of the county, and bearing interest at a rate not exceeding eight per cent per annum.

"Sec. 2. The commissioners' court of the county shall levy an annual ad valorem tax on the property in said county sufficient to pay the interest and create a sinking fund for the redemption of said bonds not to exceed one-fourth of one per cent for any one year.

"Sec. 3. The county shall not issue a larger number of bonds than a tax of one-fourth of one per cent annually will liquidate in ten years and such bonds shall be sold only at their face, or par value.

"Sec. 4. The interest on said bonds shall be paid annually on the 10th day of April, and they shall be registered and an account kept by the county treasurer of the amount of principal and interest paid on each.

"Sec. 5. Said bonds shall be signed by the county judge and countersigned by the county clerk and registered by the county treasurer before they are delivered." Gen. Laws 1881, pp. 5, 6.

5. Article 8, § 9, of the state constitution, as amended in 1883, limits the expenditures of a county for public buildings to 25 cents on the \$100.

6. The supreme court of Texas in the case of *Citizens' Bank v. City of Terrell*, 78 Tex. 456, 457, 14 S. W. 1003, says:

"While our constitution authorizes the creation of a debt, and the issuance of its negotiable bonds, by the defendant city, to provide for constructing water works, its mandate is imperative that no such debt shall be created without making provision, at the time of its creation, to assess and collect annually a sufficient sum to pay the interest thereon, and create a sinking fund of at least 2 per cent. on the principal. Until that is done, the debt is not created, and none exists."

In the same case the following language occurs, on page 456:

"But, where authority to create a debt at all, or beyond a given amount, is made to depend upon evidence furnished by official records, the same rule in regard to recitals contained in bonds given for the debt should not be applied. Every holder of such bonds is charged with a knowledge of the provisions of the law relating to their issuance, and, if the law points to the records as evidence of the existence of the facts required to authorize their issuance, or to limit the amount of the debt the city may create, such records, and not the recitals in the bonds, must be looked to by every one who proposes to deal in the bonds."

The following cases are to the same effect: *Dixon Co. v. Field*, 111 U. S. 84, 4 Sup. Ct. 315; *Lake Co. v. Graham*, 130 U. S. 682, 9 Sup. Ct. 654; *Nolan Co. v. State*, 83 Tex. 183, 17 S. W. 823; *Francis v. Howard Co.*, 4 C. C. A. 460, 54 Fed. 487, and 50 Fed. 60.

7. The question that presents itself at the threshold, in the case at bar, is, whether any one of the different series of bonds sued on was valid, under article 11, § 7, of the constitution of Texas, when issued and delivered. The commissioners' court of Nolan county, in the years 1881, 1882, 1883, 1884, and 1885, levied and collected a tax of one-fourth of one per cent. on the assessed values of said county for courthouse purposes, and a tax of one-fourth of one per cent. for jail purposes, but no provision has been shown by said court, at the time those bonds were issued and delivered, to assess and collect annually a sufficient sum to pay the interest and create a sinking fund of at least two per cent. on the principal. In *Nolan Co. v. State*, 83 Tex. 190, 17 S. W. 823, bonds of the same series with those now under consideration were before the supreme court of Texas, and were passed upon by that high tribunal. The agreed statements of facts were substantially the same in that case as in this. The court found that bonds 28, 29, and 30 were valid. Those numbered 10, 11, 12, 13, and 14, being of the series of courthouse bonds from 1 to 20, were invalid, and those numbered 1, 2, 3, and 4, issued to Martin, Byrne & Johnson, of which 6, 7, and 8, now sued on, are of the same series, were good in part. The court also found that 24, 25, and 26, sued on in the case at bar, were each valid. Bonds 1, 2, 3, and 4, of the bonds sued on, are of the series of courthouse bonds which said court declared to be invalid, from 1 to 20. See pages 198 and 199, 83 Tex., and pages 828 and 829, 17 S. W. The court, in the above case, seems to have passed on the validity of said bonds, under the assessment and tax rolls of Nolan county at the dates said bonds were issued. The question

of making provision, at the date of the issuance of said bonds, to assess and collect annually a sufficient sum to pay the interest thereon, and provide at least two per cent. sinking fund, it seems, was not called to the attention of the court by the counsel in the case, so far as appears by the reported decision. Neither the pleadings, nor briefs of the able counsel in the case, raise this question; indeed, this provision of the constitution is only referred to once, and then incidentally by the court. See page 200, 83 Tex., and page 829, 17 S. W.

The bonds themselves, from which the coupons sued on in this case were detached, were not involved in the Nolan county case, further than they were of the same series with the bonds from which the coupons there sued on were detached. We are of the opinion that none of the bonds, from which the coupons sued on in this case were detached, were valid on account of the failure to comply with said constitutional provision at the date of the issuance of said bonds.

8. Plaintiff in this case, in his supplemental petition, says:

"That if, for any reason, its said bonds were invalid when issued by defendant county, that the same have been validated, and made legal and binding obligations of defendant, by the act of the legislature of the state of Texas, approved March 24, 1885, validating bonds bought by the state school fund; that the state of Texas owned a portion of said series of bonds, issued by the defendant county, and that plaintiff also owns, and here sues upon, a portion of each series of bonds issued by defendant; that the issuance of each series of bonds by defendant county was one act, and the legislature could only validate the bonds, or any of them, by validating the act of the commissioners' court, by which said bonds were issued; that, by validating the bonds of defendant county owned by the state of Texas, the legislature of the state of Texas, by the act aforesaid, also validated plaintiff's bonds, and made them legal and binding obligations of defendant county."

Sections 3 and 4 of the act of March 24, 1885, (Gen. Laws Tex. p. 41,) are as follows:

"Sec. 3. In all cases where the proceeds of the sale of any bonds have been received by the proper officers of the county or by a party acting for it in negotiating the sale thereof, such county shall be thereafter estopped from denying the validity of such bonds so issued and the same shall be held to be valid and binding obligations of the county, and in any action upon such bonds or coupons thereto, judgment shall be rendered against the county for the amount of the bonds sued on and interest thereon at the rate mentioned therein, deducting such amounts, if any, as have been previously paid thereon.

"Sec. 4. The payment of any interest upon any bonds heretofore purchased or that may hereafter be purchased, with public school funds, or belonging thereto, shall be deemed and held a waiver of any supposed error, irregularity or want of authority affecting, or tending to affect the validity of any such bonds, and the same shall thereafter be held valid and binding obligations upon the county by which they appear or purport to have been issued, notwithstanding any such supposed error, irregularity or want of authority as aforesaid."

If the power of the legislature to validate the bonds in question be conceded, then it would seem that the coupons involved in this case would be validated, under section 3 of the act of March 24, 1885, above set out; for the plaintiff has alleged and proved that the county of Nolan got the proceeds of said bonds and used them, some in constructing a jail, and some in constructing a courthouse.

We do not think that section 4 of said act of March 24, 1885, relates to, or intended to validate, the bonds now in controversy. That section relates to bonds purchased with the school fund, and the fact that some of the bonds now in controversy (by reason of this suit on coupons detached therefrom) were of the same series and issue with some other bonds purchased by the school fund, would not validate the bonds involved in this case. Could the legislature validate any of the bonds involved in this suit?

If, at the date of their issuance, it had no power to release the counties of Texas from a compliance with the provisions of article 11, § 7, of the state constitution of Texas, it still has no power, by retroactive legislation, to validate bonds issued in violation of said section. That section is still in the constitution, and in force. *Cooley*, Const. Lim. p. 457; *Suth. St. Const.* § 483; *Katzenberger v. Aberdeen*, 121 U. S. 172, 7 Sup. Ct. 947.

Let judgment be entered for the defendant.

JOHNSON v. BAILEY et al.

(Circuit Court, W. D. Wisconsin. February 5, 1894.)

NONSUIT—RIGHT TO—DISCRETION OF COURT.

After the trial is actually begun, the plaintiff has no absolute right to take a nonsuit, and the same lies in the liberal discretion of the court, but will be denied when plaintiff gets all his own evidence in, and is not surprised by defendant's evidence.

At Law. Action by Frank J. Johnson against D. R. Bailey and John M. Bartlett to recover damages for personal injuries. On motion for a new trial. Denied.

W. F. McNally, for plaintiff.

Hayden & Start, for defendants.

BUNN, District Judge. This action was brought to recover damages for a personal injury to the plaintiff, sustained as the result of an accident happening on October 7, 1875, when the plaintiff was less than five years of age, by means of which the plaintiff lost a foot by getting it into the joint or knuckles of a tumbling rod running underground between two mills, or a mill and a power house, upon the defendants' premises. The action came on to trial in January of the present term, and was tried by a jury, and a verdict returned in favor of the defendants. After the plaintiff had introduced his evidence, he being a witness in his own behalf, and had rested his case, and the defendants had introduced a portion of their testimony, plaintiff's counsel asked leave to submit to a nonsuit. This being objected to, and no surprise or good reason being shown for it, and the court conceiving it to be in its discretion either to allow or refuse a nonsuit on the plaintiff's motion, denied the application. The plaintiff's counsel thereupon, without excepting to the ruling of the court, abandoned the plaintiff's case,

whereupon the defendants proceeded with the trial, and the jury found a verdict in their favor.

This motion is made to set aside the verdict, and for a new trial, on the ground that it was not in the discretion of the court to deny a motion for a nonsuit made by the plaintiff at any time before verdict rendered, but that the plaintiff's right to submit to a nonsuit is absolute.

That was no doubt the rule of the early common law, and is still the rule in some of the states. But I think the more reasonable rule is that the right is absolute only before the trial is begun, and that after that the granting of a nonsuit lies in the discretion of the court. Of course, that discretion should be liberally exercised, and where the plaintiff is disappointed about getting his evidence, or is surprised by unexpected evidence on the part of the defendant, the court would generally allow a nonsuit. But where the plaintiff has all his evidence in, and is not surprised by any evidence introduced by the defendant, it would not seem to be an equitable rule to allow the nonsuit as a matter of right, because it puts the parties upon an uneven footing, and gives the plaintiff a privilege that is not allowed to the defendant. Such a rule would place the case, after being tried upon the merits, and when the court and jury are in possession of all the means essential to a just and complete determination of the issue, entirely beyond the power and control of the defendant, and of the court as well. A plaintiff could experiment with his case at liberty, and the court would be powerless to bring litigation to an end. He could try the case, and submit it to the jury, with all his evidence in, and then, after the jury had retired to consider of their verdict, if they should remain out a little longer than the plaintiff should expect they ought before agreeing in the plaintiff's favor, and so fearing a disagreement, which is always unfavorable to the plaintiff, he could take a nonsuit, and the court would be compelled to discharge the jury, and the plaintiff could begin his case over again, and so ad libitum. Such a rule would seem to give to the plaintiff an unfair advantage, and put it in the reach of a rich and powerful litigant to oppress a defendant to any extent, as it is well known how far the payment of the taxable costs would fall short of compensating a defendant who might reside in a distant state for all the actual trouble and expense of a protracted trial.

These and other like considerations have led to a modification of the ancient rule of the common law which allowed a nonsuit as a matter of right any time before verdict recorded, or even after verdict and before judgment, by substituting one of a more even-handed justice, which is that at any time before the trial is opened to the jury, or to the court if tried without a jury, the plaintiff may become nonsuit as a matter of right; and that, after that, and before verdict, leave to become nonsuit is within the discretion of the court; and that, after verdict, there can be no nonsuit. This rule places the parties upon a more equal footing, and brings the case more under the control of the court. This is the rule adopted by the supreme courts of several states, notably Maine, Massachusetts,

and New Hampshire, and, so far as I know, is the one adopted by the United States circuit courts. In *Haskell v. Whitney*, 12 Mass. 47, Jackson, J., in pronouncing the opinion of the court, says:

"The plaintiff or demandant may, in various modes, become nonsuit, or discontinue his suit, at his pleasure. At the beginning of every term at which he is demandable he may neglect or refuse to appear. If the pleadings are not closed, he may refuse to reply, or to join an issue tendered; or, after issue joined, he may decline to open his cause to the jury. The court may, upon sufficient cause shown, allow him to discontinue, even when it cannot be claimed as a right; as, after the cause is opened, and the evidence submitted to the jury."

So in *Locke v. Wood*, 16 Mass. 317, the court were of opinion "that there was no such right," and that, after a cause is opened to the jury, and begun to be proceeded in before them, the parties are entitled to a verdict, unless the court should, in its discretion, allow a nonsuit or discontinuance. The justice of these early decisions was recognized and affirmed in *Means v. Welles*, 12 Metc. (Mass.) 361. And in *City of Lowell v. Merrimack Manuf'g Co.*, 11 Gray, 382, the court say: "A party may become nonsuit before going to a jury." And in *Shaw v. Boland*, 15 Gray, 572, the same doctrine is again affirmed, and the court say:

"And this law seems to us eminently just. As a nonsuit is no bar to another suit for the same cause of action, a plaintiff might harass a defendant by unlimited litigation, if the court had no authority, in any case, to prevent a nonsuit."

In a case still later, in the same court, Chief Justice Gray, now of the United States supreme court, affirms the doctrine that a plaintiff has the right to become nonsuit at any time before trial; but after the trial has begun he cannot become nonsuit, except by leave and at the discretion of the court. *Inhabitants of Truro v. Atkins*, 122 Mass. 418; *Burbank v. Woodward*, 124 Mass. 358. In *Judge of Probate v. Abbot*, 13 N. H. 21, Chief Justice Parker lays down the rule as follows:

"At any time before the plaintiff opens his case to the jury he may become nonsuit as a matter of right. The entry of his action does not oblige him to proceed with it. Even if issue be joined, this does not entitle the defendant to a verdict, if the plaintiff elect to abandon his action. After the plaintiff has proceeded to open his case to the jury he can no longer become nonsuit as a matter of right. * * * But the court, in the exercise of its discretion, may permit him to become nonsuit at any time before the return of the verdict, and ordinarily does so, if it appears that no injustice will thereby be done to the adverse party."

The same doctrine is affirmed also in Massachusetts as late as 1883 in *Leavitt v. Leavitt*, 135 Mass. 191. The same rule is adhered to in *Wright v. Bartlett*, 45 N. H. 290. In that case the court, by Nesmith, J., say:

"It may be assumed to be now the general practice in the courts of law in this country that a plaintiff may, at his own pleasure, or by right, either discontinue his suit or become nonsuit at any time before his cause is opened to the jury;" citing *Co. Litt.* 138, 139; *Seld. Pr.* 384, 386; *Com. Dig. tit. "Pleader,"* W 5; *Caverly v. Jones*, 23 N. H. 573; *Bailey v. Kimball*, 26 N. H. 351; *Keithley v. May*, 29 Mo. 220, and other cases.

The supreme court of Maine, in 1885, reviews the authorities on this question, and comes to the same conclusion. See Washburn v. Allen, 77 Me. 344.

The question was before the United States court for Massachusetts in the case of *Folger v. The Robert G. Shaw*, 2 Woodb. & M. 531, 26 Myers, Fed. Dec. 355, and the like conclusion reached. After reviewing the cases, the court, by Woodbury, J., says:

"I think, however, the readiness for trial, the call of the case, the expiration of the notice, and the introduction of any pertinent evidence is, as before intimated, the true punctum temporis when the right of the plaintiff to become nonsuit ceases and that of the defendant begins for a final judgment, because then the parties have agreed in court that final proceedings shall be had; then there is a presumed readiness for them; then they have begun, and means are before the court to settle the merits. Both parties then stand on an equality. Neither is taken at disadvantage then by requiring judgment on the merits, unless special and good cause be assigned to the court for leave to become nonsuit. And then, so far as regards the defendant, a nonsuit by the plaintiff, at pleasure, is more vexatious, as then the mere costs are usually inadequate remuneration for the expense of another preparation; and a decision on the merits, if desired by the defendant, is practicable in most cases without being subject to another action and preparation."

In speaking of the old common-law practice, the court say:

"Formerly a nonsuit used to be common during the trial and before verdict. Steph. Pl. 130, 313; 3 Bl. Comm. 376. Once it could be even after verdict, if the court took time to consider on the case. Id.; 1 Co. Inst. 139 [c]. The test as to the time, then, was before a final judgment; and the plaintiff might be nonsuit even after a verdict, if he did not like the amount of damages given by the jury. *Keat v. Barker*, 5 Mod. 208; Co. Litt. 139b."

"But," says the court, "this practice held out too great an encouragement to repeated and vexatious suits, and gave an advantage to a plaintiff which the defendant did not enjoy of a prolonged litigation, and new and various experiments and trials. In the hands of wealth and power, exercised against moderate means, it would be likely in time to break down any antagonist. Consequently, now it is forbidden by statute in England in such cases. 2 Hen. IV. c. 7; Bac. Abr. tit. 'Nonsuit,' D."

The United States circuit court for the ninth circuit has followed the same rule. In *U. S. v. Humason*, 8 Fed. 71, the court, by Deady, J., say:

"By section 243 of the Oregon Code a nonsuit cannot be granted on a motion of the plaintiff only, before trial or afterwards, without the consent of the defendant; and the later and better rule of the common law is to the same effect. Whenever the trial has commenced, the right of the plaintiff to become nonsuit, and vex and harass the defendant with another action for the same cause, is gone."

This court is entirely satisfied with the rule and reasoning of these decisions as being much more conducive to justice than the former ruling in England and in some of the states.

As long as it lies in the discretion of the court, if there has been any lack of evidence in the plaintiff's case which he might supply on another trial, or if he is surprised by unexpected evidence produced by the defendant, to allow a nonsuit or the withdrawal of a juror, it seems little short of a perversion of justice, without any good cause shown, to hold that the plaintiff shall, at any time before verdict rendered, and when the court is in possession of the means for a just and final determination upon the merits, have the

absolute power, at his own pleasure, and without showing any cause, of discontinuing his action with the right to bring a new suit for the same cause.

The motion for a new trial is overruled.

UNITED STATES v. ADAMS.

(District Court, D. Oregon. January 19, 1894.)

No. 3,589.

POST OFFICE—NONMAILABLE MATTER—DECOY LETTERS.

A conviction cannot be had for mailing a letter giving information as to medicines for the prevention of conception, when the letter is in answer to a decoy letter of inquiry written by a government inspector under an assumed name, inviting correspondence and inclosing postage stamps therefore. U. S. v. Whittier, 5 Dill. 41, followed. U. S. v. Grimm, 50 Fed. 529, distinguished.

At Law. Indictment of Mrs. C. J. Adams for mailing nonmailable matter. Submitted to the court without a jury on an agreed statement of facts. Finding for defendant.

Daniel R. Murphy, U. S. Atty.

Henry E. McGinn, for defendant.

BELLINGER, District Judge. The indictment in this case charges the defendant with having on the 26th day of August, 1893, unlawfully deposited in the United States mails—

"A certain written letter, for mailing and delivery to E. May Dunkirk, Albany, Oregon; said letter containing information, directly, how, of whom, and by what means, a certain article and thing, designed and intended for the prevention of conception, might be obtained."

The indictment is found under section 3893 of the Revised Statutes of the United States, which provides as follows:

"Every obscene, lewd, or lascivious book, pamphlet, picture, paper, letter, writing, print, or other publication of an indecent character, and every article or thing designed or intended for the prevention of conception or procuring of abortion * * * and every written or printed card, letter, circular, book, pamphlet, advertisement or notice of any kind giving information, directly or indirectly, where, or how, or of whom, or by what means, any of the hereinbefore mentioned matters, articles or things may be obtained or made, whether sealed as first class matter or not, are hereby declared to be non-mailable matter."

To knowingly deposit, or cause to be deposited, any nonmailable matter, for mailing, is made a crime by this section.

The case is submitted to the court without a jury, by stipulation of the attorney of the United States and the attorney for the defendant, upon the following agreed facts:

It is hereby stipulated and agreed by and between the parties hereto that on or about the 26th day of August, 1893, one H. P. Thrall assumed the name of "E. May Dunkirk," and wrote to the defendant, Mrs. C. J. Adams, a letter under said name of "E. May Dunkirk," and addressed to room 4, Hibernian building, 6th and Washington, Portland, Or., and sent said letter to Mrs. C. J. Adams through the United States mails, said letter being in words and figures the same as set up in the indictment herein; that there-

after he received a reply to said letter, which was handed to him, opened, by F. A. Schoppe, and that thereafter and thereupon he called upon the defendant, Mrs. C. J. Adams, and she admitted to said Thrall that she had written the letter dated August 26th, and addressed to "E. May Dunkirk, Albany, Oregon," and signed "M. M. E. Bachalt," said letter being handed to said Thrall by said Schoppe, being the letter set up in the indictment herein, and that thereupon he entered into a conversation with said Mrs. C. J. Adams relative to the purchase of the article or thing described in said two letters above described, and she agreed to sell him said article or thing for the price of \$3.00 in case he, said Thrall, would give her the assurance that he was a married man. That said letter was sent by said Thrall to room 4, Hibernian building, in pursuance to the advice of the U. S. attorney for Oregon. It is further stipulated and agreed by and between the parties hereto that the letter described in the indictment as having been written by Miss E. May Dunkirk at Albany, Or., was in fact written by N. P. Thrall, who then was and still is a postal inspector of the government of the United States, and that in all the acts which the said Thrall did he was acting for the U. S. government; that, by and with the consent of the U. S. postal officers, the said letter purporting to have been written by E. May Dunkirk was inclosed in a sealed envelope addressed as in the indictment described, having a two-cent postage stamp upon the face, and was postmarked "Albany, Or., August —, 1893;" that said letter was not mailed as postmarked at Albany, Or., but was postmarked at Portland, Or., with a marking stamp furnished said Thrall by the secret service of the United States post-office department; that said postmark was affixed by the said Thrall with the marking stamp so furnished him in the presence of, and with the consent of, the said officers of the United States government; that thereupon said letter in said envelope, so sealed, postmarked, addressed, stamped, was by the said Thrall delivered to the officers of the Portland, Or., post office, and by them placed in the mail, and was delivered to room 4, Hibernian building, at Portland, Or., by a letter carrier from the Portland, Or., post office, said room 4 being the office where the defendant has an office as a manicure and chiropodist, and the same was there received by a person having charge of said office. It is further stipulated that the letter charged in the indictment as having been written in reply to said letter of Miss E. May Dunkirk by the defendant was by the defendant deposited, or caused to be deposited, in the Portland, Or., post office, and the same was never sent to Albany, Or., or delivered to E. May Dunkirk, but said letter was taken out of the Portland post office, at Portland, Or., by the said Thrall, or by the United States post officers acting for the government, for the purpose, singly and solely, of procuring information, and detecting and ascertaining if the defendant was knowingly depositing, or causing to be deposited, nonmailable matter in the U. S. mails; that there is no such person as E. May Dunkirk; that E. May Dunkirk is a fictitious person, having no existence, and, had said letter gone to Albany, Or., it could not have been there delivered to E. May Dunkirk; that the name "E. May Dunkirk" was assumed by the said Thrall for the purpose of entrapping the defendant, and was not assumed by him for the purpose of obtaining the information as to when, where, or how any medicine for the prevention of conception could be obtained; that the defendant did not know that E. May Dunkirk was a fictitious person.

The letters mentioned in this stipulation are as follows:

Albany, Oregon, Aug 23—93

Room 4, Hibernian, 6th and Washington, Portland, Oregon. I noticed your advertisement in the Oregonian this morning "To Ladies Only" I cut out of the Oregonian last May an advertisement of the Corona Co. Which is similar to yours and which I answered to day, but for fear it is not the same I will write you also. Without wasting any words I will come to the point and say that I want something that will prevent conception without danger or injury to the health. I am about disgusted with the remedies I have tried and am willing now to give a good price for the right kind of a remedy. Can you help a friend who is in the family way, about two

months gone— You can correspond with me with absolute secrecy under the name

Enclosed find stamps

May Dunkirk
Albany, Oregon.

Portland, Oregon, Aug 26th, 1893

E. May Dunkirk, Albany, Oregon. Dear Madam:—Your letter at hand. will say in regards to remedy that if you are in that way the medicine is no good but if you are not it is one of the finest preventive that has ever been on the market. It sold without an agent 15 hundred boxes and over in the last year now think for yourself what an elegant article it must be it is external use perfect Harmless Garinteed now it sells at 3 dollars a box now you would never go with out after once trying you can send money by express register letter one money order and the remedy will be sent charges paid

Respt

M M E Bachalt
Room 4 Hibernian Bldg
6 & Washington Street
Portland Oregon

It was held by Judge Dillon in *U. S. v. Whittier*, 5 Dill. 41, that an answer to a fictitious letter of inquiry addressed to a person who had no existence could not have given to any person the information prohibited by the statute, and was therefore not within the prohibition of the statute; that a letter which is brought within the statute only by a fictitious letter of inquiry written by a detective is not the "giving of information," within the meaning of the statute. Judge Treat, concurring in that case, said:

"The sense of indignation against such vocation or conduct should not permit a violation by the courts of established rules of law, or unlawful exercise of jurisdiction nor the countenance of unlawful contrivances to induce or manufacture crime." "No court," says Judge Treat, "should, even to aid in detecting a supposed offender, lend its countenance to a violation of positive law, or to contrivances for inducing a person to commit a crime."

In *U. S. v. Bott*, 11 Blatchf. 346, it was held by Judge Benedict that the transmission of drugs through the mails is an offense, although the defendant was inveigled to mail the package by a decoy. Wharton's Criminal Law, referring to these two cases, distinguishes them upon the ground that the clause, "giving information," in the statute, does not qualify the transmission of drugs, as it does that of books or writings.

In the recent case of *U. S. v. Grimm*, 50 Fed. 529, it is held that this charge does not lose its criminal character though the letters were sent in response to an inquiry made under an assumed name by a government official, with a view to detecting the defendant in the commission of an offense, since it does not appear that the accused was solicited to use the mails, and thus to commit an offense. The court says, if the act is done without solicitation on the part of the officer that the mails be used to convey the prohibited intelligence, the weight of judicial opinion seems to be that the act is criminal, though the offense may have been committed in response to an inquiry from a person in the government service, which was made under an assumed name for the purpose of concealing his identity. In the present case the government agent, Thrall, solicited the prohibited information under the name of "E. May Dunkirk," and he solicited the defendant to use the mails for its transmission. In his decoy letter, he says, "You can correspond

with me with absolute secrecy under the name E. May Dunkirk, Albany, Oregon." To facilitate the correspondence, he inclosed stamps, so the decoy letter states, and the fact was admitted on the argument. This "correspondence" between the accused in Portland and the fictitious person at Albany, which was to employ postage stamps, must necessarily have been through the mails. The accused must have so understood the decoy letter. The government agent was therefore not engaged in detecting crime, but in procuring its commission.

The supreme court of Michigan, in *Saunders v. People*, 38 Mich. 218, denounce the practice of decoying or conniving with persons suspected of criminal designs for the purpose of arresting them in the commission of the offense. Marston, J., in a concurring opinion, says:

"Some courts have gone a great way in giving encouragement to detectives in some very questionable methods adopted by them to discover the guilt of criminals; but they have not yet gone so far, and I trust never will, as to lend aid or encouragement to officers who may, under a mistaken sense of duty, encourage and assist parties to commit crime in order that they may arrest and have them punished for so doing."

Campbell, C. J., said the encouragement to criminals to induce them to commit crimes in order to get up a prosecution against them is scandalous and reprehensible.

In the case on trial the government agent thought it necessary not only to solicit the commission of the crime charged, but to make an urgent appeal to the accused to such end: "Can you help a friend who is in the family way, about two months gone?" To this the accused answered, "If you are in that way, the medicine is no good." And at a personal interview subsequently had with the accused the government official, if one engaged in such service can be so called, was informed that he could not have the preventive remedy unless he would give assurances that he was a married man. These facts tend to show that the accused was reluctant to act in the particular transaction, and the fact adds to the reprehensible character of the conduct of the prosecuting witness. There is no case which goes so far as to allow a conviction upon such a state of facts. The case is within the rule adopted in *U. S. v. Whittier*, above referred to.

The finding is that the defendant is not guilty.

UNITED STATES v. CADWALLADER.

(District Court, W. D. Wisconsin. December 7, 1893.)

NATIONAL BANKS—OFFENSES OF OFFICERS, ETC.—INDICTMENT.

Embezzlement, abstraction, and willful misapplication of the moneys, funds, etc., of a national bank, as described in Rev. St. § 5209, constitute three separate crimes or offenses, which, under Id. § 1024, may be joined in one indictment, but must be stated in separate counts.

At Law. Indictment of A. A. Cadwallader for violating the national banking laws. Demurrer to certain counts for duplicity. Demurrers sustained.

Samuel A. Harper and J. J. Fruit, for the United States.
Spooner, Sanborn & Kerr, for defendant.

BUNN, District Judge. The defendant was indicted under section 5209, Rev. St. U. S., which reads as follows:

"Every president, director, cashier, teller, clerk or agent of any association who embezzles, abstracts, or willfully misapplies any of the moneys, funds, or credits of the association; or who, without authority from the directors, issues or puts in circulation any of the notes of the association; or who, without such authority, issues or puts forth any certificate of deposit, draws any order or bill of exchange, makes any acceptance, assigns any note, bond, draft, bill of exchange, mortgage, judgment or decree; or who makes any false entry in any book, report or statement of the association, with intent, in either case, to injure or defraud the association or any other company, body politic or corporate, or any individual person, or to deceive any officer of the association, or any agent appointed to examine the affairs of any such association; and every person who with like intent aids or abets any officer, clerk or agent in any violation of this section, shall be deemed guilty of a misdemeanor, and shall be imprisoned not less than five years nor more than ten."

The indictment contains ten counts, in each of which, except the first, the defendant is charged with having at various dates, and on and between various times specified, as president and one of the directors of the Superior National Bank at Superior, Wis., embezzled, abstracted, and willfully misapplied the moneys and funds of said bank. In each of said counts are also set out the particular facts constituting such embezzlement, abstraction, and willful misapplication of the moneys of the bank. The defendant has demurred to each of these counts for duplicity, on the ground that they, and each of them, charge three distinct offenses under the statute. The question is whether the counts are liable to this objection. And this, as a question of criminal pleading, independent of statute, would seem to turn upon a consideration of whether the statute describes only one offense or different and distinct offenses. If the statute describes only different stages, degrees, or phases of one and the same offense, these degrees or phases may undoubtedly all be set forth and charged in the same count of the indictment; but if the statute defines different and distinct offenses, each requiring different proof to establish it, there can be little doubt that they should not be joined in the same count, though they may all, or any of them, be united in different counts in the same indictment.

There has been in this country and in England a very considerable relaxation of the common-law rule that there can be but a single offense charged in one indictment; and the line of departure and distinction has been between offenses of a high grade, such as were denominated "felonies" at common law, requiring either capital punishment or imprisonment for a term of years in the penitentiary, with or without hard labor, and those of a lower grade, denominated "misdemeanors," the punishment of which is by fine or imprisonment in the common jail, or both. In the former class of cases there has never been much letting down from the strictness of the common-law rule that only one substantive offense could be charged in the same indictment, though differ-

ently set out in several counts, to meet the evidence. It has been considered greatly prejudicial to the defense of a prisoner to be put upon trial at the same time for two distinct crimes of a high grade, such as murder, manslaughter, rape, arson, burglary, grand larceny or embezzlement. These were all felonies at common law, and I think there is no example or precedent by which a defendant has been or might be put upon trial for more than one crime in the same indictment. It would prejudice the prisoner in his defense, and lead to much confusion, if not injustice. Such has been the general rule of criminal pleading by the common law, both in England and in this country. The statutes, however, in England, and presumably in most of the states, have relaxed the rule, by allowing in misdemeanors and purely statutory offenses, two or more distinct offenses to be united by different counts in the same indictment, and putting the defendant upon trial for all at once. I do not know of any case, however, where the prosecution has been allowed to unite two or more distinct offenses in the same count of an indictment; and such a thing, if allowed, must necessarily lead to much confusion and embarrassment. How is the defendant to plead, and how are the jury to find their verdict? There is no precedent or practice for allowing a prisoner to plead guilty to one portion of a count and not guilty to another, or for the jury to find the defendant guilty under one part and not guilty under another part.

It is seen that by the section of the statute above quoted congress has said that the person offending in any or either of the ways prescribed shall be deemed guilty of a misdemeanor, but probably this fact should determine nothing in regard to the degree of strictness which the law would require in pleading, as the punishment prescribed—not less than five nor more than ten years' imprisonment—makes the offense an infamous one under the decisions of the United States supreme court, within the meaning of that provision of the constitution which says that no person shall be held to answer for a capital or otherwise infamous crime unless on presentment or indictment of a grand jury. *Ex parte Wilson*, 114 U. S. 417, 5 Sup. Ct. 935; *Mackin v. U. S.*, 117 U. S. 348, 6 Sup. Ct. 777; *Parkinson v. U. S.*, 121 U. S. 281, 7 Sup. Ct. 896; *U. S. v. De Walt*, 128 U. S. 393, 9 Sup. Ct. 111; *In re Claasen*, 140 U. S. 205, 11 Sup. Ct. 735. In one of these cases—that of *Mackin v. U. S.*—the usual distinction in this country made between felonies and misdemeanors, before referred to, is recognized by the United States supreme court in the following language, found on pages 352 and 353, 117 U. S., and on page 779, 6 Sup. Ct.:

"In most of the states and territories, by constitution or statute, all crimes, or at least statutory crimes, not capital, are classed as felonies or as misdemeanors, accordingly as they are, or are not, punishable by imprisonment in the state's prison or penitentiary."

So that any offenses which are punishable by imprisonment for a term of years in the penitentiary, by these decisions are infamous crimes, and, according to the common classification, felonies, though our laws do not in general recognize the usual common-law

characterization of a felony as being a crime, a conviction for which induces a forfeiture of goods. While we have abolished forfeitures of goods as a punishment of crimes, we retain the principle of forfeiture of personal liberty, which may be quite as severe and degrading.

Upon a careful consideration of the statute, I am satisfied that it creates and defines several distinct offenses, probably not less than nine. It is true the punishment for each offense is the same, but that circumstance is not controlling in determining whether or not the offenses are one and the same, or distinct and several. If the evidence to establish one is of necessity entirely different from that which would be sufficient to establish another,—if the line of prosecution and defense would be wholly different,—then the offenses are not the same, but are distinct. And that this would be so seems quite clear. The proof to establish a case of willful misapplication of funds, or an abstraction of the moneys or funds of the bank, would be inadequate to make a case of embezzlement. The proofs to make out embezzlement of the moneys of the bank would not suffice to make a case of issuing, without authority, notes or bills of exchange or certificates of deposit, or of making false entries in the books of the bank. Embezzlement was a felony, at common law, of the same grade as larceny. 4 Bl. Comm. 231. That was when a servant fraudulently converted to his own use his master's goods, of the value of 40 shillings, not having the actual possession, but only the care and oversight, of the goods. By St. 21 Hen. VIII. c. 7, the offense was extended to all cases of fraudulent conversion by a servant of the master's goods of the value of 40 shillings. This statute was in force at the time of the settlement of our colonies, and so presumably became a part of the common law of this country. It was repealed in the time of George IV., and other statutes providing for banishment for 14 years or confinement for 3 years substituted. Under the law of congress in question, this offense of embezzlement is joined in the same section with various other distinct acts performed by the agent or officer of a banking association, which were not before indictable as crimes; and, though the statute denominates them all as misdemeanors, in the judgment of the court that is not at all decisive of the question as to the degree of strictness to be observed in criminal pleading. The statute calls them "misdemeanors," while one of the offenses described was clearly a felony at common law, punishable by forfeiture of goods and imprisonment, while to the commission of each a severe punishment is prescribed, which, by the decisions of the supreme court rendered since the passage of the act, are held to make them infamous crimes, which, according to the classification of crimes usually adopted in this country, and recognized by the supreme court, are also felonies, as involving imprisonment in the penitentiary for a term of years. The punishment of this offense defined by the statute is much more severe than that prescribed for manslaughter, which is imprisonment not exceeding three years, and a fine not exceeding \$1,000.

...But, aside from any question of how it might be adjudged at

common law, I cannot doubt that the question is practically and definitely settled by section 1024, Rev. St. U. S., which provides that—

“When there are several charges against any person for the same act or transaction, or for two or more acts or transactions connected together, or for two or more acts or transactions of the same class of crimes or offenses, which may be properly joined, instead of having several indictments, the whole may be joined in one indictment in separate counts.”

The third clause of this provision, in the judgment of the court, precisely defines and covers this case; that is to say: “Where there are two or more acts or transactions of the same class of crimes or offenses.” It was clearly competent for congress to prescribe such a rule of pleading for the courts of the United States, and the rule applies to prosecutions under the section in question; and this provision is but expressive and declaratory of the general rule of criminal pleading in this country. The rule at common law would require separate indictments for each offense. This statute, and the statutes in many of the states and in England, modify the common-law rule so far as, when the statute defines two or more acts or transactions of the same class of crimes or offenses, to allow them to be joined in the same indictment, but each offense to be charged in separate counts. There never was any rule in civil or criminal pleading for joining two or more causes of action in the same count. As said by the court in *U. S. v. Sharp*, Pet. C. C. 131:

“It is essential to justice that the grand jury should have it in their power to ignoramus any offense in the indictment which is not supported by evidence. But if two or more are thus blended together in one count, they must find the whole or ignoramus the whole; whereas, if they are arranged in different counts, they may find one a true bill, and ignoramus as to the other. How is the petty jury, in a case of this kind, to find their verdict? If they say the prisoners are guilty of part of the offense described in one count, and not guilty as to the others, they do not find them guilty ‘in manner and form;’ but where there are different counts they are the same as different indictments.”

I know of no exceptions to this rule, especially in crimes working an infamous punishment. The apparent exceptions are where different phases or stages of the same offense are set out in the same count. This is always allowable. A familiar instance of this in this country is where, under the police regulations of a state, persons are prohibited from engaging in dealing in spirituous liquors without first taking out a license. In such case the defendant may be charged in the same count with selling, trafficking in, bartering, or giving away spirituous liquors. Here the substance of the offense is that of dealing in that business without a license, and the selling, bartering, or giving away are but different phases of the same offense. *Clifford v. State*, 29 Wis. 327. So the charge of murder includes a charge of manslaughter, which is a lesser stage of homicide; and the prisoner may be convicted of either under the same count. In *State v. Smith*, 61 Me. 386, the rule, and the reason for it, are laid down as follows:

“No rule of criminal pleading is better established than that which prohibits the joinder of two or more substantive offenses in the same count. A sub-

stantive offense is one which is complete in itself, and is not dependent upon another. Where several acts relate to the same transaction, and together constitute but one offense, they may be charged in the same count, but not otherwise. Each count in an indictment must stand or fall by itself. The jury cannot find a verdict of guilty as to one part and not guilty as to another part of the same count. This strictness of pleading is necessary, in order that the accused may not be in doubt as to the specific charge against which he is called to defend, and that the court may know what sentence to pronounce."

The same rule is laid down by the supreme court of Indiana in *Knopf v. State*, 84 Ind. 316; *State v. Shields*, 8 Blackf. 151; *State v. McPherson*, 9 Iowa, 53; *Reed v. People*, 1 Parker, Crim. R. 481, and many other cases. See *Bish. Crim. Proc.* § 432, and cases cited.

The demurrers to counts are sustained.

In re LUM LIN YING.

(District Court, D. Oregon. February 2, 1894.)

No. 3,666.

1. CONFLICT OF LAWS—CHINESE MARRIAGES—VALIDITY.

A marriage solemnized in China according to the laws and customs thereof, but while the bridegroom is in America, is not valid in America.

2. CHINESE—EXCLUSION ACTS.

Where a woman, married according to Chinese laws to a Chinaman then in the United States, is brought to the United States by direction of her husband, both acting in good faith, she is entitled to land, there being no evidence that she is a prostitute.

Petition for writ of habeas corpus. Petitioner discharged.

B. B. Beekman and G. W. P. Joseph, for petitioner.

Daniel R. Murphy, for the United States.

BELLINGER, District Judge. It is admitted that the person claiming to be the husband of the petitioner is a merchant doing business in this city. Is the petitioner his wife? He testified that she was betrothed to him at two years of age, and that six months ago the marriage was solemnized according to the laws of China. He further testified that he had never seen his wife until her arrival here. Upon this last statement, I concluded to remand the petitioner, without further inquiry, but deferred to the urgent request of her attorneys to be heard as to this alleged China marriage, and as to the bona fides of the marriage transaction.

The only authority cited as to what constitutes the solemnization of marriage under Chinese laws is an article in the *Encyclopedia Britannica* by Prof. R. K. Douglas, professor of Chinese in King's College, London. According to this authority, marriage in China is an arrangement with which the parties most concerned have nothing to do. The duty of filial piety is said to be the final object of Chinese religious teaching, and, under its influence, parental will is a supreme authority, from which there is no appeal. Marriage, therefore, is not the result of acquaintanceship. "The bridegroom

rarely sees his betrothed until she has become his wife." The preliminaries are entirely arranged by professional go-betweens with the parents and families of the respective parties. The correspondence between the two, thus conducted, is in writing, and is of the briefest character. If the arrangements proceed satisfactorily, the particulars of the engagement are committed to writing upon duplicate cards. These are sewn together, and the ceremony is complete. The bride journeys to the home of her husband, who may then see her for the first time. This is the system under which the marriage relied upon in this case is claimed to have taken place, and is consistent with such marriage. The fact that such a marriage did take place, as testified to by the parties, is not contradicted, and is consistent with all the circumstances appearing in the case.

If the parties were married according to the laws of China, such marriage is valid here. Parsons on Contracts says that "it seems to be generally admitted, and is certainly a doctrine of English and American law, that a marriage which is valid in the place where it is contracted is valid everywhere. The necessity and propriety of this rule are so obvious and so stringent that it can hardly be called in question." This rule is subject to the qualification that a marriage made elsewhere would not be acknowledged as valid in a state, the laws of which forbade it as incestuous. Meyer's Federal Decisions says the general rule is undoubtedly that a marriage good by the law of the place of solemnization is good everywhere.

At the time of the marriage in question in this case, the husband was domiciled in the United States. This raises a question, as to whether China is the place of solemnization of the marriage. While the place of solemnization governs, by what rule shall such place be determined, when the parties are at the time within different jurisdictions? It is doubtful whether this is a China marriage. It is not enough, in my judgment, that such a marriage is valid under the laws of China. I am of opinion that it must not only be valid under such laws, but, to be valid elsewhere, must have been solemnized within the jurisdiction of those laws.

The parties in this case appear to have acted with the utmost good faith. On the 7th of last October the husband consulted a firm of lawyers of high standing in the city, touching the right of his wife to land here. The subject was carefully considered by them. Acting on their advice, a certificate was prepared and forwarded to China, identifying the husband, and setting forth that the petitioner was his wife, and that such certificate was intended to evidence her right to land here, by virtue of such relation. Money was forwarded for the journey, which she undertook in pursuance of the advice given her husband here. There is no doubt as to this. I have no right to assume, upon the whispered suggestions made on the authority of some of her countrymen, that she is a prostitute. There is no testimony tending to prove anything of the kind. Nor is there anything in the case calculated to arouse a suspicion against her. If, as the testimony shows, she is a girl of 18 years of age, who has made this journey in good faith under the circumstances

I have mentioned, she does not belong to any class of persons within the exclusion acts of congress, and her rejection would be a cruel injustice.

I am aware that there is danger of imposition in cases like this, but that danger exists in all cases where Chinese persons are landed, and must continue to exist until exclusion is made absolute.

The petitioner is discharged.

UNITED STATES v. A LOT OF JEWELRY, ETC.

(District Court, E. D. New York. January 9, 1894.)

1. CUSTOMS DUTIES—VIOLATION OF LAWS—FORFEITURES—REPEAL OF STATUTES.
Rev. St. § 3082, relating to unlawful importations, is not a purely criminal statute, but, on the contrary, authorizes a suit in rem to forfeit the goods; and it was not repealed, either by the act of February 27, 1877, (Rev. St. § 2865,) or by section 9 of the act of June 10, 1890. U. S. v. A Lot of Jewelry, 13 Blatchf. 65, criticised.
2. SAME—INFORMATION—SUFFICIENCY.
An information of forfeiture under Rev. St. § 3082, is sufficient to support a verdict when it contains averments that certain persons named received the goods, knowing them to have been imported contrary to law; that they were seized by the collector within the district; that they were subject to duty, were brought from a foreign port into the port of New York, without being invoiced or entered at the custom house, and without payment of any duty; and that they were imported contrary to law, by persons named, fraudulently and knowingly.
3. SAME—INFORMATION—CRIMINAL RULES NOT APPLICABLE.
An information of forfeiture under Rev. St. § 3082, is capable of amendment, if objected to; and, when there is no demurrer or application for particulars before the trial, it will not, after verdict, be judged of with the strictness applicable to an indictment.
4. SAME—BURDEN OF PROOF—"PROBABLE CAUSE."
In section 21 of the customs administrative act of 1890, which casts the burden of proof, in cases of seizure, upon the person claiming the goods, provided that probable cause for the prosecution is shown, the words "probable cause" are to be understood as importing circumstances which create suspicion. Boyd v. U. S., 6 Sup. Ct. 524, 116 U. S. 616, distinguished.
5. EVIDENCE—COMPETENCY—IDENTITY OF PERSONS—PHOTOGRAPHS.
It is competent, for the purpose of proving the identity of a person alleged to have passed under different names in different places, to show a photograph to witnesses who knew the person passing under the names, respectively, and allow each to testify that it looked like the man he had so known.

At Law. Information of forfeiture, under Rev. St. § 3082, to secure the condemnation of certain jewelry, alleged to have been brought into the United States contrary to law. The court directed a verdict for the United States, and the cause is now heard on a motion for a new trial, and in arrest of judgment. Denied.

The information, omitting the caption, was as follows:

"On the 20th day of June, in the year 1893, comes Jesse Johnson, as the attorney of the United States of America for the eastern district of New York, in a cause of seizure and forfeiture of the property, under the revenue and customs laws of the said United States, and informing the court: That on the 5th day of May, and the 10th and 16th days of June, in the year one thousand eight hundred and ninety-three, Francis Hendricks, collector of customs for the port and collection district of New York, seized on land, in the

said eastern district of New York, certain goods, wares, and merchandise, and which said goods, wares, and merchandise, he, the said collector, has now, within the said eastern district of New York, as forfeited to the said United States for the causes propounded in the following articles. That heretofore, about February, March, or April, 1893, the goods, wares, and merchandise were brought from a foreign port and place—from France, or some other foreign country—into the port and collection district of New York, by Alexander Vollkringer, or Madame Vollkringer, or Eugene Leroux, or Jenny Leroux, alias Jenny Dolli, or by one Flamant, or Madame Flamant, or Herbert Gailarden, or by some person or persons unknown, and were found partly in the possession of Eugene Leroux, or Jenny Dolli, alias Jenny Leroux, and partly in the possession of certain other persons, with whom said Eugene Leroux, or Jenny Leroux, alias Jenny Dolli, or some person acting for them, had placed the same as security, for loans, or, as is commonly known, had pawned the same. The names of such other persons are A. H. Samuels, J. J. Freel, H. C. Lewis, F. Freel, M. Brockheimer, and Arthur J. Heaney, in the said eastern district of New York. That said goods, wares, and merchandise, so found in the possession of the persons last above named, were subject to duty, and which were not, at the time of making entry for such goods, wares, and merchandise, by the person or persons having possession thereof, mentioned to the said collector of the port and collection district of New York, before whom such entry should have been made, and which said goods, wares, and merchandise were then and there subject to duty, and should have been invoiced, but that no duty was paid thereon, contrary to the provisions of the statutes of the United States in such case made and provided. That said Vollkringer, Madame Vollkringer, Leroux, Jenny Leroux, alias Jenny Dolli, Gailarden, Flamant, and Madame Flamant did fraudulently and knowingly import or bring into the United States the said goods, wares, and merchandise, or did assist in so doing, and did receive, conceal, buy, sell, and pawn, the same after importation, knowing the same to have been imported contrary to law. And the said attorney of the United States saith that all and singular the premises are true, and that by reason thereof, and by power of the statutes in such case made and provided, the aforesaid goods, wares, and merchandise became and are forfeited to the use of the said United States, as in the statutes provided."

Jesse Johnson, U. S. Atty.

M. L. Towns, (R. Moses and J. J. Allen, of counsel,) for claimants.

BENEDICT, District Judge. This is a proceeding in rem to procure the condemnation of a quantity of jewelry alleged to have been forfeited to the United States. The value of the jewelry proceeded against is about \$12,000. A full description of it is given in the information. A claim and answer having been filed, the case came to trial before the court and a jury. At the close of the testimony introduced by the government, no testimony being offered by the claimants, a verdict for the government was directed by the court. The cause now comes up upon a motion for a new trial, and a motion for an arrest of judgment, these motions having been heard together.

It will be convenient to consider first the point made that section 3082 of the Revised Statutes, which was the statute upon which the trial proceeded, was repealed by section 9 of the act of June 10, 1890. Such is not my opinion. The language of section 9 of the act of 1890 shows, as it seems to me, that it was intended to relate to acts done in connection with an entry of goods at the custom house, not to a case where no attempt is made to enter the goods, or otherwise to comply with the laws respecting the col-

lection of duties. The words "any false, or fraudulent practice and appliance," as used in section 9 of the act of 1890, must be taken to be limited to the case mentioned in the section, not to a case where no entry at the custom house is made or attempted.

In a supplemental brief, submitted on behalf of the claimants, the further point is taken that section 3082 was repealed by the act of February 27, 1877, an act passed three years after the Revised Statutes took effect, but which now appears in the Revised Statutes in section 2865. I am unable to see how the provision in section 3082, which declares a forfeiture of goods imported contrary to law, can be affected by section 2865, which is a purely criminal statute, and in no way deals with goods unlawfully imported, but only with the person of the offender. There is no inconsistency between the two provisions, and no language is used in section 2865 indicating an intention to repeal or modify the provision for forfeiture contained in section 3082.

Again, it is contended that section 3082 is a purely criminal provision, and no action in rem to procure a judgment of forfeiture of goods can be maintained by virtue of it. In support of this point is cited the case of *U. S. v. A Lot of Jewelry*, 13 Blatchf. 65, where Mr. Justice Hunt remarks, in regard to section 3082:

"The object and intent of the proceeding is the imposition of the fine and the imprisonment, not the recovery of the goods. The statement that goods so imported shall be forfeited is incidental to the main point, the imposition of the fine and imprisonment. It is by virtue of sections 3059, 3061, 3072, and other sections, that goods are seized when imported in violation of law, and the authority of section 3082 is not needed for that purpose."

This remark furnishes no binding authority in this case. The only question up for decision was a question of evidence. The remark above quoted was not necessary to the determination of the case, nor is it easy to see how a forfeiture of goods, which is plainly declared, by express terms in section 3082, can be enforced as incidental to a criminal prosecution. No attempt to do that has ever come to my knowledge, and it seems to me that the introduction of the civil proceeding to forfeit goods into a trial upon an indictment would be, if not wholly impracticable, at least productive of great confusion. It would seem that there must be some mistake in the report of the opinion of Mr. Justice Hunt, for sections 3059, 3061, and 3072, to which reference is made as entailing forfeiture of smuggled goods, are not, as I read them, sufficient for that purpose. To give to section 3082 the effect now claimed in this case would be to nullify express and important language in the statute, and without apparent reason. The decision of the supreme court of the United States, in *U. S. v. Claffin*, 97 U. S. 546, which is also cited by the defense in this connection, simply decides that an action of debt will not lie under section 3082. The case at bar is not an action of debt. In deciding that case, however, it is stated by the supreme court (page 551) that the act of 1866, which is section 3082, imposes a forfeiture of the goods. And in *Friedenstein v. U. S.*, 125 U. S. 224, 8 Sup. Ct. 838, although one count of the information was based on section 3082, nothing is said by the court

to cast doubt upon the validity of that section. In the case of *Cotzhausen v. Nazro*, 107 U. S. 219, 2 Sup. Ct. 503, the seizure there in question was held lawful, upon the ground that the article, being dutiable, and having been imported in a letter, had been imported contrary to law, and, therefore, was forfeited under section 3082 of the Revised Statutes. A consideration of the various statutes anterior to the act of 1866, now section 3082, leads to no different conclusion. The suggestion, that the words "shall be forfeited" were introduced into section 3082 merely to emphasize the fact that such was already law, seems without force. The better suggestion would seem to be that the words were introduced because instances had been found of goods imported contrary to law, which could not be forfeited by virtue of the prior statutes. "Goods imported in a United States vessel and not included in the manifest," (sections 2809, 2810;) "goods unladen within four leagues of the coast," (section 2799;) "articles in baggage and not reported to the collector," (sections 2872, 2874;) "goods unladen without a permit," (sections 2872, 2874;) "goods found concealed in any dwelling house or other similar place," (section 3066;) "goods brought from any foreign country adjacent to the United States," (sections 3098, 3099,)—are declared forfeited. But I have been referred to no statute, other than section 3082, which declares a forfeiture of goods brought into the United States as the goods proceeded against here are shown to have been.

My conclusion, therefore, is that so much of section 3082 as declares a forfeiture of goods imported contrary to law is a subsisting statute, under which the goods in question can be lawfully condemned as forfeited to the United States.

It is said that the information will not support a verdict, because it contains no averment that the goods were imported contrary to law. The information is not scientifically constructed, but, treating it according to the contention of the claimants, as consisting of a single count, it contains an averment that certain persons named did receive the goods described, knowing the same to have been imported contrary to law. This averment, by necessary implication, avers that the goods were imported contrary to law. The information also avers a seizure of the goods by the collector, within the district; that these goods were subject to duty; that they were brought from a foreign port into the port of New York, without being invoiced or entered at the custom house, without the payment of any duty whatever; and that the goods were so imported contrary to law into the United States by persons named, fraudulently and knowingly. These averments are, as it seems to me, sufficient to support a judgment of forfeiture by virtue of section 3082, and to be sufficiently particular to meet the requirements of the law in a case of this description.

At this point, while examining the language of the information, may be considered the point made that the information confines the proceeding to goods which had been pawned, and that there must be a new trial, inasmuch as the evidence fails to show what part of the goods had been pawned. But whether the goods had been

pawned or not is immaterial. A pawning of the goods is not necessary to entail the forfeiture declared in section 3082, and need not be proved. Nor need any intention to defraud be averred or proved, in a proceeding to condemn goods under this section. *Cotzhausen v. Nazro*, above cited.

Again, it is said that the information, as drawn, confines the proceeding to goods found in the possession of six pawnbrokers, named in the information, and, inasmuch as the testimony fails to show what goods were so found, there must be a new trial. I cannot agree with this view of the information. It seems to me that it would be an unreasonable construction of the information to hold that the words "last above named" refer to six persons whose names preceded these words, and did not include the other persons, who were also previously named as having the goods, or some part of them, in their possession.

Some other objections have been made to the information, but it seems sufficient to observe, in regard to them all, that this is not a trial upon an indictment, but upon an information, capable of amendment, if objected to. The information was not demurred to, nor was any application for particulars made before the trial; no doubt for the reason that no additional information was required. At the trial particularization of the statutes relied on was asked and given. Two of the statutes so named were rejected by the court, and the case confined by the ruling to section 3082. The fact that no objection to the information was raised, either by demurrer, or by motion for particulars, or otherwise, until after a jury had been sworn to try the issues raised by the pleadings, points to a belief on the part of the claimants that no amendment of the pleadings was required to protect their rights. I am unwilling to import into a suit of this character rules of criminal law, which are so often successfully resorted to, after a jury has been sworn, for the purpose of defeating the ends of justice.

During the trial it became important for the government to show that a man named Vollkringer, who had a stock of jewelry in a store in Paris, of which the jewelry proceeded against is shown to have been a part, came to New York, as a passenger, by the steamship *New York*, under the name of Flamant. In order to prove this, a witness who knew Vollkringer in Paris was shown a photograph of a man, and he testified that Vollkringer's appearance corresponded with the picture in the photograph. Another witness, who had known the man called Flamant at the hotel in New York, on being shown the same photograph, testified that Flamant's appearance corresponded with the photograph. When the photograph had been taken, and whether or not it was taken from Vollkringer, did not appear. This line of testimony was objected to, but, it seems to me, without good reason. It was only another, and a more definite, method of proving the appearance of the man Vollkringer, and of the man who called himself Flamant. The resemblance of feature could surely be proved, to show that the man Vollkringer and the man called Flamant were the same person. Such testimony would not, of course, be conclusive, but, in

my opinion, it was some evidence, pertinent to the inquiry then in hand.

There remains to be considered the question whether error was committed by the court in finding, upon the testimony submitted by the government, that probable cause for the prosecution had been shown, and in directing a verdict for the government in the absence of any testimony from the claimants. This action was taken by virtue of section 21 of the administrative act of 1890, which is as follows:

"In all suits or informations brought, where any seizure has been made pursuant to an act providing for or regulating the collection of duties on imports or tonnage, if the property is claimed by any person, the burden of proof shall lay upon such claimant, provided that probable cause is shown for such prosecution, to be judged of by the court."

The goods proceeded against consisted of a quantity of metal forks, spoons, watches, bracelets, unset stones, diamonds, sapphires, rubies, pearls, opals, gold brooches, hair pins, combs, amber cigarette holders, metal match safes, salt cellars, sleeve buttons, smelling bottles, gold rings, gold studs, empty jewel cases, 97 gold chains, 119 scarf pins, 20 pairs of diamond earrings, 27 ladies' gold watches, 20 gentlemen's gold watches, etc., and apparently are the stock, or part of the stock, of a retail jewelry store. Many of the articles have still on them the store tags. The articles are of foreign manufacture, and are dutiable goods. It was proved by direct evidence that a considerable part of this property, prior to March 29th, composed the stock of a man named Vollkringer, who then kept a small jewelry store in Paris. The tags were identified as in his handwriting, and his purchase of some of the articles is proved by the seller. On April 1, 1893, the police of Paris examined Vollkringer's store in Paris, and found it closed, and the stock gone. On the 15th day of April, Vollkringer arrived at the port of New York, in the steamship New York. He came as a passenger, under the assumed name of Flamant. In his baggage entry he signed the name "Flamant," and in it declared one trunk, one bag, and one box, as the personal baggage of himself and wife. He declared no dutiable goods, and he paid no duty. With him there came a woman, who passed as his wife, and who was dressed in a long overcloak, reaching from her neck to her boots. On landing from the steamship on the 15th day of April, 1893, Vollkringer and the woman went to the Atlantic Hotel, without waiting for their baggage. There a meeting took place between Vollkringer and Leroux, the claimant in this case. They acted like acquaintances. The woman without removing the long overcloak, as was noticed by the landlady, remained sitting in the dining room of the hotel for about three hours, while Vollkringer and Leroux went to the steamship. On their return, all went upstairs together. Vollkringer and the woman remained at the hotel until about the 1st of May, when they left, having tickets for Canada; Vollkringer, in the mean time, having shaved off his mustache. A few days after this, Leroux and his wife left the hotel, and on the 5th day of May, the wife was found in Brooklyn, pawning jewelry at v.59F.no.6—44

several places, one after another, under the name of Jennie Dolle. She was arrested, and, at the lodgings occupied by her and Leroux, was found most of the jewelry in question. The rest was found at the pawnbrokers', where it had been pawned by the woman.

A considerable part of this property, as has been already stated, was subsequently identified, by a witness from Paris, as having belonged to Vollkringer in Paris, and as forming part of the stock in his store in Paris, and, in the course of the trial, it was proved, without objection, that Leroux said he got the diamonds from Flammant. A large part of this jewelry, when found, was sewed up inside flannel bags, which bags, seven in number, were evidently constructed to be worn on the person, by means of tapes attached, under the arms, about the waist, around the stomach, and around the legs. The goods, the claimants say, in their answer, they had bought in New York; from whom is not stated.

There is hardly room to contend that this evidence fails to show circumstances sufficient to warrant a suspicion that the goods had been brought by Vollkringer into the United States, without entry or payment of duty.

The statute on which the action of the court was based is a reproduction of the old statute of 1789, and it cannot be doubted that the statute supports the ruling made at the trial, if it is to be understood as the similar statute has been interpreted by the supreme court of the United States in many cases,—of which it is sufficient to refer to the case of *Averill v. Smith*, 17 Wall. 83, where a certificate of probable cause was upheld, although the evidence was not sufficient to justify a condemnation of the property, and where the court cites with approval the remark of Mr. Parsons that the words "probable cause" mean less than evidence that would justify condemnation, and says, "It is settled that the words 'probable cause' import circumstances which create suspicion." This, as was said by the supreme court in *Cliquot's Champagne*, 3 Wall. 145, "has always been regarded as a prominent feature of the revenue system of this country."

But it is said that recent decisions of the supreme court have changed the law, and that it must now be held that, to show probable cause, within the meaning of the statute, the evidence must be such as to establish the charge beyond a reasonable doubt; and it is contended that, if the statute be interpreted as stated in *Averill v. Smith*, it renders the provision unconstitutional, as being in violation of the fifth amendment of the constitution. In support of this contention reference is made to the decision of the supreme court in the cases of *Lilienthal v. U. S.*, 97 U. S. 237; *Chaffee v. U. S.*, 18 Wall. 516; and especially the case of *Boyd v. U. S.*, 116 U. S. 616, 6 Sup. Ct. 524. The argument based upon these cases is this: The case at bar is not a civil suit, but is a criminal proceeding, and, as such, governed by the rules of the criminal law. A rule of criminal law is that no verdict can be given for the government unless the charge is proved beyond a reasonable doubt, and of that the jury, and not the court, must judge; therefore, no judgment can be given here, because the court decided that the evi-

dence cast the burden of proof upon the claimants, whereas the evidence did not prove the charge beyond a reasonable doubt, and, when no evidence was offered for the claimants, the court directed the jury as to their verdict. It may well be that error was here committed, if the decision in Boyd's Case is to be given the effect claimed for it here; but, if such a sweeping effect is to be given to the decision in Boyd's Case as has been claimed, I prefer to leave it to the appellate court to do it. I say sweeping, because I have heard it argued that the decision in Boyd's Case renders it unlawful, in a criminal trial upon an indictment charging the prisoner with knowingly passing a counterfeit dollar, to put in evidence, on the question of guilty knowledge, numerous similar counterfeit dollars which the accused had in his pocket at the time he passed the coin in question, and which, upon a search of his person, made without his consent, were there found by the officer, and taken from him without his consent. Besides, it can, I think, be fairly said that the decision in Boyd's Case is not binding authority in this case. Boyd's Case, as the court says, was a case of forfeiting a man's property by reason of offenses committed by him. This is not such a case. It is not contended that the goods in question had been smuggled by Leroux or his wife, who have claimed the property as owners. Any such proposition was expressly disclaimed by the district attorney at the trial, and the case was limited to the question whether the goods had been smuggled by Vollkringer. But Vollkringer, as the claimants say, in their answer, had parted with his interest in the goods in the city of New York, and after the right of the United States to the goods had attached by reason of his unlawful acts. No punishment of Vollkringer is or can be inflicted by this proceeding. Indeed, no action of Vollkringer amounting to a felony is asserted. This case, therefore, cannot be a criminal prosecution of Vollkringer, under the cloak of a civil suit against jewelry. The question whether, in a case like this, such action as was taken by the court on the failure of the claimants to produce any evidence is unlawful, is not decided in Boyd's Case. In my opinion, this case must be governed by the anterior law as declared by the supreme court of the United States in the cases, and by the decision in Boyd's Case, to which I have referred.

Upon these grounds the motion for a new trial, and for arrest of judgment, must be denied.

EDISON ELECTRIC LIGHT CO. et al. v. BUCKEYE ELECTRIC
CO. et. al.

(Circuit Court, N. D. Ohio, E. D. January 23, 1894.)

No. 5,142.

1. PATENTS — ATTEMPTED CORRECTION — LIMITING TO EXPIRE WITH FOREIGN
PATENTS—ESTOPPEL.

The voluntary act of a patentee in causing his patent to be amended after issuance so as to be limited to expire with a foreign patent secured

by him, even though taken under the mistaken view that the law required such limitation to appear on the face of the patent, estops him, as against one who invested money in a manufacturing plant on the faith of his action, from claiming that the amendment was invalid and of no effect, or from relying upon a subsequent annulment of the amendment secured by him only a short time before the amended patent would have expired.

2. SAME—NOTICE.

Where the petition for correction, in such case, states that, while the inventor's American application was pending, "he applied for and obtained" letters patent for the same invention in several foreign countries,—enumerating such patents, with their dates,—and prays that the American patent may be amended so as to be limited to expire with the expiration of that one of them having the shortest time to run, the petition does not, by reason of the indefiniteness of this language, put the public upon investigation as to the laws of the various countries, so as to affect them with notice that the British patent, which was the one first expiring, did not begin to run on the day of its date, but upon the day of its sealing and issuance.

3. SAME—PRELIMINARY INJUNCTION—DISSOLUTION—WHEN GRANTED.

The burden of proof is on defendant to show cause for dissolving a temporary injunction, but nevertheless a dissolution will be granted upon new evidence sufficient to raise grave doubts as to the complainant's right to such injunction.

In Equity. Suit by the Edison Electric Light Company and the Edison General Electric Company against the Buckeye Electric Company and others for infringement of a patent. On motion to dissolve a preliminary injunction. Granted.

Statement by RICKS, District Judge:

This case is now before the court upon a motion to dissolve the preliminary injunction allowed herein on the 28th day of July, 1893. Said injunction enjoined the defendant from using lamps infringing the second claim of letters patent No. 223,898, for the alleged infringement of which the bill of complaint was brought. The motion recites what the record discloses: That the letters patent upon which the bill is filed bear date the 27th day of January, 1880, and purport to be for the full term of 17 years from that date. That after said letters patent were issued, and on or about the 15th day of November, 1883, Thomas A. Edison, to whom said letters patent were granted, filed with the commissioner of patents of the United States a duly-verified petition, wherein, among other things, he alleged that, while his said application for letters patent was pending, he applied for and obtained letters patent for the same invention in several foreign countries, to wit: British patent, dated November 10, 1879, No. 4,576; Canadian patent, dated November 17, 1879, No. 10,654; Belgian patent, dated November 29, 1879, No. 49,884; Italian patent, dated December 6, 1879; and French patent, dated January 20, 1880, No. 133,756. And that no other patents were granted upon his invention in foreign countries before the grant of said United States patent No. 223,898, and at the time of filing said application for said United States patent, and while the said application was so pending, he was advised that the rules and practice of the office, under the prevailing construction of section 4887 of the Revised Statutes of the United States, did not require an applicant to acknowledge, during the pendency of his application, a foreign patent applied for and granted subsequent to the filing of such application, and that he therefore did not acknowledge the above named foreign patents, and that the United States letters patent were granted to him, unlimited, for the full term of 17 years. He, further, in said petition, tendered said letters patent No. 223,898 to the commissioner of patents, and requested that they be corrected so that his said patent should be limited to expire with the date of said foreign patent, referred to in his petition, having the shortest time to run. The said petition of Thomas A. Edison for such

correction of his said patent was duly consented to and concurred in, in writing, by the Edison Electric Light Company, to whom the said Edison had assigned the said letters patent.

The motion further alleges that the United States commissioner of patents, upon the filing and due consideration of said petition for the correction of said patent, granted the said request of the said Thomas A. Edison and the Edison Electric Light Company, and accepted the surrender of said patent for the purpose of such correction, and corrected said letters patent in accordance with the request made in said petition, and indorsed thereon such correction, wherein and whereby said letters patent were, at the election and request of the said complainants, limited so as to expire at the same time with the foreign patent having the shortest time to run, naming said patents as hereinbefore described, and certified that the proper entries and corrections had been made in the files and records, and that the said amendment was made that the United States patent might conform to the provisions of section 4887 of the Revised Statutes. Said motion further avers that "said British patent, No. 4,576, dated November 10, 1879, was for the same invention as that for which the said United States letters patent aforesaid were granted, and as your petitioners are informed, advised, and believe, and therefore allege, was for the term of fourteen years from the said November 10, 1879," and that said British patent, No. 4,576, has now expired.

Said motion further avers: That the defendant, the said the Buckeye Electric Company, was organized for the purpose of manufacturing and selling incandescent lamps in the month of February, 1890. That at the time of its organization it had an authorized capital of \$100,000, and its investment at that time was about \$25,000. That, before said business enterprise was started and said capital invested, the parties interested in the enterprise made diligent examination of the records of the patent office with reference to patents pertaining to incandescent electric lamps, and also informed themselves as to the prevailing understanding of the trade, and persons engaged in similar enterprises, as to the rights of parties to manufacture incandescent electric lamps notwithstanding said letters patent No. 223,898, and other patents professing to cover the manufacture of incandescent electric lamps at that time, and among other things ascertained that the circuit court of the United States, in a case heard by Mr. Justice Bradley, had decided to be invalid a certain patent upon incandescent lamps, known as the "Sawyer-Mann Patent," which was considered by the trade and all parties interested as being in all respects as valid as the said letters patent No. 223,898, which patent was commented upon and referred to in said case, and that at the time of said ruling the electrical engineers, and all parties interested throughout the country, accepted that decision as holding that the public generally were free to make, sell, and manufacture incandescent electric lamps in the form now claimed, and subsequently decided to be an infringement of the letters patent in the bill of complaint described. And, prior to the time that said Buckeye Electric Company engaged in the business, there were many other concerns in the United States manufacturing incandescent lamps, among the principal of whom were the Sawyer-Mann Company, of New York City; the Thomson-Houston Company, of Lynn, Mass.; the Bernstein Company, of Boston; the Sunbeam Incandescent Lamp Company, of Chicago; the Perkins Incandescent Lamp Company, of Manchester, Conn.; the Brush-Swan Company, of Cleveland, Ohio; and others. That none of those companies had ever been sued by the owners of the "Edison Patent," so called.

Said motion further avers that the defendants and those interested also ascertained from such investigation that the particular patent in suit in this case was then believed to have expired by reason of the termination of the Canadian patent covering the same invention, issued on November 17, 1879; it being, as was then understood by the petitioners, the prevailing opinion of the courts that the termination of the Canadian patent, by the decision of the deputy commissioner of patents, terminated at the same time as the Edison patent sued upon herein, which had been issued in the United States subsequent to the date of said Canadian patent, and it was the distinct understanding of the defendant at the time said company began business that there was no valid patent outstanding which could in any way

interfere with their carrying on the proposed business of manufacturing and selling incandescent electric lamps. And the defendant, in common with other manufacturers throughout the United States, continued business with its said investment of about \$25,000 until the summer of 1891, without molestation or threat of interference by any one claiming the patents were infringed by the defendant. That in the summer of 1891 the defendant, the Buckeye Electric Company, having some months before that time discovered and put into practical use a filament superior in every respect to that which was then and is now used by the complainants herein, and had so far increased its business that it became necessary to largely increase its investment. And thereupon further examination was made by the parties interested in the said Buckeye Electric Company's enterprise as to the patent of the said Thomas A. Edison, and it appeared from the examination which was then made, for the second time, that said letters patent had been, upon the petition of Thomas A. Edison, as hereinbefore described, corrected so that said patent was limited to expire with the aforesaid patents issued by foreign countries having the shortest time to run, and that said patent would expire on the 10th day of November, 1893. That consequently the United States letters patent would expire at the same time. And thereupon, and before any ruling had been made by the circuit court of the United States sustaining the validity of the said Edison patent, and in full reliance on said petition, and with the concurrence and consent of complainants, as hereinbefore set forth, and upon the certificate of the patent as issued and corrected, limiting its term as aforesaid, the said defendants, for the further purpose of introducing its improved and superior filaments, further increased its investment in said electric light business, so that it now has, and since said summer of 1891 has had, invested in said business, and in connection therewith, about the sum of \$125,000. The motion avers that said investment was made in good faith, believing that in no event could the United States letters patent of the said Thomas A. Edison continue in force longer than November 10, 1893, which said defendant was induced to believe by the action of the said Edison and his associates as hereinbefore recited.

The motion further avers that after the decision of Judge Wallace, hereinbefore referred to, an appeal was at once taken by the parties to said suit, so that the defendant and others in the same line of business continued to manufacture lamps pending said appeal; that shortly thereafter negotiations were opened between the defendant and complainants with a view of completing some arrangement by which a sale or consolidation of interests could be effected; that these negotiations were carried on constantly from about September, 1892, until February, 1893, during which time the defendants operated their factory, with the acquiescence, and substantially at the request of, said General Electric Company, and materially increased its capacity at the suggestion and request of the said General Electric Company. These negotiations finally failed, and immediately upon such failure the defendant closed its factory, by reason of the ruling of the circuit court of appeals for the second circuit sustaining said claim of the Edison patent, and said factory remained closed until a subsequent decision of Judge Hallet, in the eastern district of Missouri, in a case in which the Goebel defense to the validity of the Edison patent was presented, and the complainants were refused an injunction. Upon such ruling the defendant opened its factory, and continued manufacturing until the decision of Judge Seaman, of Milwaukee, when the defendant again closed its factory; and said motion avers that said defendant has at no time knowingly or willfully infringed complainants' rights.

By reason of the premises, the defendant avers that said United States letters patent No. 223,898, so far as the rights of the defendant to now manufacture lamps is concerned, is no longer in force, said invention having been, by the voluntary act of the owners, as hereinbefore described, dedicated and abandoned to the public, and that by reason of said action the public generally, and especially the defendant, has thus made large investments upon the faith of the expiration of said patent at the date to which its term was so expressly limited by request of the owners thereof, and have now the right to manufacture and use and sell the lamps covered by said patent, and that the complainants, by reason of the acts aforesaid, are es-

topped to claim any benefits under said patent, as against the defendant, since November 10, 1893.

This motion is supported by affidavits of the officers of the defendant, and by most of its directors, each of whom avers the truthfulness of the facts hereinbefore set forth.

The complainants, in reply, file affidavits in which they admit the proceedings in the patent office, substantially as set forth in the defendant's motion, but declare with great particularity the circumstances under which said proceedings were taken, alleging and claiming that the same were taken under a mistake of law, and under the advice of eminent counsel. They further deny that the defendant was misled by the negotiations set forth in their motion, and that they in any way impaired their legal rights to insist upon a continuation of the injunction now in force. They further deny that the defendant was misled by reason of complainants' conduct because of the proceedings in the patent office, and deny that they are estopped by virtue of those proceedings to insist that their patent is in force for the full term of 17 years from the date it was issued.

Wm. B. Bolton, for complainants.

Squire, Sanders & Dempsey and Benj. H. Bristow, for defendants.

RICKS, District Judge, (after stating the facts.) It will be seen from the foregoing statement of facts that the complainants do not deny the proceedings instituted by them in November, 1883, in the patent office, substantially as set forth in the defendant's motion. But they contend that they are not bound by the action of the patent office, taken upon their petition, for several reasons; among these, and chiefly:

First. Because the petition for a limitation upon the duration of their patent, filed by the complainants, and the proceedings in support thereof on their part, were taken under a mistake as to the law, and as to their rights under the patent, and that this error was corrected as soon as possible after discovery.

Second. Because the action and orders of the patent office were without authority of law, of no force and validity, and therefore did not in any way affect the patent.

The complainants' statement of the facts under which this action of the patent office was invoked admits that they were advised and believed at the time that such action was necessary in order to remove doubts as to the validity of the patent as originally issued. These doubts arose because of a decision of one or more of the federal courts that it was essential to the validity of a patent, where foreign patents for the same invention had been applied for, that the date of such foreign patents, and their limitation, should be cited in the application, so that the limitation of the American patent would appear on its face. In view of the uncertainties thus existing as to the validity of the Edison patent, because of these omissions in the application for the patent, and to remove all doubts, the patentee and the assignee both joined in a petition to the commissioner of patents, in which they stated that, while the application for letters patent No. 223,898 was pending, said patentee applied for and obtained letters patent for the same invention in several foreign countries, as hereinbefore fully set forth in the statement of the case. The petitioners further represented that because of the omissions of such recitals in the application

the United States letters patent were granted to the patentee, unlimited, for the full term of 17 years. The petitioners further say that they were advised that said letters patent, when issued, should have been limited upon their face to the term of the foreign patent having the shortest term prior to the date of the United States patent. Thereupon, the petitioners tendered the said United States letters patent to the commissioner of patents, and requested that they be corrected according to the provisions of the first clause of rule 164. Upon this petition the commissioner issued the following certificate:

"Department of the Interior.

"United States Patent Office.

"Washington, D. C., Dec. 18th, 1883.

"In compliance with the request of the party in interest, letters patent No. 223,898, granted January 27th, 1880, to Thomas A. Edison, of Menlo Park, New Jersey, for an improvement in electric lamps, is hereby limited so as to expire at the same time with the patent of the following named having the shortest time to run, viz.: British patent, dated November 10th, 1879, No. 4,576; Canadian patent, dated November 17th, 1879, No. 10,654; Belgian patent, dated November 29th, 1879, No. 49,884; Italian patent, dated December 6th, 1879; and French patent, dated January 20th, 1880, No. 133,756. It is hereby certified that the proper entries and corrections have been made in the files and records of the patent office. This amendment is made that the United States patent may conform to the provisions of section 4887 of the Revised Statutes.

[Seal.]

"Benjamin Butterworth, Commissioner of Patents.

"Approved: M. L. Joslyn, Acting Secretary of the Interior."

On the 6th day of March, 1893, the complainants, as petitioners, forwarded another application to the commissioner of patents, in which they recited their former petition; the action taken thereon; that subsequent thereto, by decision of the circuit court of appeals of the second circuit, said former action of the commissioner was declared to have been taken without authority of law, and therefore void; and asking that the former correction of the records by the commissioner of patents be canceled. Thereupon, the following action was taken by the commissioner of patents:

"Now, in compliance with the request of the parties in interest, said certificate is hereby canceled, and the proper entries and corrections have been made in the files and records of the patent office.

"In testimony whereof, I have hereunto set my hand, and caused the seal of the patent office to be affixed, this 15th day of March, 1893.

[Seal.]

"W. E. Simonds, Commissioner of Patents.

"Approved: Cyrus Bussey, Asst. Secretary of the Interior."

What is the legal effect of these applications of the petitioners, and the action of the commissioner of patents thereon? It is urged on behalf of the defendant that these proceedings, deliberately taken by the complainants, amounted to a voluntary dedication by them to the public, of the patent, from and after November 10, 1893, at which time the British patent expired by limitation. It is contended in reply that, even though such action was a dedication by the complainants, as claimed, it was a dedication of something which was to be given to the public some time in the future, and long before the dedication was to take effect it was revoked

and annulled, and no rights thereby passed either to the defendant or to the public.

Was this conduct and action of the complainants an abandonment of some right, or a dedication to the public of a privilege or right conferred? The arguments on this point have taken a wide range in the briefs of counsel. The action of the complainants in this case, while in the nature of a dedication to the public of a part of the time for which the sole enjoyment of the privileges of the patent were conferred, is not in all respects like the abandonment of a part of an invention by a failure to claim all of it, or by a disclaimer, in express words, of a part of it. In the latter case, the right of the public to at once appropriate the abandoned or disclaimed part of the invention attaches, and the patentee is powerless to prevent such appropriation. In this case the complainants did not abandon or disclaim anything that could be immediately appropriated. It was a voluntary act by which they declared a limitation upon the duration of their patent, which shortened its term. It was not, however, as complainants contend, a simple declaration that, at the expiration of the shortest foreign patent recited in their petition for correction, they would then dedicate to the public the remainder of its full term of 17 years, conferred by the United States patent. If its legal effect was such a dedication, to take effect 10 years in the future, it would have been a gift or grant which might have been subject to revocation. But the time for which the patentee is granted the sole enjoyment of the monopoly conferred is just as much the subject of a dedication and grant to the public as a part of the invention or process. The law on this subject is well stated in Robinson on Patents, (section 345,) to be as follows:

"The patent privilege is not a mere reward bestowed upon the inventor for past services, the payment of a debt of gratitude towards one who has already conferred a benefit upon the state. It is also a purchase by the government, acting on behalf of the whole people, of some new art or instrument, capable of beneficial use, for which it recompenses the inventor by securing to him for a time its sole enjoyment; and when, without this recompense, it has obtained the invention through his voluntary act, so far from recognizing him as entitled to remuneration, it unhesitatingly appropriates his invention to itself, whatever loss and difficulty may result to him."

What, then, did the complainants intend to do, and what did they think they had the legal right to do, with reference to the legal difficulties which they believed then surrounded them? There can be no doubt as to what their intentions and purposes then were. They asked for the right to limit their United States patent so that it might expire at the same time with the patent named having the shortest time to run. They named in their petition the British patent, No. 4,576, and therein stated that the said patent was dated as of November 10, 1879. They then believed that said patent would expire November 10, 1893; for, if they correctly stated its date, it would by law then expire. The limitation thus deliberately put upon the duration of their own patent was then believed to be necessary to its validity. Acting under such a belief of their

legal relations to the public, they then fixed the limit for their patent for what seemed to them a pressing necessity and a sufficient consideration. Whether the patent office was authorized by law, or not, to make such official correction, the petitioners unquestionably had the legal power to voluntarily fix a limit upon the duration of their own patent. Did that power depend upon future revelations as to the correctness of the legal advice under which they acted? That their proceedings were taken under a mistake of law might give them the right to correct their error by proper application, made within proper time; but such misapprehension could not affect their power or authority to make such limitation of the grant conferred upon them.

But it is contended that their petition for correction was of such an indefinite character that it put the public and all parties interested upon their inquiry as to its legal effect. It is said that the duration of the patents set forth in the petition were not stated, and to ascertain such a limitation involved investigation as to the laws of the respective countries, and that if such investigation had taken place the defendant would have ascertained that the term of the British patent did not begin until it was sealed and granted. But the public, and those interested in the duration of the patent, had the right to accept complainants' statements as to the date of those foreign patents, and to act accordingly. In their petition for correction they aver that they were not advised that the practice of the patent office required an applicant to acknowledge during the pendency of his application a foreign patent applied for and granted subsequent to the filing of such application. The application for the Edison patent was filed November 4, 1879, and the patent was granted January 27, 1880; so that, by the admissions of their petition, the British patent was both applied for and granted between those dates, and expired between November 10, 1893, and January 27, 1894. The complainants cannot object because the defendant acted upon those representations. If complainants had taken no action whatever, but had relied upon their legal rights as they might be subsequently defined, the public would have acquired no advantages by the proceedings now under consideration. The defendant would have acted at its own peril, and have had no claim such as they now assert. The complainants' conduct and public declaration of the facts concerning their patent are binding upon them, and they cannot now be heard to say that they were made in doubt as to their legal rights, and made in such uncertain terms as to put the defendant upon examination as to the facts and the law, and to be bound by its proper interpretation of them. Even conceding that said petition was filed under mistaken advice as to the law, and that it asked only for such action as the patent office might lawfully take, and that the terms in which said action was invoked were such as to put the defendant upon its inquiry as to the law, it was nevertheless a solemn and public act, by which it limited the duration of its own patent to a term shorter than that granted in the original patent. The petition and prayer was for such a limitation, and the complainants

are bound by such declaration and conduct. Can there be any doubt as to their right and power to have made such a declaration and abandonment of an existing right? Such power is clearly recognized in *Insurance Co. v. Mowry*, 96 U. S. 547.

But it is said this dedication was revoked. On the 6th of March, 1893, the complainants filed their petition in the patent office, as hereinbefore stated, and recited, further, that, by the decision of the circuit court of appeals for the second circuit, said action of the patent office was declared to be "without jurisdiction and wholly void," and for these reasons asking that the records of the patent office "be amended so as to cancel the said statements and limitations, and so as to restore them to the same condition in which they were at the time of the original grant of said patent," and, further, "that the said certificate of correction attached to the said letters patent be canceled so that the patent will be in the same condition in which it was originally granted." Upon this petition the commissioner of patents, on March 15, 1893, ordered "that said certificate is hereby canceled, and the proper entries and corrections have been made in the files and records of the patent office."

By these proceedings it is claimed that if the petition for correction, and the proceedings thereunder of November, 1883, amounted to a dedication, such dedication was then revoked, and that the patent stands as though no correction had ever been taken or made. It is further contended that the holding by the circuit court of appeals for the second circuit that the action of the commissioner on the first petition for correction was wholly void, and that the surrender of the letters patent for correction was without legal authority and of no effect, should be conclusive of this controversy. But this is not a controversy in which the authority of the complainants to surrender their letters patent to the commissioner of patents for correction, or his power to make such correction and amend the records of his office, are involved. The defendant is not here asserting any such power, or claiming any such result as legal or valid. It is here, however, contending that whether the commissioner of patents had legal authority for his action, or not, the complainants certainly had the right and power to publicly and solemnly limit the duration of their own patent, and make record of their intention to abandon it to the public from and after November 10, 1893, the time of the expiration of their British patent. Having done so, and the defendant having in good faith acted on said public declaration, it now contends that the complainants are estopped from coming into court and asserting that such conduct was a mistake as to the law, and therefore not binding upon them. This involves the consideration of the question as to whether the complainants' conduct was a representation as to something it proposed to do in the future, and therefore subject to revocation, or whether it was an abandonment of an existing right. I find the exact question, as it seems to me, fairly settled by the supreme court in the case of *Insurance Co. v. Mowry*, 96 U. S. 547. In that case, the court said:

"The only case in which a representation as to the future can be held to be an estoppel is where it relates to an intended abandonment of an existing right, and is made to influence others, and by which they have been induced to act. An estoppel cannot arise from a promise as to future action with respect to a right to be acquired upon an agreement not yet made. The doctrine of estoppel is applied with respect to representations of a party, to prevent their operating as a fraud upon one who has been led to rely upon them. They would have that effect if a party who, by his statements as to matters of fact or as to his intended abandonment of existing rights, had designedly induced another to change his conduct or alter his conditions in reliance upon them, could be permitted to deny the truth of his statements, or enforce his rights against his declared intention of abandonment."

But in a later decision the same court said it is not necessary that there should be a design or a purpose to mislead the opposite party, on the part of the person to be estopped. In the case of *Bank v. Morgan*, 117 U. S. 108, 6 Sup. Ct. 657, the supreme court approvingly said:

"In *Continental Nat. Bank v. National Bank of Commonwealth*, 50 N. Y. 575, it was held not to be always necessary to such an estoppel that there should be an intention upon the part of a person making a declaration or doing an act to mislead the one who is induced to rely upon it. 'Indeed,' said *Folger, J.*, 'it would limit the rule much within the reason of it if it were restricted to cases where there was an element of fraudulent purpose.'"

Many other cases are cited by counsel, pro and con, which it is not necessary to consider and review. The exact question we have under consideration seems to be met by the foregoing decisions, and are conclusive.

While it is true that the complainants' proceedings in the patent office were not had with any reference to the defendant, but had reference solely to their relations to the public, the defendant had, as one of the public, the same right to be influenced and governed by the complainants' conduct as though it had been the result of their representations to each other as individuals or corporations. The complainants' proceedings were a matter of public record. Their acts and conduct were of such notoriety that the defendant, by law, was bound to take notice of them, so far as they affected its legal rights under the complainants' patent.

But conceding that there is doubt as to whether the above decisions are conclusive of the controversy, the revocation which the complainants claim to have made of their dedication to the public was not made until March, 1893, nearly 10 years after their voluntary limitation of the term of their patent, as hereinbefore stated. If they were in doubt as to the legality of their conduct in the proceedings in the patent office, they should have acted so soon as such mistake was suggested. They could not wait until the public had acted on their dedication, had acquired rights and equities, and then, after the courts had declared their action unauthorized, proceed to revoke their grant.

Did the defendant, in good faith, act upon the complainants' limitation of the life of their patent, and was it induced so to act by the conduct of the complainants, and is it now in such relation to the complainants as estops them from denying that their conduct induced the defendant to make its investments and act as it has set

forth in its motion now under consideration? The circumstances under which the defendant began its enterprise of manufacturing electric incandescent lamps, the different stages in the progress of its development, and the reasons inducing it to increase its capital, are fully set forth in its motion, and as hereinbefore recited. Whatever may be the complainants' claim with reference to the defendant's statement of the circumstances under which it originally entered into this enterprise, it seems well established by the affidavits of the defendant's directors that its capital stock was increased, and its capacity for manufacturing incandescent lamps greatly enlarged, by reason of its belief that the complainants' patent, by its own conduct, was limited so as to expire on the 10th of November, 1893. This was a very important fact, and the claim that it largely influenced the defendant in its conduct is both reasonable and natural. For the reasons hereinbefore fully considered, it seems to me plain that the complainant is estopped from now claiming that its conduct did not induce such well-defined belief as to the limitation of its patent on the defendant's part. Without deciding how far others, not similarly situated, had the right to rely upon such conduct on the part of the complainants, or without passing upon the question of how far the public generally acquired rights under the complainants' proceedings in the patent office, by which they limited the life of their patent, it is sufficient to find, under this motion, that the defendant, by reason of the circumstances particularly set forth in its motion, did rely in good faith upon the complainants' conduct, and had a right to be, and was in fact, influenced thereby.

The application for a dissolution of the injunction is based upon evidence as to a fact which did not exist at the time the temporary injunction was allowed. At the time such application was made, the complainants' patent had not then expired, according to the limitation put upon it by its proceedings in the patent office. The rule is well settled that on such an application the complainant's rights to an injunction must be clearly established. While it is true that, on a motion to dissolve, the burden of proof is on the defendant, yet the rule is equally well settled that evidence which would prevent the allowance of an injunction would be sufficient to dissolve it, and that an injunction will be dissolved on new evidence raising grave doubts as to the complainant's right to the temporary injunction in force. The rule is well expressed by Judge Nixon in the case of *Cary v. Bed Co.*, 26 Fed. 38. In that case, the complainants' patent, for the protection of which a temporary injunction was asked, had been sustained by three different circuit courts prior to the filing of the bill in Judge Nixon's district. Upon the strength of those prior adjudications, Judge Nixon ordered the injunction, "without an examination of the merits, or expressing anything upon the validity of the patent." But, upon motion to dissolve, new affidavits were offered to show prior use. After an examination of these affidavits, Judge Nixon says:

"It does not appear that such testimony of prior discovery, knowledge, and use of the invention was brought to the notice of either of the learned judges

who granted the injunction in the other cases. * * * I do not think that I should have seen my way clear to allow the preliminary injunctions in the present case if it had been presented on the original motion, and the rule is a good one that the evidence which would prevent the issuing of an injunction ought to be regarded as sufficient to dissolve one already granted."

For the reasons hereinbefore stated, if, on the application for the injunction now in force, the facts now relied upon in support of the motion to dissolve had been available as a defense, I would not have allowed the temporary injunction. The complainants' right to such an injunction under such a defense would have been so doubtful that it would not have been entitled to it under the rules cited. To continue the injunction now, in view of these doubts, would certainly be a great hardship upon the defendant. According to the affidavits now before the court, the defendant is a solvent corporation. Under the Ohio law, the personal liability of the stockholders is an additional indemnity to which the complainants may look in case, upon a final hearing, its right to a permanent injunction should be established.

As the case is now presented on the motion to dissolve, one of the two parties must suffer loss. If the injunction is continued, the defendant is wholly without remedy. It has shown that it was honestly misled by complainants' conduct, and in good faith made additional investments upon the belief so formed. The complainants cannot complain if, for this reason, the benefit of the doubts expressed are given to the defendant, and the injunction is dissolved. If I am in error as to this conclusion, no great harm can result to the complainants, for if such error is established they can recover for the damages caused thereby, and their right to contest as to other infringers not able to show such meritorious claims to estoppel as defendant has established can be asserted without prejudice from this decision.

AMES & FROST CO. v. WOVEN-WIRE MACH. CO. et al.

(Circuit Court, D. Minnesota, Fourth Division. April 20, 1893.)

PATENTS—PIONEER INVENTION—COILED-WIRE FABRIC MACHINES.

The Briggs patent No. 348,150, for a machine for automatically manufacturing coiled-wire fabrics suitable for bed bottoms, mats, and the like, covers a pioneer invention, and is entitled to a liberal construction.

In Equity. Bill by the Ames & Frost Company against the Woven-Wire Machinery Company and others for infringement of a patent. Decree for complainant.

Offield, Towle & Linthicum, for complainant.

Paul & Merwin and L. L. Bond, for defendants.

SANBORN, Circuit Judge. Complainant is the owner of letters patent No. 348,150, dated August 24, 1886, for improvements in machines for weaving coiled-wire fabric for bed bottoms, invented by Orlando P. Briggs, and brings this suit against the defendants for infringement. These letters patent contain 14 claims. Claims 4 and 5 are:

"(4) An automatic machine for weaving coiled-wire fabric embracing the following mechanisms, namely, a wire coiler, means for arresting and starting the coiler at stated intervals, means for severing the coil when completed, means for supporting the fabric in position to receive the coil to be added, and means for feeding forward the fabric preparatory to the insertion of a new coil; said mechanisms being connected and driven to coact in due order and relation, substantially as set forth.

"(5) In an automatic machine for weaving coiled-wire fabric, the combination of a coiler, mechanism for starting and stopping the coiler, mechanism for severing the coil, mechanism for moving the final coil of the fabric longitudinally, and mechanism for feeding the woven fabric forward, together with means for actuating these several mechanisms so as to secure their co-operation at proper intervals of time, and in due order of sequence, to produce a continuous fabric, substantially as described."

Claims 1, 2, and 3 are for combinations of certain parts of the mechanism claimed in No. 5. The remaining nine claims of the patent relate to specific devices, or combinations of devices, that are not infringed by the defendants, provided they do not infringe the broad claims to which reference has been made. The defendants have constructed, and are using, an automatic machine for weaving coiled-wire fabric. In its construction, one of the defendants placed complainant's description of his invention before him, and tried to make such a construction as would evade it. He used mechanical devices so unlike those described in complainant's patent that it was conceded by its counsel that they would not constitute an infringement of its specific devices, if Briggs should be found not to have been the original and first inventor of an operative automatic machine for weaving this coiled-wire fabric, but a mere improver upon, or adapter of, an older machine to this purpose. On the other hand, it was practically conceded by the counsel for the defendants that, if Briggs was the first and original inventor of an operative automatic machine for weaving coiled-wire fabric, then the defendants infringed these broad claims of complainant's letters patent. It follows that the only question in the case is whether the inventor Briggs is entitled to rank as the first and original inventor of an automatic machine for weaving coiled-wire fabric of the character used for bed bottoms, mats, and other like purposes, and to treat as infringers all who make machines on the same principle, and performing the same functions, by analogous means or equivalent combinations, or as one who has simply made an improvement on a known and operative machine by a mere change of form or combination of parts, and who cannot invoke the doctrine of equivalents to suppress other improvements that are not colorable invasions of his own.

The manufacture of a woven-wire fabric for bed bottoms, mats, and other like purposes is a large and rapidly growing industry. The proofs disclose that the machine described in complainant's letters patent was the first combination of devices that, by its unaided operation, coiled wire, and converted it into a woven fabric ready for use for such purpose. Prior to this invention of Briggs, the apparatus employed to weave this fabric consisted of a broad table on which the fabric lay while it was being made, and a coiling machine arranged at one end of the table, and run by hand or

power. The coiling machine formed the wire into a spiral of uniform pitch and diameter. The fabric for bed bottoms was about six feet in length, and, when the coiling machine had formed a spiral of that length, the wire was cut, and a new coil started, which, as it revolved, was made to run through and engage with each twist of the preceding coil, thus making a firm but elastic fabric. To enable each new coil as it came in to run forward into, and properly engage with, the marginal coil of the fabric that was being woven, it was necessary, after the preceding coil was completed, to move the fabric, or the marginal coil of it, longitudinally, alternately to and from the coiler, about half the length of one twist of the coil, and forward from the line of the axis of the coil a distance equal to the diameter of the coil. This forward movement, and the longitudinal movement of the fabric alternately to and from the coiler, as each successive coil was completed, had, before Briggs' invention, been produced by the hand of the operator who stopped the coiler, cut the wire, and placed the fabric in position to receive the next coil. Briggs constructed a machine which itself produced these movements of the fabric at the proper times, and automatically manufactured the woven-wire fabric from plain wire, with no assistance from the hand of the operator. The specifications of complainant's letters patent describe the various mechanical devices which Briggs combined to constitute this machine. Many—perhaps all—of these devices, taken separately, were old, but the combination of them which Briggs formed was new. The machine he constructed by this combination was itself novel, and produced a result never before attained by machinery.

To establish their contention that Briggs' invention was not of a primary character, and that he was a mere improver of an old machine, defendants relied principally upon British letters patent No. 1,488, for "improvements in the manufacture of chain bands and the machinery applicable thereto," issued to James Lancelott in 1864. James Lancelott was a jeweler, and the object of his invention was to produce a machine to manufacture chain bands for bracelets and such purposes, which should contain 25 coils to the inch, while this woven-wire fabric for bed bottoms usually contains but two or three coils to the inch, and the coils themselves are many times longer than those Lancelott was trying to manufacture. In his specifications, Lancelott describes a device for coiling and cutting the wire at proper times, and provides two coilers, one on each side of the fabric, producing coils alternately, which rendered it unnecessary for him to move the fabric longitudinally in its manufacture, and accordingly he mentions no device for that purpose. The machine of Briggs manufactures the fabric with the use of but a single coiler. To accomplish this result by a single operative machine, mechanical devices to move the fabric the proper distance alternately to and from the coiler, to feed it forward the diameter of a coil at the completion of each successive coil, and to hold the marginal coil in the line of the axis of the incoming coil, so that the latter would engage with each twist of the coil preceding it, were lacking in 1864, when Lancelott completed his invention, and

until 1884, when Briggs perfected his. These devices Briggs supplied, and combined them with the coiler and cutter, which were old, to make a single operative machine. To accomplish this, he provided a box or shell a little longer than the fabric being manufactured, placed the fabric upon it so that the marginal coil would rest by its gravity against the front face of the shell, and put the coiler in a position which enabled it to send the new coil along this face of the shell, so that it would properly engage with the marginal coil. To feed the fabric forward at the completion of each coil, and to hold it in position, he placed a feed shaft within the shell, provided with radial pins arranged in circumferential series at intervals of a few inches, which extended through transverse slots in the shell, and engaged with the fabric above them. By suitably connecting this feed shaft with the driving shaft of his machine, he caused the protruding ends of these radial pins to revolve, at the completion of each coil, a distance equal to the diameter of one coil, thus drawing the fabric forward, and leaving the marginal coil again in proper linear position to receive its successor. To insure the linear position of the marginal coil, he fastened a presser bar of equal length and width with the shell, and provided with a strip of soft rubber, which extended slightly below its front face upon the fabric as it rested on the shell, and thus, by the radial pins and this bar, held it firmly in place, and fed it forward at the proper intervals. To secure the longitudinal movement of the marginal coil alternately to and from the coiler at the completion of the successive coils, he placed this shell, which carried the fabric, upon a frame, and so connected it by suitable mechanical devices with the driving shaft of his machine that, at the completion of each coil, it carried the fabric alternately to and from the coiler one-half the distance between the twists of the coil, and thus placed the marginal coil in the proper position longitudinally to engage with its successor. The mechanical devices by which these results are attained are clearly described and illustrated in the specifications and drawings of complainant's patent.

That this machine of Briggs was constructed and operated is established; but it is urged by defendants' counsel that it was without utility, that it was a mere paper machine, that it never displaced any of the old hand machines, and that defendants' machine is in fact the first and only operative one that has ever been constructed. There is very persuasive evidence in this record in support of this contention, which may go far to limit the damages the complainant can recover in this suit; but I cannot find in the defendants' favor upon this question, because the utility of Briggs' invention is not properly denied in the answer, because complainant's letters patent are *prima facie* evidence of its utility, and because one of the defendants constructed their machine, which is operative and successful, within five years of the date of these letters patent, with these before him for his guidance and direction.

No such result followed the invention of Lancelott. Between 1864, when his letters patent issued, and 1886, when Briggs' machine was patented, no machine was constructed that would automatically

manufacture wire into coiled-wire fabric. This is very persuasive evidence that the practical devices of Briggs for placing and holding the fabric in proper linear position at the completion of each coil were neither described nor suggested by Lancelott. Indeed, the principal, if not the only, value of his specifications and drawings to the skilled mechanic, would seem to have been to teach him to avoid the mistakes of Lancelott, and not to use his pretended improvements. In his machine he placed the fabric between two grooved plates held loosely together with screws, so that the fabric might be pushed through between them. The marginal coil protruded from the edges of the plates opposite his two coilers, which operated alternately, one at each side of the fabric. The only device provided for feeding the fabric forward was a plunger, consisting of a curved bar with teeth, which was made to advance at the completion of each coil, and to push it, and the fabric with which it was connected, forward between the plates. A model somewhat resembling the machine described by Lancelott was produced at the hearing, but after a careful examination of the drawings and specifications of the patent and the testimony of the witnesses, and repeated inspections of this model, I am unable to persuade myself that this device of the Lancelott machine, as a whole, could ever be made to operate successfully in the manufacture of any such woven-wire fabrics as are now in common use. Indeed, it is a conclusive answer to the Lancelott patent here, that it describes no device by which the marginal coil can be moved longitudinally, so that the fabric can be manufactured with a single coiler. This was one great desideratum without which the automatic machine of Briggs could not operate. It is true that there is a suggestion contained in Lancelott's specifications that the coils might be fed from one side of his machine by giving a side movement to the holder and plunger, in order to alternately enter the coils, the one within the other; but this in no way anticipates or detracts from the invention of Briggs. The specifications describe no device for effecting this movement, and amount to no more than the suggestion that must have occurred to every one who saw the manufacture of these fabrics by hand,—that the table on which they were moved might be moved with the fabrics, instead of moving the fabrics on the table. It remained for Briggs to invent a device that accomplished this result, and a machine that embodied it, and successfully manufactured the fabric.

There are two other fatal defects in the machine described in the Lancelott patent: First. His plunger, as it advances, must often force the marginal coil into a cylindrical space so near that of the preceding coil that the succeeding coil cannot engage with it, while the drawing method of Briggs leaves the marginal coil in a cylindrical space the most distant from that of the preceding coil that it is possible for it to keep while woven into it, and just in position to engage with its successor. Second. It is obviously necessary to the successful operation of a wire-weaving machine of the kind under consideration that the axis of the marginal coil should rest in a line parallel to the axis of the incoming coil, because, if it does not, the latter will not engage each twist of the former, but will run out,

and the operation will fail. Not only has Lancelott failed to insure this position of the marginal coil, but the curved plunger with its convex head must absolutely prevent the marginal coil from assuming this position, and thus must insure the failure of his machine to successfully operate. For these reasons it seems clear to me that the Lancelott machine must have been inoperative; that the advance from this crude and worthless machine to the operative machine of Briggs was not the result of a modification or adaptation of the devices of Lancelott, but was the work of invention; and that the letters patent of Lancelott neither anticipated nor suggested the invention of Briggs.

None of the other patents referred to in the answer are worthy of serious consideration here. Only two of them were urged as defenses at the hearing. They were the two patents of William C. Edge,—No. 117,227, granted May 18, 1874, and No. 524,616, granted June 7, 1881. These patents describe a machine for the manufacture of a tubular wire fabric, by which the fabric is fed forward automatically, simultaneously with the addition of each strand of wire. The fabric manufactured upon this machine was not made from coiled wire. The machine itself has neither coiler, cutter, nor any other device adapted to the work of making woven-wire fabric of coiled wire. It was, in effect, a machine for knitting tubular wire fabric, which was carried forward by a slow screw-like movement as it received its increment from an incoming crimped wire. Neither the machine nor the patents upon it contained or described any device for moving longitudinally or forward a flat fabric, or any other device adapted to the manufacture of woven-wire fabric from coiled wire, or suggestive of the devices or machine claimed in complainant's patent. These patents were not material to the issues presented in the case at bar. The result is that Briggs is the original and first inventor of a machine that automatically manufactures coiled-wire fabrics suitable for bed bottoms, mats, and such articles from wire; the letters patent of complainant are entitled to rank as a pioneer patent in the art of manufacturing such woven-wire fabric; and the defendants have infringed the first five claims of these letters patent. *Sewing-Mach. Co. v. Lancaster*, 129 U. S. 263, 272, 9 Sup. Ct. 299; *Consolidated Safety-Valve Co. v. Crosby Steam Gauge & Valve Co.*, 113 U. S. 157, 170, 179, 5 Sup. Ct. 513.

Let the usual interlocutory decree for an injunction and an accounting be entered against them.

SPRINGER LITHOGRAPHING CO. v. FALK.

(Circuit Court of Appeals, Second Circuit. February 9, 1894.)

No. 53.

1. COPYRIGHTED PHOTOGRAPHS—INFRINGEMENT—EVIDENCE—RELEVANCY.

It is immaterial from what source an alleged infringer may have obtained suggestions for making variations in a copyrighted photograph, and hence another photograph, offered in evidence for the purpose of showing that a certain feature was taken from it, is irrelevant.

2. SAME—ACTION FOR STATUTORY PENALTY—EVIDENCE OF DAMAGE.

In an action to recover the statutory penalty of one dollar for every infringing copy of a photograph, it is immaterial whether plaintiff has suffered any actual damage, and hence evidence of the effect on his sales of the infringer's acts should be excluded.

3. SAME—INFRINGEMENT—VARIATIONS—INSTRUCTIONS.

An instruction which makes the test of infringement the taking of the "substantial ideas—the distinctive characteristics"—of the original, regardless of intentional variations in minor particulars, is all that defendant is entitled to, and he cannot complain of a refusal to charge that the original and copy must be "substantially identical."

4. APPEAL—REVIEW—QUESTIONS NOT RAISED BELOW.

An assignment of error will not be considered when the exceptions were insufficient to call the question to the attention of the trial court.

In Error to the Circuit Court of the United States for the Southern District of New York.

At Law. Action by Benjamin F. Falk against the Springer Lithographing Company for penalties for infringement of copyright. Verdict and judgment for plaintiff. Defendant brings error. Affirmed.

This action was brought to recover the penalty imposed by section 4965, Rev. St. U. S. It was commenced by seizure of 3,000 lithographs found by the marshal in the possession of the plaintiff in error, which, it was claimed, were infringements of a copyrighted photograph of Lillian Russell, made by defendant in error. The plaintiff in error, in its answer, denied that the lithographs were copied from the copyrighted photograph of the defendant in error, and denied infringement. This was practically the sole issue in the case, as it was admitted that the 3,000 lithographs taken by the marshal were found in the possession of the plaintiff in error. Upon conflicting evidence and various exhibits the jury found a verdict for defendant in error in the full amount claimed,—\$3,000,—and judgment was duly entered thereon. The defendant below brings the case here on a writ of error.

The charge given to the jury below by SHIPMAN, Circuit Judge, was as follows:

The statute of the United States, passed in pursuance of the constitution of the United States, prescribes, in substance, as follows: That any citizen of the United States who shall be the author, inventor, designer, or proprietor of any book, map, etc., print or photograph, or negative thereof, shall, upon complying with the provisions of this chapter, have the sole liberty of printing, reprinting, completing, copying, executing, finishing, and vending the same. Another section provides that if any person, after the prerequisites which had been directed by the statute to be taken for the purpose of perfecting a title in the copyright,—if any person, after those prerequisites had been complied with, shall, within the term limited, and without the consent of the proprietor of the copyright first obtained in writing, and executed with certain formalities, engrave, etch, work, copy, print, publish, or import, either in whole or in part, or by varying the main design with intent to evade the law, or shall sell or expose for sale, he shall forfeit to the proprietor all the plates, and every sheet thereof, and forfeit, in addition, one dollar for each sheet of the same found in his possession.

This is an action upon this statute which I have just, in substance, read to you, imposing a penalty or forfeiture of one dollar per copy for every sheet of copies of a photograph of Lillian Russell found in the possession of the defendant, which it had printed without the consent of the plaintiff, the owner of the copyright of such photograph. The prerequisites necessary to obtaining a copyright were duly taken, and it is substantially proved that the plaintiff is the owner of the copyright. It is not denied that the plaintiff made the original photograph, substantially devised its pose and expression and accessories, and was the designer of the copyrighted photograph. It is not denied that three hundred of the lithographs No. 2, and twenty-seven

hundred of No. 4, were in the possession of the defendants, and were seized by the marshal. The only question really before you is whether these lithographs are copies, or substantial copies, or whether the ideas, pose, and characteristics of the original photograph were substantially reproduced by the defendant. It is not necessary that the copies should be exact or Chinese copies. You will observe that the statute says: "If the infringer shall copy, either in whole or in part, or by varying the main design with intent to evade the law." As I said, it is not necessary that the copies should be exact copies. It is necessary that the infringer should appropriate a substantial portion of the distinctive ideas and characteristic features of the original photograph to make up its lithographs. The general effect of the two lithographs which were exposed before you, it is said, shows that they were a reproduction, with so much of a variance as not to be an exact copy, slightly altered here, and more particularly altered in some other point, but so closely followed as to retain the idea, the plan, the general design, of the original photograph; and the question before you, to state it in different form, is: Has the defendant made such a use of the original photograph as to carry into the new lithographs so much of the distinctive ideas and characteristic features of the original as to reproduce, in substance and effect, the general characteristics of the original, though some minor particulars are intentionally avoided?

Now, gentlemen, before I go more particularly into the testimony, I wish to caution you against permitting any prejudice against this statute, and particularly against this section of the statute, which imposes a forfeiture upon infringers, to enter into your minds so far as to bias your judgment. We are here—I am here, and you are here equally as well as I—to administer the laws of the United States, and to administer them according to their spirit and their letter, and to carry them out so far forth as we can, under the oaths that we have all taken; and it is of no consequence—not the least consequence—whether we personally like or dislike a statute of the United States. We are to administer, gentlemen, the laws of our country.

Now, gentlemen, the history of this transaction is somewhat as follows: The plaintiff made a photograph, which is called in this case "Exhibit No. 1," the card photograph which you have frequently seen here in court, of Lillian Russell. It was by him copyrighted, and subsequently the defendant sent this lithograph, which bears upon its face these words, "Taken from a copyrighted photo by Falk, of New York,"—sent this lithograph, which is, in my judgment, a substantial copy, so far as a lithograph can be a copy, or which was intended to be a reproduction by the lithographic art of the original photograph, not exact,—they sent that in a letter to Mr. Falk, asking him if they might have the privilege of reproducing it. The reply was a substantial negative, unless a license was furnished, presumably for a pecuniary consideration. The letter was correctly construed by the defendant to be a denial of the privilege, without pecuniary compensation, of reproducing the photograph of which the lithograph is an imitation. The lithograph had been enlarged by aid of the magic lantern for the purpose of reproducing it if proper permission had been obtained. That permission was not obtained, and then instructions were given, as Mr. Parker says, to the designer, not to make a copy of that, but to make an ideal picture of some other character. Now, gentlemen, here is the precise difference; here the parties divide in this litigation. The plaintiff says that the defendant, through its employees, or through the gentleman who was one of the witnesses, and is an officer in the company, departed from an exact copy, but retained so much of the substantial and distinctive ideas of the original as to produce, in lieu of an exact copy, a modified form of this photograph, but so far removed from it that it could not be called an exact copy; in other words, intended to avoid infringement, but retain the substantial fruits of infringement. That is the way in which the plaintiff puts his case to you. The defendant says, on the other hand, that it avoided this,—intentionally departed from it,—and presented, finally, an ideal photograph, which did not contain the distinctive features of this photograph; and that is the precise question before you: Did the lithographs Nos. 2 and 4 contain the main design, the substantial ideas, the distinctive characteristics, of the original photograph, only so far varied as to intend to evade the law, without actual evasion? Upon that

question of fact it is for you to exercise your judgment, derived from your inspection of these various articles, and your conclusion derived from the testimony which has been presented before you; and the plaintiff might truthfully say that the testimony of defendant's witnesses is as important in this connection as the testimony of the plaintiff, or as the lithographs themselves. It is in evidence that this lithograph was at hand in the office or shop or apartment where the new designs were being made. It is in evidence that it was used. The defendant would say that it was used for the purpose of avoiding it. The plaintiff would say that it was used for the purpose of copying it in its substantial features, but of avoiding it in its minor details. For instance, Mr. Parker says, in comparing the two: "I made a harder chin; I made the teeth more protruding; I made the eyes soft and dreamy; I made the hair darker, and avoided the form or the peculiarities or the droop of the hair",—or something of that sort. "I carried the hair further over the shoulder." This testimony is somewhat significant to show that, while the artist varied, he did not vary absolutely, and the question is whether he so far varied as to retain the distinctive ideas and characteristic features of the original photograph so as to present in the new lithograph the original ideas in a modified form. If you find for the plaintiff, it will be within your province to determine whether the twenty-seven hundred are reproductions,—that is, whether the lithographs Nos. 4 were substantial reproductions of the photograph, and whether the three hundred of the lithographs No. 2 were substantial reproductions. If you find that they were all substantial reproductions,—that is, if the copyright was infringed by both,—then your verdict will be for the plaintiff for \$3,000. If you find that No. 2, only, infringed, then your verdict will be for \$300. If you find that No. 4, only, infringed, then your verdict will be for \$2,700. If you find that neither of them infringed, then your verdict will be for the defendant.

John W. Boothby, for plaintiff in error.

Benno Lewinson, for defendant in error.

Before WALLACE and LACOMBE, Circuit Judges.

LACOMBE, Circuit Judge. The plaintiff in error has assigned error in 12 particulars, but, as several of them were not argued to this court, and are not referred to on the brief, it may be assumed that they are abandoned, and they need not be discussed.

1. The first assignment of error discussed in the brief is to the admission in evidence of a copyrighted photograph of Miss Pauline Hall. The circumstances under which such photograph was admitted are these: The defendant's lithograph, while presenting in face, pose, and other details resemblances so close to plaintiff's photograph as to satisfy the jury that it had been copied from it, differed from it in the shape and general appearance of the hat. In the photograph of Miss Pauline Hall there was shown a hat identical with that in defendant's lithograph. The defendant's contention was that the lithograph was an original representation of another actress, Mrs. Nelson; the plaintiff insisted that it was not taken from Mrs. Nelson, but was a composite reproduction, in part of Miss Russell's photograph, in part of Miss Hall's. The issue for the jury was whether the defendant had "copied, either in whole or in part, or by varying the main design with intent to evade the law," the copyrighted photograph of Miss Russell which was the subject of the action. To that issue it was immaterial where defendant had obtained suggestions for any variances from the original, and the photograph of Miss Hall was therefore

irrelevant testimony. But its admission was not error calling for a reversal, unless such admission can be fairly assumed to have operated upon the jury's mind in some way to the prejudice of defendant. It shows on its face that it was made by plaintiff, and copyrighted by him; and defendant's counsel contends that "the object of introducing it in evidence was to prejudice the jury by giving them the impression that the parts of the lithograph which it was conceded were not copied from the photograph in suit were stolen from another copyrighted photograph of defendant, which was not in suit." Were there no other evidence touching Miss Hall's photograph than is above set forth, there would be force in this contention. But it further appeared in proof that, before the execution of the lithograph, defendant had expressly asked for and received from plaintiff a license in writing to reproduce three specified photographs of Miss Hall, including the one (No. 14) whose admission in evidence is complained of. It was apparent, therefore, upon the proof, that defendant had not stolen the design for the hat; that it had an undoubted right to reproduce it, either in connection with Miss Hall's face or otherwise; and defendant might, had it chosen to ask for it, have had a charge from the court to that effect. We fail, therefore, to see where in the admission of Miss Hall's photograph in evidence operated to the prejudice of defendant.

2. Defendant assigns it as error that, on cross-examination of the plaintiff, the court excluded this question: "Q. As a fact, has the production of No. 2 or No. 4 [the lithographs complained of] interfered with you in the sale of this photograph?" This contention is unsound. The action is for a statutory penalty of one dollar for every copy found in defendant's possession. "The damage to the plaintiff is not the test of the defendant's liability, and the penalty is to be paid even if there is no actual damage." *Chatterton v. Cave*, 3 App. Cas. 489.

3. Upon the photograph of Miss Russell there appears the copyright notice required by the statute, and plaintiff testified that it was affixed to every copy printed and published by him. The evidence of defendant shows that its lithograph was copied from a reversed lithograph, undoubtedly a copy of the original, but bearing, as defendant claims, no proper copyright notice, the only mark on it being, "Taken from a copyrighted photo by Falk, of New York." This reversed lithograph was not printed or published by the plaintiff, but by a person to whom he had given a license to reproduce the photograph. Defendant contends that, as to a lithograph made and published with plaintiff's consent and license, but without the proper copyright notice upon it, he stood in exactly the same position as though he had made and published it himself, and was barred from claiming a penalty from any one copying it.

To this assignment of error it is sufficient to say that the point was not raised in the court below. The exceptions on which defendant relies were to the court's refusal to direct a verdict for the defendant, on the ground that it never was in possession of

the original photograph, and to the refusal to instruct the jury that "even if the jury found defendant's lithographs were copied from the lithographic copy, or varied copy, of the photograph, no infringement has been made out." In view of the fact that the case was mainly tried on the question whether or not there was a substantial similarity, and that the exception last quoted, by its very phraseology, referred to the question of infringement, rather than to plaintiff's forfeiture of a right to recover for that infringement, there was a failure to apprise the trial judge of the point now raised.

4. It is further assigned as error that the court refused to charge, as requested by defendant: "To be an infringement of plaintiff's photographs, the defendant's lithograph must be substantially a copy of it,—that is, that the two are substantially identical." The court charged the jury that the only question before them was "whether these lithographs are copies or substantial copies, or whether the ideas, pose, and characteristics of the original photograph were substantially reproduced by the defendant. It is not necessary that the copies should be Chinese copies. You will observe that the statute says: 'If the infringer shall copy, either in whole or in part, or by varying the main design with intent to evade the law.' As I said, it is not necessary that the copies should be exact copies. It is necessary that the infringer should appropriate a substantial portion of the distinctive ideas and characteristic features of the original photograph to make up its lithographs. * * * Did the lithographs contain the main design, the substantial ideas, the distinctive characteristics of the original photograph, only so far varied as to intend to evade the law without actual evasion? * * * If defendants have reproduced, in substance and effect, the general characteristics of the original, though some minor particulars are intentionally avoided, then there is an infringement."

This was all the defendant was entitled to, and the exception to a refusal to charge as requested is unsound.

Judgment affirmed, with costs.

CHINA MUT. INS. CO. v. WARD et al.

(Circuit Court of Appeals, Second Circuit. February 9, 1894.)

No. 55.

MARINE INSURANCE—INSURABLE INTEREST—ADVANCES BY AGENT.

A ship's general agent, even though acting under a power of attorney authorizing him to sell, manage, direct, charter, and freight, has presumptively no maritime or equitable lien, or other insurable interest in the vessel, for advances made in the course of the agency.

Appeal from the circuit court of the United States for the Southern District of New York.

At Law. Action by Josiah O. Ward and Joseph Ware against the China Mutual Insurance Company on a policy of marine in-

insurance. A verdict was directed for plaintiffs in the court below, and, from the judgment entered thereon, defendant brings error. Reversed.

Clark & Bull, (J. L. Ward, of counsel,) for plaintiff in error.

Henry D. Hotchkiss and Wm. S. Maddox, for defendants in error.

Before WALLACE and LACOMBE, Circuit Judges.

WALLACE, Circuit Judge. This is a writ of error by the defendant in the court below to review a judgment for the plaintiffs, entered upon the verdict of a jury by the direction of the trial judge.

The action was on a marine policy issued June 21, 1888, by the defendant, insuring the plaintiffs, for account of whom it might concern, "\$5,000 on advances on bark Victor at and from New York to Tampico, at and thence to Minititlan, and at and thence to New York." Inserted in the policy was a special clause, as follows:

"This policy covers only the interest of the assured in advances and disbursements, without reference to other insurance which may have been effected on the vessel, freight, or disbursements, free of general average, and liable for any loss which the assured may suffer in consequence of perils of the seas, whereby the value of the property pledged to cover the advances made is reduced below the amount of said advances; the net amount realized from the sale of said pledged property, or, if not sold, its net value after the disaster, being deducted in all cases from the amount insured, in determining the amount of claim."

It appeared upon the trial that the plaintiffs had been, since 1882, the agents at New York city for the owner of the vessel, acting under a power of attorney authorizing them to sell, manage, direct, charter, and freight the vessel, and during the years 1886, 1887, and 1888, in the course of their business for the vessel as such agents, had made disbursements and advances, which were unpaid at the time of the insurance and loss, to the amount of over \$6,000. The vessel was a British ship, and her owner resided in Mexico. The vessel was wrecked in March, 1889, while on the voyage covered by the insurance, and became a total loss.

The exceptions taken upon the trial, and the assignments of error, present the questions whether the plaintiffs had any lien upon the vessel for the disbursements and advances, or any insurable interest in the vessel. If these questions ought to be ruled adversely to the plaintiffs, the trial judge erred in directing a verdict for them, and in not directing a verdict for the defendant, as requested upon the trial.

The language of the special clause denotes very plainly that it was the purpose of the policy to indemnify the plaintiffs against the contingency that, by disaster to the vessel, their security for advances might be lost or impaired. The phrase "property pledged to cover the advances" is broad enough to cover any interest arising from an hypothecation of any character, whether by way of mortgage, maritime lien, or equitable lien; but it has no significance unless it is intended to evince that the insured interest is

one in the nature of a security upon the vessel. It is to be presumed that the parties intended to make a valid insurance, and the contract made would be a mere wager policy if it were intended to insure a debt owing to the plaintiffs, in respect to which they would suffer no pecuniary loss as a consequence of the loss of the vessel.

We cannot discover that the plaintiffs had any interest in the vessel in the nature of a security for their advances, or that they occupied any relation towards the subject-matter of the insurance other than that of a general creditor of the owner. A ship's husband does not have a maritime lien upon the vessel for the advances made in the course of his agency for the owners, in the absence of an express contract with them to that effect, or of peculiar circumstances from which such a contract should be implied. Presumptively, he relies upon the credit of the owners. *The Larch*, 2 Curt. 427; *The Sarah J. Weed*, 2 Low. 555; *White v. The Americus*, 19 Fed. 848; *The Raleigh*, 32 Fed. 633; *The Esteban de Antunano*, 31 Fed. 920.

The power of attorney did not effect an hypothecation, or give the plaintiffs an equitable lien upon the vessel. It was not coupled with an interest, or given as security to the plaintiffs, but was merely a naked power, revocable by the principal at any time. *Hunt v. Rousmanier*, 8 Wheat. 174; *Hartley's Appeal*, 53 Pa. St. 212; *Walker v. Denison*, 86 Ill. 142; *Barr v. Schroder*, 32 Cal. 609; *Attrill v. Patterson*, 58 Md. 226. It did not confer upon them the right to sell the vessel for their own benefit, and any authority exercised under it would have been, in law, the act of the owner, and exercised solely for his benefit.

Upon the facts proved at the trial, the defendant was entitled to a verdict, and, for the error in refusing the request for an instruction to the jury to that effect, the judgment must be reversed.

THE BRINTON.¹

FISHER et al. v. THE BRINTON.

(District Court, S. D. New York. December 16, 1893.)

COLLISION—STEAM AND SAIL—VESSELS MEETING—CHANGE OF COURSE BY SAILING VESSEL—FAILURE TO REVERSE BY STEAMER.

Where a schooner, sailing free, and a tug, met and collided in Arthur kills, and the evidence showed that prior to the collision the schooner, wholly without necessity, had altered her course so as to cross the course of the tug, it was *held* that the schooner was liable for the collision. But as the tug, which had been going at a high rate of speed, failed to reverse at all, though a reversal, even for a short time, might have avoided the collision, it was *held* that the tug also was in fault, and the damages should be divided.

In Admiralty. Libel by Peter Fisher and another against the steam tug Brinton to recover damages for a collision. Decree for divided damages.

¹ Reported by E. G. Benedict, Esq., of the New York bar.

Wing, Shoudy & Putnam, for libelants.
Robinson, Biddle & Ward, for respondent.

BROWN, District Judge. Between 11 and 12 o'clock on the night of September 5, 1893, as the libelants' oyster sloop Marietta, of 11 tons, and about 30 feet long, was coming up the Kills from Rahway river, bound for New York, she was run into by the steam tug Brinton, going down, light, and sunk, for which the above libel was filed.

The collision was in the northerly reach of the Kills, a passage about 600 feet wide, along the upper part of Duncan or Chelsea island, and between that and the Jersey shore. The Brinton's red light was seen from the sloop a half mile distant, and probably while the Brinton was heading more to the westward, and before her turn to go south at the head of Chelsea island. Afterwards, both the colored lights of the tug were seen for a short time, and then the green light just before collision. Both sides agree that the collision was on the New Jersey side of the channel way, and that the angle of collision was considerable; the libelants say about four points; the respondents, about seven points, the stem of the tug striking the sloop upon her starboard side a little aft of the fore rigging. Each strenuously insists that no change was made in its course.

The libelants, both of whom were on board, testify that the tug's lights were seen a little on the sloop's starboard bow; but I cannot place entire reliance upon this testimony, from the fact that the lookout forward took all his observations, except when the tug was very near, from near the starboard rail, from which point he was very liable to mistake as to whether the tug was a little on the starboard bow or a little on the port bow. Both witnesses from the tug, on the other hand, state that the sloop was seen from a point to a point and a half on the tug's port bow. Neither light of the sloop was seen, and she was first recognized by her sails, seen from 500 to 1,000 feet distant. The tug was going down the channel, about one-third of the distance across from the Jersey shore, at the rate of about 10 miles an hour. The pilot testifies she was going straight down the channel; and going so near to the Jersey shore, and at that speed, it is incredible that the tug should have been headed much, if at all, toward the Jersey shore.

The considerable angle of the collision could not, therefore, have been brought about, except in consequence of the heading or yawing of the sloop towards the Jersey shore. And this would reconcile nearly all the testimony. It would place the tug on the schooner's starboard bow, though she was, in fact, a little to the eastward of the line of the tug. It would explain the fact that neither the pilot nor the lookout of the tug saw the red light of the schooner, because, on that heading, it was not exposed to their view, and the green light which was 10 feet above the deck, in the rigging, was probably obscured by the jib. It explains also the angle of collision, and shows that the sloop crossed the course of the tug by heading to the westward, and thus brought about the collision. This is rendered less

improbable, by the fact that the sloop was not steered by compass, nor by any definite landmarks. The sloop had a free wind well aft of abeam. Her place was on the right-hand side of the channel; the place of the tug was on the other side. The tug was perceived, at first, to be going down on that side, and in that narrow passageway, the sloop was blamable for going over, wholly without necessity, towards the Jersey shore. Had attention been given to her course, and her lights, I am confident it would have been seen that both lights were obscured from the tug, and that it was the sloop's duty to show her red light in time to the tug.

Though the sloop is in fault for navigating unnecessarily in the way of the tug, and so as to obscure both her lights, I think the tug must also be held to blame, if not for failure to see the sails of the sloop earlier, at least for not reversing at all. The rule of navigation absolutely requires this, and I cannot accept as a sufficient excuse the claim of the pilot that he did not know which way the sloop was going. The engineer testifies that he could reverse in three seconds; and a reversal for a very short period would have detained the tug enough to permit the sloop to pass on some 15 or 20 feet further, whereby this collision would have been avoided.

For these reasons, I find both to blame; and the libelants are entitled to only one-half of their damages and costs.

THE SAALE.¹

TROUTON et al. v. THE SAALE.

(District Court, S. D. New York. January 29, 1894.)

1. COLLISION—FOG—IMMODERATE SPEED—FIFTEEN KNOTS.

In a fog so dense that a vessel cannot be seen until within 1,200 or 1,400 feet, a speed of 15 knots is not moderate speed.

2. SAME—STEAM OR SAIL—CHANGE OF COURSE—SPEED OF STEAMSHIP CONTRIBUTING TO COLLISION.

A steamship and a bark collided in a fog, the collision resulting in the sinking of the bark. It appeared that the primary cause of the collision was a change of some 5 points on the part of the sailing vessel; but the evidence showed that the steamship was going at the rate of about 15 knots; that she saw the sailing vessel at a distance of about 1,350 feet, and at once put her helm hard a-port, and stopped and reversed her engines, but was unable to avoid collision. Computation showed that, had her speed been 9 or 10 knots, instead of 15, she would have passed well clear of the bark, notwithstanding the latter's change of course; and that, had her speed been only 8 knots, she would have been stopped before reaching the line of the bark's course. *Held*, that the speed of the steamship contributed to the collision, rendering her liable to the owners of cargo on the bark for their loss.

In Admiralty. Libel for collision. Decree for libelants.

Wing, Shoudy & Putnam, for libelants.

Shipman, Larocque & Choate, for the Saale.

BROWN, District Judge. The above libel was filed in behalf of the consignee and insurers of the cargo of the Norwegian bark

¹ Reported by E. G. Benedict, Esq., of the New York bar.

Tordenskjold to recover the damages arising from a collision between the bark and the North German Lloyd steamship Saale, whereby the bark was sunk on the high seas and lost, at about 7 P. M., a little after sunset on August 4, 1892, about 800 miles east of Sandy Hook, in thick fog. The libelants ascribe the collision to the high speed of the steamer in fog; the claimants, to the bark's change of course.

The steamer was on one of her regular trips from New York, sailing E. $\frac{1}{4}$ S. by compass. She was a first-class passenger steamship, 460 feet long, by 67 feet beam, 4,765 tons register, and 7,500 horse power. Her speed was then about 15 knots. The wind was light from the west-southwest and variable.

The bark was about 200 feet long, and making from $3\frac{1}{2}$ to 4 knots per hour. She was supplied with one of the best mechanical fog horns, which I find was properly blown at regular intervals, giving two blasts as she was upon the port tack. Until the steamer's whistles were heard, she was sailing about northwest. Before she was seen, her fog horn was not heard upon the steamer. The bark had been for some time in thick fog. But there was not much fog where the steamer was until 15 or 20 minutes before collision. The weather was hazy, with occasional showers of fog, and becoming thicker, all the usual preparations were made for thick fog. Her whistle was sounded regularly for about 15 minutes before the collision. About 5 minutes before collision, as the evidence constrains me to find, the fog became dense about the steamer, and shortly afterwards—not over a minute before collision—the first notice to the steamer of the near presence of the bark was the sight of her sails, which, according to the testimony of the master, and of the first and fifth officers, who were on the bridge, appeared to be about half a point on her starboard bow, and at a distance estimated by them to be from 1,200 to 1,400 feet. The steamer's full speed was 16 knots; but her steam pressure had been previously somewhat reduced and her speed slackened from 16 knots to 15. Her helm, on sight of the bark, was at once ordered hard a-port, and the engine reversed as soon as possible. The steamer's stem, however, struck the port side of the bark between the fore and main rigging and cut half or three-quarters through her, causing her to sink as soon as the steamer cleared.

The whistles of the steamer had been heard by Wolf, the wheelman on the bark, about 10 minutes before. There is a conflict in the testimony whether, when the whistles were first heard, the master and mate were on deck or not. I consider this immaterial; for they were on deck about 5 minutes before collision, and besides hearing the steamer's whistles, they heard the noise of her approach in the water, before she could be seen. Wolf, the wheelman, testified that some 5 minutes before collision, noticing the continued approach of the whistles off his port bow, he gradually turned his wheel to port, and continued doing so until it was hard over at the time when the steamer was sighted; and that this was done without orders, because he thought it necessary to get out of the way of the steamer. From the fact that this witness has been more or less in the care and employ of the claimants ever since the

collision, whatever suspicions might attach to his testimony, if it was unconfirmed, the confirmation which his testimony receives from the libelants' as well as from the claimants' witnesses, does not permit the finding that his story is a fabrication. The master of the bark, and almost all the other witnesses, testify that the angle of collision was as much as seven points between the bows of the two vessels; and the master of the bark was so struck with this large angle, that he testified that in order to produce it the steamer must have turned three or four points to port. There can be no doubt, however, of the fact that the steamer, instead of turning to port, turned somewhat to starboard; not only because the order was given to port her wheel, but because her propeller, while her engine was reversed, would undoubtedly bring her head to starboard; and her master testifies that he observed the compass at collision, and that she was then heading E. S. E., showing that she had veered a point and three-quarters to the southward. If, then, the angle of collision was such as the great weight of testimony shows it to have been, viz., about seven points, there is no escape from the conclusion that the bark did change her course as much as five points; and this agrees with Wolf's testimony as to porting his wheel, though he did not observe the compass heading of the bark just before collision. Without referring to further details of the testimony, none of which is sufficient to overcome, or otherwise explain the above facts, it is evident from an inspection of the relative positions of the two vessels, that the bark's change of course to starboard, after hearing the steamer's whistle, brought about the collision; and that without such change the steamer would unquestionably have passed her by a good margin without collision. This fixes the primary responsibility for the collision upon the bark, and with that, the sole responsibility also, unless it further appears that the speed of the steamer was not moderate, within the thirteenth article of navigation, and that this fault presumably contributed to the collision.

The evidence shows that when the bark was first seen she could not have been over 1,400 feet distant, the highest estimate of the Saale's officers; while the libelants' witnesses, and the lookout on the Saale, estimate the distance at only 600 feet. Whichever is correct, the fog was of such density as made the thirteenth article applicable, and required the Saale to go at "moderate" speed. Under the decisions binding upon this court, I am not at liberty to regard a speed of over nine knots, in a fog of that kind, as moderate speed. *The Nacoochee*, 137 U. S. 339, 11 Sup. Ct. 122; *The Bolivia*, 1 C. C. A. 221, 49 Fed. 169. I am obliged to hold, therefore, that the Saale was sailing in violation of the thirteenth article, and the only remaining question is whether this was a material fault contributing to the collision.

Upon this point, the claimants invoke the benefit of the rule, that where, as in this case, the collision has been plainly, and by undoubted testimony, brought about by the gross fault of one of the vessels, such as a change of course of five or six points, whereby she ran under the bows of the steamer, and this fault is plainly sufficient to account for the disaster, without which it would not have

happened, "it is not enough for such vessel to raise a doubt with regard to the management of the other vessel; there is some presumption at least adverse to this claim, and any reasonable doubt with regard to the conduct of the other vessel should be resolved in its favor." Per Mr. Justice Brown, in *The City of New York*, 147 U. S. 72, 85, 13 Sup. Ct. 211.

This evidently just rule is not, I think, applicable here; for we have not here to deal with any doubt in regard to the management of the steamer, as respects her speed of 15 knots; for this is admitted. Nor am I permitted to hold that this speed was not moderate. Whether this excessive speed contributed to the collision; or, in other words, whether the collision would have happened substantially the same had the steamer been going at such moderate speed as article 13 requires, is a wholly different question; and on this point the burden of proof is upon the steamer.

Considering that under the circumstances of this case the steamer ought to be exempted from liability if it is reasonably certain that the difference of speed would have made no substantial difference in the result, I have given that question as careful an investigation as I am able, after the further hearing of counsel upon that point. I am satisfied, however, from this examination, that if the Saale had been going at the rate of 9 or even 10 knots instead of 15 knots at the time when her engines were ordered to be reversed, the bark would have passed well clear to the northward before the steamer reached the line of her course.

In reaching this conclusion, I adopt most of the data assumed by the distinguished counsel for the claimants; namely, the speed of the bark at three and eight-tenths knots; that at collision she was heading N. $\frac{1}{2}$ E., and the steamship E. S. E.; that the bark was seen a minute before collision; that the order to reverse the engines of the steamer was then given, and her helm at the same time ordered hard a-port; that in 10 seconds afterwards her engines began to move backward; that the ship, under the combined action of her port helm, and reversed engines—being a right-handed propeller—veered to starboard a point and three-quarters before collision; and that in order to avoid the collision the bark must have had time to move to the northward 147 feet further; that is, at least 24 seconds more time before the steamer reached the line of her course. These data seem to me to accord substantially with the weight of the testimony. The master's testimony further shows that the full speed of the Saale was 16 knots, and that from full speed it takes four minutes, under reversed engines, to bring her to a standstill. In the latter respects, as well as in size and model, the Saale approximates so nearly to the *Normandie*, and to the *Aurania*, that the observations made in regard to the movements of those vessels are valuable, as confirmatory of the testimony in the present case. See *The Normandie*, 43 Fed. 151, 159-161; *The Aurania*, 29 Fed. 123.

The distance of the vessels apart when the bark was first sighted, and the time that elapsed between then and the collision, are of the greatest importance. The counsel for the claimant assumes a distance of 846 feet only, as the average of all the estimates; but

neither that method, nor its result, can be admitted as correct in this case, because it is wholly incompatible with more definite testimony which proves a much greater distance. The time assumed by the claimant's counsel is one minute; the master called the time a minute or a minute and a half. The engineer's testimony to 30 or 40 revolutions backward before collision, and the lapse of 10 seconds before the engine began to move backward, does not admit of less than a minute's interval; and the change of $1\frac{1}{2}$ points to starboard while reversing would require at least that time.

Taking, therefore, 1 minute as the least admissible interval, and 50 seconds as the time of actual reversal of the engine before collision, it is evident that the Saale, while diminishing her speed from 15 knots to 9 or 10, as the master states, could not have gone a less distance than that given by the average speed of $12\frac{1}{2}$ knots during the interval of 50 seconds, and that would be 1,020 feet. Adding 250 feet for the 10 seconds before reversal, would make 1,270 feet as the distance of the Saale from the point of collision when the bark was first seen.

The bark, during the same interval, would change about two points. When first seen, she would therefore be heading about N. N. W., and at her given speed she must have advanced upon her course, swinging to N. $\frac{1}{2}$ E., about 350 feet. On tracing diagrams of these positions, the bark will be found to be about 1,350 feet from the steamer when first seen, and bearing one and a half points on the steamer's starboard bow. These results accord so well with the officers' estimates of the distance apart, and with the testimony of the boatswain as to the bark's bearing (who was in the best possible position to observe accurately, viz., from the steamer's rail), that I can have no doubt of their proximate correctness.

Adopting, then, the distance of from 1,000 to 1,050 feet as the distance advanced by the Saale from the time of reversing until collision, computation shows that if her speed had been 9 or 10 knots instead of 15 knots, at the time when she reversed, she could not have advanced from 1,000 to 1,050 feet in less than from 85 to 110 seconds; and that the bark would consequently have been from 100 to 300 feet clear to the northward at the time when the steamer reached the line of her course; and that had the steamer been going at a speed of 8 knots only, she would have stopped still in the water from 100 to 150 feet before reaching the bark's path. These computations are easily made, if desired, upon the data furnished by the evidence in this case, in the same manner as shown in the tables in respect to *The Normandie*, 43 Fed. 151, 159-161, where the data were substantially the same.

The result in this instance agrees with the presumption often stated, that where the steamer is chargeable with the statutory fault of excessive speed, that fault presumably contributed to the collision, unless she proves that it could not have done so. *The Pennsylvania*, 19 Wall. 126; *The Bolivia*, 1 C. C. A. 221, 49 Fed. 171. It is always open to her to prove this if she can. *The City of Rio Janeiro*, cited in *The Normandie*, 43 Fed. 156. As the evidence in the present case, however, confirms the legal presumption, the libelants are entitled to a decree, with costs.

FLORIDA CONST. CO. v. YOUNG et al.

(Circuit Court of Appeals, Second Circuit. December 12, 1892.)

No. 97.

CIRCUIT COURTS OF APPEAL—REVIEW OF ORDER GRANTING INJUNCTION.

On appeal (Act March 3, 1891, § 7) from an interlocutory order appointing a receiver, and granting an injunction merely subsidiary to the receivership, the court cannot consider whether a receiver should have been appointed, but only whether, such appointment being proper, the injunction was a necessary or proper auxiliary remedy.

Appeal from the Circuit Court of the United States for the Southern District of New York.

In Equity. Suit by James H. Young and others, on behalf of themselves and other stockholders of the Florida Construction Company, against said company and the Jacksonville, Tampa & Key West Railway Company, for an accounting between the two companies, and a distribution of the assets of the construction company among its stockholders and creditors. An order was made July 8, 1892, and continued August 2, 1892, appointing a receiver of the property of the construction company, and granting an injunction. The construction company appeals. Affirmed.

Statement by WALLACE, Circuit Judge:

This is an appeal by the Florida Construction Company from an order of the circuit court entered August 2, 1892, whereby a receiver was appointed of all the property of the construction company within the jurisdiction of the court, with power to reduce the assets of the company to his possession, and to hold the same during the pendency of the action, subject to the further order or decree of the court. The order provided that the officers and agents of the construction company should forthwith deliver up to the receiver all and every part of the property of the company, and all books, accounts, vouchers, and papers in any way relating to its business. The order also provided that the construction company, its officers and agents, be enjoined and restrained from removing from the jurisdiction of the court any of the books, papers, or property of the company, and from disposing of any of the assets or property of the company, and from interfering in any way in the possession or control of the receiver over the same.

Thomas Thacher, (John W. Simpson, on the brief,) for appellant.

William B. Hornblower, (Wallace Macfarlane, on the brief,) for appellees.

Before WALLACE, Circuit Judge, and WHEELER, District Judge.

WALLACE, Circuit Judge, (after stating the facts.) The appellant insists that a sufficient case was not made in the court below for the appointment of a receiver by the bill of complaint and the depositions used upon the motion, and, this being so, that the injunction should not have been granted by the circuit court. We are of the opinion that we are not at liberty upon the present appeal to inquire whether the circuit court erred in appointing a receiver, but are confined to the question whether, there being a proper case for the receivership, the injunction was not a necessary or proper auxiliary remedy. This court cannot review the action of the cir-

cuit court in appointing a receiver, except upon an appeal from a final decree. Our appellate jurisdiction is confined to the review of final decisions by appeal or writ of error, (section 6, Court of Appeals Act,) except where, by section 7, an appeal may be taken in equity causes from an interlocutory order or decree granting or continuing an injunction. The order appointing a receiver is not appealable, because it is not a final decision. *Forgay v. Conrad*, 6 How. 201; *Grant v. Insurance Co.*, 106 U. S. 429, 1 Sup. Ct. 414. We ought not to attempt to review indirectly an order or decision which we are not permitted to review directly; and if this court should conclude that an injunction should not have been ordered, because there was not a sufficient case for the appointment of a receiver, our mandate could not direct the circuit court to vacate the receivership. It would have been entirely competent for the circuit court to embody its decision in two orders, one appointing a receiver, and the other granting the injunction; and, if it had done this, the latter only would have been subject to review. We cannot with propriety or consistency undertake to review the other merely because both have been assembled together. Congress might have authorized an appeal from an interlocutory order or decree appointing a receiver, but it has not done so. The language of the section permits a review of the order or decree granting or continuing an injunction so far as may be necessary to do justice in the particular case. Whenever the injunction is the main relief granted, the whole case is necessarily presented for review. When it is a substantial part of the relief granted, it may be necessary to consider the whole case on appeal. But when, as in the present case, it is incidental and subsidiary merely to other relief, an appeal only brings up for determination the question whether, conceding the other relief to have been proper, the injunction was a necessary or proper auxiliary remedy. For these reasons, the question whether or not a receiver ought to have been appointed in the present case should not be entertained; and we are only to decide whether the court erred in allowing an injunction also. The injunction allowed by the interlocutory order is merely subsidiary to that part of the order whereby a receiver is appointed of the property and effects of the construction company, the appellant, *pendente lite*. Although it is auxiliary to the receivership, it is a remedy so merely formal in the present case that it is difficult to conceive how it could have benefited the complainants or injured the appellant. The order constituting the receivership, among other things, directed the officers and agents of the construction company to forthwith deliver to the receiver all the property of the company in their possession; and, for a refusal to comply, they would be punishable by process of contempt as effectually as they could be under the injunction if, in violation of its terms, they should remove the property beyond the jurisdiction of the court. The appointment of a receiver is a remedy somewhat more stringent than an injunction restraining the party whose property is subjected to a receivership from removing it beyond the jurisdiction of the court. *Railroad Co. v. Sloan*, 31 Ohio St. 1. In the case of *Skip v. Harwood*, 3 Atk.

564, where the defendant was present in court during the hearing on a bill for an accounting, and, in consequence, knew of the decision appointing a receiver, he was adjudged to be in contempt for removing a portion of the assets before the decree was drawn. The injunction in the present case may have been unnecessary, but it is hardly open to argument that, if the case presented to the circuit court justified the appointment of a receiver, it could not have been an improper exercise of discretion on the part of the court to enjoin the officers and agents of the construction company from doing any acts which might tend to render the receivership ineffectual. The order should therefore be affirmed.

EDWARDS v. HILL et al.

(Circuit Court of Appeals, Eighth Circuit. January 29, 1894.)

No. 330.

FEDERAL COURTS—JURISDICTION—CITIZENSHIP—FORECLOSURE OF MORTGAGES.

A citizen of another state may sue in a federal court to foreclose a mortgage, unaffected by the fact that the mortgagor has made a statutory general assignment for benefit of creditors, and without obtaining permission of the court having jurisdiction over the assigned estate.

Appeal from the Circuit Court of the United States for the District of Kansas.

In Equity. Suit by Hiram G. Hill and others, executors of Hiram Hill, deceased, against James G. Sands and wife, and others, to foreclose a mortgage made by defendants Sands and wife to said Hiram Hill. Decree for complainants. Defendant Charles L. Edwards, the assignee for benefit of creditors of the mortgagor, Sands, appeals therefrom. Affirmed.

Statement by CALDWELL, Circuit Judge:

On the 1st day of July, 1887, James G. Sands and Susie E. Sands, his wife, executed and delivered to Hiram Hill, then and thereafter, until his death, a citizen of the state of Massachusetts, their promissory note for the sum of \$2,500, and, to secure the payment thereof, on the same day executed and delivered to Hill a mortgage on certain real estate in the city of Lawrence, Kan. The mortgage was filed for record on the 14th day of July, 1887. Hiram Hill died at his home in Massachusetts, and the appellees, all of whom are citizens of that state, were duly appointed his executors by the probate court of Hampshire county. Default was made in the payment of the mortgage debt, and on the 5th day of April, 1892, this bill was filed to foreclose the mortgage. Sands and wife, the assignee of the estate of Sands, and others, were made defendants. The bill was taken pro confesso as to all the defendants except the appellant, Charles L. Edwards, as assignee of the estate of James G. Sands. The answer of the defendant Edwards alleges, in substance, that on the 14th day of May, 1889, James G. Sands executed a deed of assignment of all his property, real and personal, in trust for the benefit of all his creditors, to Richard S. Horton, as temporary assignee, and afterwards the creditors met and elected the defendant Edwards as permanent assignee; that the assignment was made in accordance with the laws of Kansas; that the district court of Douglas county, Kan., the court having jurisdiction of the estates assigned in that county, in trust for the benefit of creditors, had taken jurisdiction of the trust, and caused the same to be

docketed under the style of "The Estate of J. G. Sands;" that the assignee was administering the trust in accordance with the law of the state; and that the district court of the state, having jurisdiction of the estate, had not given its consent to the bringing of this suit.

D. S. Alford, (O. S. Thatcher, on the brief,) for appellant.

W. H. Rossington, Chas. Blood Smith, and Clifford Histed, for appellees.

Before CALDWELL and SANBORN, Circuit Judges, and THAYER, District Judge.

CALDWELL, Circuit Judge, after stating the facts as above, delivered the opinion of the court.

The contention of the appellant is that the appellees should have brought their suit to foreclose the mortgage in the state court having jurisdiction of the assigned estate of the mortgagor, or that, at the least, they should have obtained from that court leave to sue in the federal court. Stated in another form, the contention of the appellant is that when a debtor living in Kansas, who has previously mortgaged his real estate in that state to a citizen of another state, makes a voluntary assignment of his estate for the benefit of his creditors, the mortgagee, though a citizen of another state, must bring his action to foreclose his mortgage in the state court having jurisdiction over the assigned estate, or must obtain the leave of that court to file his bill in the federal court.

Assuming, but not deciding, that a citizen of the state could not maintain a bill to foreclose a mortgage in any other court than that having the administration of the assignment, even though the lands lay in another county, or that no such bill could be maintained at all, in any court, by a citizen of the state, that fact would not affect the jurisdiction of the circuit court of the United States in a suit brought by a citizen of another state to foreclose a mortgage.

In *Payne v. Hook*, 7 Wall. 425, the supreme court said:

"The theory of the position is this: That a federal court of chancery, sitting in Missouri, will not enforce demands against an administrator or executor, if the court of the state having general chancery powers could not enforce similar demands. In other words, as the complainant, were she a citizen of Missouri, could obtain a redress of her grievances only through the local court of probate, she has no better or different rights because she happens to be a citizen of Virginia. If this position could be maintained, an important part of the jurisdiction conferred on the federal courts by the constitution and laws of congress would be abrogated. As the citizen of one state has the constitutional right to sue a citizen of another state in the courts of the United States, instead of resorting to a state tribunal, of what value would that right be if the court in which the suit is instituted could not proceed to judgment, and afford a suitable measure of redress? The right would be worth nothing to the party entitled to its enjoyment, as it could not produce any beneficial results. But this objection to the jurisdiction of the federal tribunals has been heretofore presented to this court, and overruled."

This has been the doctrine of that court for more than half a century. In the case of *Suydam v. Broadnax*, 14 Pet. 67, (decided in 1840,) the court declared that a statute of a state barring all actions at law against the executors and administrators of estates

judicially declared insolvent cannot be pleaded as a bar to an action by a citizen of another state in a circuit court of the United States. The doctrine laid down in case of *Suydam v. Broadnax* was re-affirmed in 1855, in the case of *Bank v. Jolly*, 18 How. 503, in this language;

"The law of a state limiting the remedies of its citizens in its own courts cannot be applied to prevent the citizens of other states from suing in the courts of the United States in that state for the recovery of any property or money there to which they may be legally or equitably entitled. This principle was fully discussed and decided by this court in the case of *Suydam v. Broadnax*, 14 Pet. 67. We refer to the reasoning in support of it given in that case, without repeating it, or thinking it necessary to add anything on this occasion. It concludes this case."

These cases were cited approvingly, and their doctrine reasserted, in *Hyde v. Stone*, 20 How. 170, where the court said:

"But this court has repeatedly decided that the jurisdiction of the courts of the United States over controversies between citizens of different states cannot be impaired by the laws of the states, which prescribe the modes of redress in their courts, or which regulate the distribution of their judicial power. In many cases, state laws form a rule of decision for the courts of the United States, and the forms of proceeding in these courts have been assimilated to those of the states, either by legislative enactment or by their own rules. But the courts of the United States are bound to proceed to judgment, and to afford redress to suitors before them, in every case to which their jurisdiction extends. They cannot abdicate their authority or duty in any case in favor of another jurisdiction."

The doctrine of all these cases was again approved in *Railway Co. v. Whitton*, 13 Wall. 270, 286, and in the very late case of *Chicot Co. v. Sherwood*, 148 U. S. 529, 13 Sup. Ct. 695. The last case cited arose upon this state of facts: On the 27th of February, 1879, the legislature of Arkansas passed an act repealing all laws authorizing counties in that state to be sued, requiring all demands against them to be presented to the county courts of the several counties for allowance or rejection, and allowing appeals to be prosecuted from the decisions of those courts. Notwithstanding this act, a citizen of New York brought suit in the circuit court of the United States in Arkansas against a county on bonds and coupons issued by the county. The objection was made to that suit, as it is to this, that, by the law of the state, the county court of the county had exclusive jurisdiction to hear and determine all claims against the county, and that the circuit court of the United States could not take jurisdiction of the case. The supreme court, speaking by Mr. Justice Jackson, said: "The jurisdiction of the federal courts is not to be defeated by such state legislation as this;" and, in support of its judgment, quoted from and cited the line of cases we have referred to. See, to the same effect, *Hunt v. Danforth*, 2 Curt. 592, 604, Fed. Cas. No. 6,887; *Phelps v. O'Brien Co.*, 2 Dill. 518, Fed. Cas. No. 11,078.

We are not cited to any provision of the Kansas statute which purports to deny to the holder of a mortgage on real estate the right to bring suit for its foreclosure in any court of competent jurisdiction; but, if the state denied such right to its own citizens, the

denial would not affect the right of a citizen of another state to bring a bill to foreclose his mortgage in the circuit court of the United States. The assignee under the deed of assignment is not a receiver of any court. He is not appointed by the court, but, in the first instance, selected by the debtor, and, later, elected by the creditors. If the statute of the state required all claims against the debtor to be submitted to his assignee for determination, or to the court exercising jurisdiction over the assignment, the requirement, as we have seen, would be ineffectual as against citizens of other states.

A citizen of another state may establish his debt in the courts of the United States against the representative of a decedent, notwithstanding the local laws relative to the administration and settlement of estates place them within the exclusive jurisdiction of the state courts. *Green's Adm'x v. Creighton*, 23 How. 90, 107; *Yonley v. Lavender*, 21 Wall. 276; *Ellis v. Davis*, 109 U. S. 485, 3 Sup. Ct. 327; *Hess v. Reynolds*, 113 U. S. 73, 5 Sup. Ct. 377; *Byers v. McAuley*, 149 U. S. 608, 620, 13 Sup. Ct. 906; *Stephens v. Bernays*, 44 Fed. 642, 41 Fed. 401. But the debt, when established in the federal court, must be classified, and take its share of the estate, according to the laws of the state, as administered by the probate court; and it cannot be enforced by process directly against the property of the decedent. *Id.* And in this respect there is no difference between the administration and the insolvent laws of a state. *Yonley v. Lavender*, 21 Wall. 282. But where a decedent, in his lifetime, or an insolvent, before he makes an assignment for the benefit of his creditors, mortgages his real estate to secure the payment of a debt, the mortgagee thereby acquires a specific lien, in Kansas, by contract, upon the mortgaged property, and the right to have it applied to the payment of his debt; and this lien is not affected, or the mortgagee's rights in any way impaired, by the death or insolvency of the mortgagor. Dead or alive, solvent or insolvent, the obligation of the mortgagor's contract remains the same. All that remains to his representative, whether he be an administrator or an assignee for the benefit of creditors, is the equity of redemption. Any court of competent jurisdiction may entertain a bill to foreclose such a mortgage, and decree the sale of the property, and sell it; and the sale, if the proper parties are before the court, will pass the title. The administrator, in the one case, and the assignee, in the other, take the estate subject to the mortgage lien, and to the right of the mortgagee, by proper proceedings in a court of equity, to have the mortgaged property appropriated to the payment of his debt. This right cannot be taken from him without impairing the obligation of his contract. Our attention has not been called to any provision of the Kansas statute which seeks to do this. The obligation of the contract is protected by the constitution of the United States, and the citizen of another state has a constitutional right to enforce the performance of that obligation in the courts of the United States. It is every-day practice to foreclose mortgages executed by decedents in their lifetime, or by insolvents before they made an assignment, in the

federal courts, when the citizenship of the parties is such as to confer the jurisdiction; and this practice obtains in the state courts as well.

By the statutes of Arkansas, the probate court is invested with exclusive jurisdiction over the estates of decedents; but the supreme court of that state has uniformly held that, where a debt is secured by a mortgage executed by the deceased in his lifetime, the mortgagee is under no necessity to swear to the debt, or present it to the executor or administrator for allowance or payment, as is required in the case of unsecured debts, but that he can rely solely on his mortgage, and that, when his claim is not sworn to and presented by him, the executor or administrator has nothing to do with it, unless the probate court orders him to redeem the property mortgaged with the assets in his hands, which it may do if it deems it to the best interests of the estate. *Hewitt v. Cox*, 55 Ark. 225, 15 S. W. 1026, and 17 S. W. 873; *Simms v. Richardson*, 32 Ark. 297; *Richardson v. Hickman*, Id. 406; *McClure v. Owens*, Id. 443; *Hall v. Denckla*, 28 Ark. 507; *Rogers v. Stevenson*, 42 Ark. 555.

By the common law, the powers of executors and administrators did not extend beyond the territorial jurisdiction of the government under whose laws they were appointed, and they could not bring suits in any other jurisdiction; but, by a statute of Kansas, (paragraph 2989, Gen. St. 1889,) an executor or administrator appointed in any other state or country may sue or be sued in any court in that state. A similar provision is found in the statutes of other states. *Mansf. Dig. Ark. § 4937*.

The decree of the circuit court is affirmed.

GRAND TRUNK RY. CO. v. TWITCHELL.

(Circuit Court of Appeals, First Circuit. February 1, 1894.)

No. 56.

1. FEDERAL COURTS—JURISDICTION—DUTY OF COURT.

It is the duty of a federal appellate court to take notice, of its own motion, that the record does not show jurisdiction in the court below, and thereupon to remand the cause. *Railway Co. v. Swan*, 4 Sup. Ct. 510, 111 U. S. 379, followed.

2. REMOVAL OF CAUSES—LOCAL PREJUDICE.

The third subdivision of Rev. St. § 639, applies only in cases between citizens of different states, and not when one of the parties is an alien. *Young v. Parker's Adm'r*, 10 Sup. Ct. 75, 132 U. S. 267, applied.

3. SAME—DIVERSE CITIZENSHIP—HOW ALLEGED.

An averment of residence is not equivalent to an averment of citizenship.

4. SAME.

The description of a party as being "of Greenwood, in the state of Maine," is not equivalent to an allegation of citizenship.

5. SAME—DIVERSITY NECESSARY AT COMMENCEMENT OF ACTION.

Diversity of citizenship must be shown to exist at the commencement of the action, and also at the time of removal; and hence, when a party

dies, the substitution of an administrator having the requisite citizenship does not make the case removable.

6. SAME—JURISDICTION OF APPELLATE COURT—COSTS.

On a writ of error in an action which appears to have been improperly removed, the appellate court has jurisdiction so far as to determine whether the circuit court had jurisdiction to hear and determine the case on its merits, and has jurisdiction, therefore, to award costs.

7. SAME—DIVERSITY FIRST APPEARING ON APPEAL—AMENDMENTS.

The record must show on its face, at the time of the application for removal, that the cause is removable, and therefore amendments to the record for the purpose of showing diverse citizenship cannot be permitted in the circuit court of appeals. Nor is the jurisdiction helped out by the fact that diverse citizenship appears from the bond filed with the petition for a writ of error, and in the evidence preserved by the bill of exceptions.

In Error to the Circuit Court of the United States for the District of New Hampshire. Reversed.

Almon A. Strout, Irving W. Drew, and William H. Coolidge, for plaintiff in error.

James W. Remick, J. S. H. Frink, Geo. A. Bingham, and Daniel C. Remick, for defendant in error.

Before PUTNAM, Circuit Judge, and WEBB and CARPENTER, District Judges.

CARPENTER, District Judge. This is an action at law, and was originally brought the 28th of January, 1885, in the supreme court of the state of New Hampshire, by Henry F. Noyes, "of Greenwood, in the state of Maine," against the Grand Trunk Railway Company, "a corporation organized under the laws of the dominion of Canada, and a citizen thereof," to recover damages for alleged negligence of the defendant. The action was removed into the circuit court for the district of New Hampshire by the defendant, and was there tried by a jury, and now is brought here on a writ of error, which has been fully argued on the merits of the exceptions on which the writ of error was based, neither party making any claim adverse to the jurisdiction of the circuit court or of this court to hear and determine the controversies arising in the action. It seems to us, however, that the jurisdiction of the circuit court does not appear from the record, and that the action must be remanded to the state court.

Upon observing the insufficiency of the record, we have called the matter to the attention of counsel in the case, and have given them an opportunity to file briefs on the questions which are raised, and the defendant in error has accordingly filed such a brief.

The first question we meet is whether it be the duty of the court to take notice of the record, and, if jurisdiction do not appear, to remand the cause; and we have no hesitation in answering this question in the affirmative, on the authority of *Railway Co. v. Swan*, 111 U. S. 379, 4 Sup. Ct. 510; and *Burnham v. Bank*, 3 C. C. A. 486, 53 Fed. 163.

The petition for removal alleges that when the said Twitchell became a party to the cause, as administrator of Henry F. Noyes, de-

ceased, at the April term, 1885, of the supreme court, there was a controversy between the said Twitchell, who was a citizen of New Hampshire, and the petitioner, which was and is an alien corporation, and that the petitioner believes "that, from prejudice and local influence, it will not be able to obtain justice in said state court," and that the value of the matter in dispute exceeds the sum of \$500, exclusive of costs. An affidavit was also filed of the superintendent of the railway company in support of the allegation of prejudice and local influence.

From the frame of the petition, it might be thought that the removal was sought under the provisions of the third subdivision of Rev. St. § 639. But it has been held that this act is applicable only in cases arising between citizens of different states, and we therefore conclude that it does not apply to the case where one of the parties is an alien. *Young v. Parker's Adm'r*, 132 U. S. 267, 10 Sup. Ct. 75.

The only other statute under which this removal is sought to be justified is the second section of the act of March 3, 1875, (18 Stat. pt. 3, p. 470.) The objection to the jurisdiction under this clause lies in the fact that the record does not properly show the citizenship of the plaintiff Noyes at the time of the commencement of the suit. We do not think it necessary to repeat the discussion of the various questions which arise on this state of the record, but only to say that the cases appear to establish the following propositions applicable to this case:

1. That an averment of residence is not the equivalent of an averment of citizenship.

2. That the description of a person as being "of Greenwood, in the state of Maine," is not equivalent to an allegation of citizenship.

3. That diversity of citizenship must be shown to exist at the commencement of the action, and also at the time of the removal.

4. That the court has jurisdiction of the action so far as to determine whether the circuit court has jurisdiction to hear and determine the same on its merits, and has jurisdiction, therefore, to award costs.

5. That there can be jurisdiction in the circuit court only when, at the time of the application for removal, the record shows on its face that the action is removable, and consequently that the parties cannot now be permitted to amend this record so as to show the requisite diversity of citizenship. *Craswell v. Belanger*, 6 C. C. A. 1, 56 Fed. 529, and cases there cited; *Wolfe v. Insurance Co.*, 148 U. S. 389, 13 Sup. Ct. 602; *Crehore v. Railway Co.*, 131 U. S. 240, 9 Sup. Ct. 692; *Cates v. Allen*, 149 U. S. 451, 13 Sup. Ct. 883, 977.

It has been very carefully argued on behalf of the defendant in error that the coming in of the administrator to prosecute the suit makes a new action for the purpose of removal, and that inasmuch as the record shows that the administrator, Twitchell, was and is a citizen of New Hampshire, therefore the action was properly removed. But we think the rule is now well established, and must be literally enforced, that, in order that there may be jurisdiction, it must appear that the diverse citizenship existed at the beginning

of the suit, and has continued until the removal. The coming in of an administrator might therefore prevent, but could never permit, a removal. It has been held that the substitution of new parties having the requisite citizenship, and having a beneficial interest in the controversy, will not bring the action within our jurisdiction; and still less, as it seems to us, could such a result follow from the substitution of an official party, having no interest of his own, and suing in the same right and for the same interest as the original party. *Burnham v. Bank*, 3 C. C. A. 486, 53 Fed. 163.

It has also been suggested, with much force, that the cases in which it is held that the diversity of citizenship not only must exist in fact, but also must be made to appear in the record filed in the circuit court on removal, are all cases in which, so far as appears, the fact of citizenship had not appeared anywhere in the record up to the time of the decision of the case, whereas, in the case at bar, the bond filed with the petition for a writ of error to this court, and also certain statements in the evidence included in the bill of exceptions, may be held to disclose the necessary citizenship. It is therefore argued that these cases are not here precisely in point, having been decided under a different state of facts.

Assuming that the statements in the bond and in the evidence disclose the necessary jurisdictional facts, we may conclude that these facts are sufficiently proved. But the case of *Crehore v. Railway Co.* distinctly holds that there is no jurisdiction in the circuit court to pass on this proof and to find these facts, unless they be alleged in the removal papers. In that case the parties prayed leave to supply the proper allegation, and the motion was denied on the distinct ground that by reason of the want of this allegation the cause "was never removed from the state court." That case has never been doubted, so far as we know, and it is cited with approval in *Jackson v. Allen*, 132 U. S. 27, 10 Sup. Ct. 9; *Young v. Parker's Adm'r*, 132 U. S. 267, 10 Sup. Ct. 75; *Graves v. Corbin*, 132 U. S. 571, 10 Sup. Ct. 196; *La Confiance Compagnie v. Hall*, 137 U. S. 61, 11 Sup. Ct. 5; and *Com. v. Paul*, 148 U. S. 107, 13 Sup. Ct. 536. Compare, also, *Mining Co. v. Turck*, 14 Sup. Ct. 35. Applying the principle of that case to the case at bar, it seems to us to be clear that we have no jurisdiction to find from the allegations in the bill of exceptions and in the bond the jurisdictional facts of citizenship.

The judgment of the circuit court will therefore be reversed, with costs against the plaintiff in error, and the cause will be remanded to the circuit court, with directions to enter judgment against the plaintiff in error for the costs of the circuit court and of this court, and thereupon to remand the cause to the state court, whence it came.

HEATON v. THATCHER.

(Circuit Court, D. Vermont. October 31, 1893.)

1. EXECUTORS AND ADMINISTRATORS — ALLOWANCE OF CLAIMS — LIMITATION — EQUITY.

R. L. Vt. § 2125, provides that, where commissioners have been appointed to receive, examine, and adjust claims against the estate of an intestate, "all claims proper to be allowed by commissioners" shall be barred unless presented within the time limited. *Held*, that this does not apply to purely equitable claims, and hence it does not bar a suit by the receiver of a corporation to reach the avails of corporate property assigned to an intestate, contrary to law.

2. FEDERAL COURTS—JURISDICTION—DIVERSE CITIZENSHIP—STATE LAWS.

Such provision, that claims against the estate of an intestate shall go before a state tribunal, cannot deprive parties of the right to sue on them in the circuit court of the United States, where that court has jurisdiction on the ground of diverse citizenship.

In Equity. On plea to the jurisdiction. Bill by Willis E. Heaton, receiver of the Arlington Manufacturing Company, against Charles W. Thatcher, administrator. Pleas overruled.

Chas. M. Wild, for orator.

Jas. K. Batchelder, for defendant.

WHEELER, District Judge. This bill is brought to reach avails of property of the Arlington Manufacturing Company, of which the orator is receiver, alleged to have been assigned to the defendant's intestate, contrary to the laws of New York, under which that corporation was organized, and to the laws of Vermont, where the property was situated. The defendant has pleaded the appointment of commissioners to receive, examine, and adjust all claims and demands against the estate of the intestate, and failure to present this claim within the time limited by the laws of the state after which claims are barred, and the pleas have been argued. The statute itself of the state only bars claims "proper to be allowed by commissioners." R. L. § 2125. Purely equitable claims are not such. *Brown v. Sumner*, 31 Vt. 671. Therefore this suit might have been brought in the proper court of equity of the state, whose equitable jurisdiction is founded upon that of the courts of chancery of England, and is similar to that of this court, if the claim is of that character; and it may be brought in this court because the parties are citizens of different states, and this court has concurrent jurisdiction. Besides this, the laws of a state cannot deprive parties of their right to proceed in the courts of the United States by providing that certain claims shall go before particular tribunals of the state. *Payne v. Hook*, 7 Wall. 425; *Lawrence v. Nelson*, 143 U. S. 215, 12 Sup. Ct. 440; *Railroad Co. v. Gomila*, 132 U. S. 478, 10 Sup. Ct. 155. The arrangement by which the property was transferred to the intestate would, if valid, create a trust in him, and the transaction was had through an intermediate party. An account would be necessary, and an action at law inadequate to the adjustment of these rights between these parties to this suit. Pleas overruled.

HARRISON v. HARTFORD FIRE INS. CO.

(Circuit Court, S. D. Iowa, E. D. January 27, 1894.)

1. INSURANCE—PREMATURITY OF SUIT.

Where a suit against a fire insurance company was commenced within 90 days after a waiver of proofs of loss, it will be held to be premature, and the court without jurisdiction, under the statutes of Iowa, which provide that no suit shall be begun against an insurance company within 90 days after proofs of loss have been furnished.

2. SAME—AN APPRAISEMENT AND AWARD NOT A CONDITION PRECEDENT.

Where an insurance policy provided that, in event of a disagreement as to the amount of the loss, two competent appraisers should be chosen, each party selecting one, and the two so chosen shall first select a competent umpire, and that an award in writing of any two shall determine the amount of said loss, and that no suit or action on the policy for the recovery of any claim shall be sustainable in any court of law or equity until after a full compliance by the assured with the foregoing requirements; and when the agreement for submission to appraisers provided that two persons, naming them, should act as appraisers, together with a third person to be appointed by them, if necessary to decide upon matters of difference only, and there is no evidence of any disagreement,—*held* that, such submission not being in accordance with the terms of the policy, and there being no evidence of disagreement, the appraisalment and award is not a condition precedent to maintaining suit.

3. SAME—EFFECT OF ENTERING INTO AN AGREEMENT TO APPRAISE.

Where a policy of insurance provided as above stated, and the parties, in accordance therewith, voluntarily entered into a contract of appraisalment, and appraisers were chosen by the parties, and duly qualified and entered upon the discharge of their duties, and, while such appraisers were endeavoring to comply with the conditions of the agreement for submission, a suit is brought by the assured, *quære*, whether such agreement and part performance thereof will prevent the plaintiff from maintaining suit, or whether a suit, if begun, would be stayed until an award should be submitted.

4. SAME—ACTS OF A RECORDING AGENT.

A general local recording agent, with authority to issue and deliver policies of insurance and to collect premiums, has no authority, by virtue of such agency, to waive proofs of loss.

5. SAME—WAIVER OF PROOFS.

Where a local recording agent, with authority to issue policies of insurance and deliver them, and to collect premiums, and whose business it was to notify his company of any fire which might occur within his territory, advised his company that such a fire had occurred, and the company advised such agent that an adjuster would give the matter attention as soon as he could do so consistently with other duties, and the local agent so notified the assured, and within a few days thereafter stated to the assured that an adjuster would be there on a day named, and for the assured to get his appraiser ready, *held*, that such agent had no authority to waive proofs of loss, and, further, that the above facts did not constitute a waiver of proofs.

At Law.

This was an action brought by the plaintiff against the defendant upon a policy of insurance, New York standard form, the petition being in the usual form. The defendant, for answer, pleaded (1) a general denial; (2) prematurity of action under the Iowa statute; (3) that there was an appraisalment entered into under the terms of the policy, and no award had been made at the time the suit was commenced, and that said award was a condition precedent to bringing suit; (4) that no proofs of loss had been served. The plaintiff pleaded a waiver of proofs.

The evidence showed that the fire occurred on the 4th day of October, 1892; that on the same day the local recording agent of the defendant, who was present, notified the defendant of the fire, and the defendant advised said agent, within two or three days, that an appraiser would be sent to look after the matter, as soon as he could get there consistently with other duties, which fact was communicated to the assured. About the 14th of October the local agent informed the assured that the adjusters would be at the place of the fire on the 20th of October, and for the assured to get his appraiser ready for appraisement. There was also a policy of insurance upon the same property in another company, and another adjuster representing such other company; and on the 20th of October the adjusters for both companies arrived, and the parties entered into a joint agreement to submit the extent of the loss to two appraisers. The agreement provided that the two appraisers should, together with a third person to be appointed by them, if found necessary to decide upon matters of difference only, appraise and estimate the cash value of the damages by fire. This agreement was duly executed, and two appraisers were chosen, and qualified on said day, and entered upon their duties as such appraisers. They continued in consultation two days, and were unable to agree upon the extent of the loss, and separated with the understanding that they were to meet in Kansas City. The appraiser chosen by the assured was not well, and no meeting occurred in Kansas City. About the middle of January the appraiser for the insurance company called upon the appraiser for the plaintiff, and they each submitted names, one to the other, of persons alleged to be suitable to act as umpire. The appraisers then separated with the understanding and agreement that they would each consider and investigate the competency, etc., of the persons named for umpire. On the 16th of January, 1893, and while matters were in the condition named, suit was commenced by the plaintiff. After the evidence of the plaintiff, showing the above facts, was concluded, the defendant moved the court to direct the jury to return a verdict for the defendant upon the following grounds: (1) That the action was premature, under the statutes of Iowa, which provide that no suit shall be begun within 90 days after proofs of loss shall have been furnished; (2) that, under the terms and conditions of the policy, an appraisement and an award is a condition precedent to the right to maintain action; (3) that the parties having voluntarily entered into an agreement to appraise the damages caused by the fire, and the appraisers having been chosen and qualified, and having entered upon their duties as such appraisers, and while they were engaged in the performance of their duties as such appraisers, and before an award was entered, and without any fault upon the part of the defendant, suit was brought by the plaintiff, and that therefore this suit could not be maintained; (4) that no proofs of loss were furnished the defendant, as required by the statutes of Iowa and the conditions of the policy.

D. N. Sprague and A. H. Stutsman, for plaintiff.
McVey & Cheshire, for defendant.

WOOLSON, District Judge, (orally.) An examination of the policy in suit shows that, in the event of a disagreement as to the amount of the loss, the same shall be ascertained by two competent and disinterested appraisers, the assured and the company each selecting one, and the two so chosen shall first select a competent and disinterested umpire. The appraisers together shall then estimate and appraise the loss. The policy further provides that no suit or action on the policy for the recovery of any claim shall be sustainable in any court of law or equity until after a full compliance by the assured with all the foregoing requirements, etc. The agreement executed herein for submission to appraisers and the evidence show that two appraisers were chosen, who entered upon

their duties, but that they did not first choose a third person to act as umpire, and that the agreement expressly provides that a third person shall be chosen by these appraisers only if necessary to decide upon matters of difference. The appraisers, being unable to agree as to the amount of the damages, thereafter attempted to choose a third person as umpire. There has been no evidence submitted to the jury of any disagreement as to the amount of the loss taking place prior to the appointment of the appraisers; and it appears from the evidence that an umpire was not first chosen; neither was there any attempt, at first, to choose an umpire. The agreement for submission does not, therefore, follow the terms and conditions of the policy; and while the supreme court of the United States has held, in the case of *Hamilton v. Insurance Co.*, 136 U. S. 242, 10 Sup. Ct. 945, that an appraisalment and an award is a condition precedent to maintaining an action where the policy so provides, yet in this case, as the terms and conditions of the policy were not followed, I am of the opinion that this agreement for submission, under the terms and conditions under the facts proven, do not constitute a condition precedent to the bringing of this suit. This was held, also, in the case of *Adams v. Insurance Co.*, (Iowa,) reported in 51 N. W. 1149.

As to whether the fact that the parties had entered into a contract of appraisalment and chosen appraisers (which appraisers entered upon their duties as such, and, at the time suit was brought, were endeavoring to agree upon an umpire) would prevent a suit from being maintained, I do not here decide. It is conceded by counsel for plaintiffs that such a condition of affairs, if properly pleaded, would authorize the court to suspend the suit, and order the appraisalment to proceed; but as to whether it would be an actual bar or not it is not necessary here to decide.

It appears from the undisputed evidence in this case that the local recording agent of the defendant resided at the place of the fire, and was present at the time of the fire, on the 4th of October, 1892, and that on the same day he notified the general managers of the defendant in Chicago of the occurrence of the fire, and soon after, within two or three days, the managers advised the agent that an adjuster would be sent to give the matter attention as soon as he could do so consistently with other duties, which message was delivered to the assured orally. About the 14th of October the local agent of the defendant informed the plaintiff that the adjuster would be there on the 20th, and for him to get his appraiser ready for appraisalment. On the 20th of the month the adjuster came upon the ground, and, in connection with an adjuster of another company who had issued a policy upon the property destroyed, entered into an appraisalment agreement with the assured, and appraisers were appointed, who entered upon their duties as such on the 20th day of October. It is insisted by the plaintiff that these acts constituted a waiver of proofs of loss on the 14th of October, and, if the proofs of loss were in fact waived on the 14th of October, then this action is not prematurely brought. The statutes of Iowa

provide (section 1734, McClain's Code) that no action shall be begun within 90 days after proofs of loss have been furnished. If proofs of loss are waived at a given date, the 90 days would begin to run from the date of the waiver of proofs of loss. In this case less than 90 days had elapsed between the 20th of October and the 16th of January, 1893, when the suit was brought. I am of the opinion that the acts of the local agent, whose powers were general, within the scope of his authority, did not constitute a waiver of proofs of loss, and that the facts do not constitute a waiver of proofs prior to the 20th of October, 1892. The case of *Wilhelm v. Insurance Co., (Iowa)*, reported in 53 N. W. 233, is a strong case in point. In that case the record shows that the loss was verbally reported to the general officers of the company, who caused immediate examination to be made of the premises, and made request for duplicate bills of invoice, but this was held not to constitute a waiver of proofs. The case of *Von Genechtin v. Insurance Co.*, reported in 75 Iowa, 544, 39 N. W. 881, is also a case in point. There the local agent who issued policies promised the assured that his loss would be paid, and repeatedly so assured him. This action by the local agent was held, however, not to constitute a waiver of proofs of loss. The following cases decided by the supreme court of Iowa clearly establish the doctrine that an action brought within 90 days after proofs of loss have been furnished is premature, and that courts are without jurisdiction of an action thus prematurely brought: *Quinn v. Insurance Co.*, 71 Iowa, 615, 33 N. W. 130; *Von Genechtin v. Insurance Co.*, 75 Iowa, 544, 39 N. W. 881; *Christie v. Investment Co.*, 82 Iowa, 360, 48 N. W. 94; *Wilhelm v. Insurance Co., (Iowa)*, 53 N. W. 233; *Woodruff v. Insurance Co., (Iowa; Jan. Term, 1894)*, 57 N. W. 592; *Vore v. Insurance Co.*, 76 Iowa, 548, 41 N. W. 309; *Taylor v. Insurance Co.*, 83 Iowa, 402, 49 N. W. 994; *Moore v. Insurance Co.*, 72 Iowa, 414, 34 N. W. 183.

It is insisted that the case of *Harris v. Insurance Co., (Iowa)*, reported in 52 N. W. 128, is in point, and that under that authority there was a waiver of proofs of loss. In that case, however, a general adjuster of the company, with full authority, visited the home of the assured, and in substance promised the assured's wife to pay the loss. No case has been cited where a waiver has been based upon a set of facts similar to those presented in the case at bar. On all the facts, I am therefore of the opinion that this case is prematurely brought, and the jury are instructed to return a verdict for the defendant.

BUDD et al. v. BUDD et al.

(Circuit Court, W. D. Missouri, W. D. February 6, 1894.)

No. 1.872.

1. MUNICIPAL CORPORATIONS—POWERS OF COUNCIL—APPROPRIATIONS—ACCEPTANCE OF DEVISE FOR PARK.

A charter provision forbidding the council to appropriate any money in excess of the revenue for the fiscal year actually collected, or to bind the city by any contract or act to any liability until a definite sum shall

first be appropriated for the liquidation of all liability flowing therefrom, does not apply so as to prevent the council from accepting a devise of lands for a public park, subject to an annuity to the widow of the devisor during her life, which is paid by annual appropriation from the general fund; the council being vested by other provisions of the charter with ample powers to acquire land for this purpose, either by devise, or by actual purchase, to be paid for out of the general funds in annual installments.

2. CONSTRUCTION OF STATUTES.

Statutes in pari materia must be construed so that they may all stand. Each part should be construed in connection with every other part so as to give effect, if possible, to each, and harmony to the whole.

3. WILLS—CONSTRUCTION—ACCEPTANCE OF DEVISE.

A devise of real estate to a city, on condition that the city pay to the devisor's widow annually \$3,000, creates a legacy—an annuity—in her favor. Its acceptance by the city vests in it the fee, charged in equity with the payment of the annuity.

In Equity. Suit to set aside a devise of lands to Kansas City for a public park. Bill dismissed.

Statement by PHILIPS, District Judge:

In December, 1890, Azariah Budd died, testate, at the county of Jackson, state of Missouri, leaving the defendant S. A. Cornell Budd his surviving widow. On the 15th day of December, 1890, his will was duly admitted to probate in said county. The second paragraph of the will is as follows: "(2) I give and devise to Kansas City, Mo., for a public park, to be named 'Budd Park,' twenty-one acres of land, being in the northwest corner of the northwest quarter of the southeast quarter of section 35, township 50, range 33, subject to an annual payment of three thousand dollars to said S. A. Cornell Budd during her natural life. If said Kansas City shall not accept said land for such park under said conditions, then it is my will that said land and all other lands owned by me in said Jackson county be sold, and the interest of the proceeds be paid to the said S. A. Cornell Budd during her natural life, and, at her death, the principal to be given to such benevolent purposes as may be productive of the most good."

Kansas City, by ordinance, accepted the devise of said land, of date March 5, 1891, "upon the terms and conditions named and provided for in said last will and testament," and declared the land to be a public park, to be known as "Budd Park," and directing the annual payment to be made to said S. A. Cornell Budd upon the 15th day of December of each year, to begin on the 15th day of December, 1891; and the said S. A. Cornell Budd duly filed her acceptance of the provisions of said ordinance. The city, by ordinance, for each fiscal year, apportioning funds to the city, has since made two payments of said annuity out of the general fund of the city, and has, since the institution of this suit, made provision therefor. The said Azariah Budd left no children or father or mother surviving. The plaintiffs, who are brothers and sisters of the whole blood and half blood of said Azariah, bring this action to have said devise of said real estate declared ineffectual, for the reasons that the said city has no power to take and hold said land under said will, and because the will is otherwise inoperative, by reason of the provision that, in case the said city shall not accept, the land be sold in case of the death of said S. A. Cornell Budd, the money arising from such sale to be given to such benevolent purposes as may be productive of the most good, the said provision being void for uncertainty. The cause is submitted to the court on the pleadings and proofs.

Johnson & Lucas, J. L. Grider, and A. M. Allen, for complainants.
C. O. Tichenor and Fyke & Hamilton, for respondents.

PHILIPS, District Judge, (after stating the facts.) The controlling question in this case is, did Kansas City possess legal capacity

to take and hold this land under the provisions of said will? The charter of a municipality is the source of its powers. It can exercise no power which is not expressly conferred upon it, or such as arises by fair implication as essential or reasonably proper to give effect to powers expressly granted. Doubts as to the existence of such power are to be resolved against the corporation. This rule of construction is succinctly stated by the supreme court in *Min-turn v. Larue*, 23 How. 436:

"It is a well-settled rule of construction of grants by the legislature to corporations, whether public or private, that only such powers and rights can be exercised under them as are clearly comprehended within the words of the act, or derived therefrom by necessary implication, regard being had to the objects of the grant. Any ambiguity or doubt arising out of the terms used by the legislature must be resolved in favor of the public. This principle has been so often applied in the construction of corporate powers that we need not stop to refer to authorities."

Under the city charter in force at the time of the taking effect of the devise, it is expressly declared in section 1, art. 1, that said Kansas City is empowered to—

"Acquire and hold by gift, devise, purchase or by condemnation proceedings, lands or other property for public use, either within the corporate boundaries of said city or beyond the limits of the city * * * for public parks, * * * and may also take, hold, use and improve any property, real, personal or mixed, either within or without the city limits, that may be acquired by gift, devise, bequest or otherwise, for any charitable use or educational or benevolent purposes whatsoever."

Article 10 provides especially for the establishment of public parks. By section 1 it is made the duty of the common council to "arrange for a system of parks," and it directs the division of the city into park districts. Section 3, art. 10, declares that:

"It shall be the duty of the board of park commissioners to select or to select and purchase real estate for parks in the district for which a park shall have been ordered by the common council; provided, however, that before such election shall be valid it shall be approved by the board of public works."

Section 4, art. 10, provides for the mode of payment of lands purchased for parks inside the city limits, which may be done by assessments on property within the district, and may be raised by installments.

Section 11, art. 10, declares that:

"The common council is authorized to provide by ordinance for the purchase, or otherwise obtaining, of real estate for such public park or public parks as it may deem necessary outside of the city limits. Payment therefor shall be made out of the general fund or by a direct tax levy upon the taxable property within the city limits; such levy to be made by the common council, subject to the constitution and laws of the state; in such manner and at such rate as may be prescribed by ordinance."

Then follows section 12:

"The city is authorized to receive gifts, devises and bequests of any real or personal property for any public park, or for the public park of any district which may be by it created."

From all of which it is manifest that the city is fully empowered to take and hold lands for the use of public parks.

The principal objection urged against the city's title is predicated of section 30, art. 4, of the charter, which declares, *inter alia*, that:

"The common council shall not appropriate money for any purpose whatever in excess of the revenue of the fiscal year actually collected and in the treasury at the time of such appropriation and unappropriated. Neither the common council, nor any officer of the city, except the comptroller, in a single instance in this charter provided, shall have authority to make any contract, or to do any act binding Kansas City, or imposing upon said city any liability to pay money until a definite amount of money shall first have been appropriated for the liquidation of all pecuniary liability of said city under said contract, or in consequence of said act; and the amount of said appropriation shall be the maximum limit of the liability of the city under such contract, or in consequence of any such act, and said contract or act shall be ab initio null and void as to the city for any other or further liability."

The argument is not only that no such appropriation was in fact provided for by ordinance, but from the very nature of the transaction no such ordinance could have been enacted, for the reason that, owing to the uncertainty of the duration of the life of Mrs. Budd, the amount of the appropriation in the aggregate was not ascertainable.

There are several valid answers to this objection. Said section has especial reference to contracts made by the common council, or acts done by it to bind the city, or imposing upon it a pecuniary liability springing therefrom; and, in the very reason and nature of things, it can only apply to such transactions by the common council as are susceptible of liquidation by an immediate appropriation. It must be construed in connection with the whole provisions of the charter, so as, if possible, to give harmony, force, and efficacy to every part thereof. Statutes *in pari materia* are to be construed so that they may all stand. Among the recognized canons for the interpretation of statutes are that the intention of the legislature may be gathered from a view of every part taken and compared together, and, when the true intention is ascertained, it will prevail over the literal sense of the terms; and the reason and intention of the lawgiver will control the strict letter when the latter would lead to palpable injustice, contradiction, or absurdity. And, where there is doubt whether a certain thing falls within the terms used in an act, it is proper to resort to other statutes to ascertain the mind of the legislature in enacting the general statute. A thing within the intention of the legislature in framing a statute is sometimes as much within the statute as if it were within the letter. In *re Bomino's Estate*, 83 Mo. 441.

In *U. S. v. Kirby*, 7 Wall. 483, Mr. Justice Field said:

"All laws should receive a sensible construction. General terms should be so limited in their application as not to lead to injustice, oppression, or an absurd consequence. It will therefore be presumed that the legislature intended exceptions to its language, which would avoid results of this character."

So in *Pollard v. Bailey*, 20 Wall. 525, the chief justice said:

"The intention of the legislature, when properly ascertained, must govern in the construction of every statute. For such purpose, the whole statute must be examined. Single sentences and single provisions are not to be selected and construed by themselves, but the whole must be taken together."

Said section 30 was in the charter of the city before the amendment incorporating article 10 providing for public parks. This added article devolved upon the common council the duty of arranging for a system of parks; and in and of itself furnished a method and means of compassing the system; and, in so far as it embodies within itself the method and means of acquisition by the city of such lands, it is not dependent upon section 30, art. 4, for its life. Section 4, art. 10, provides, for instance, for the payment for lands purchased for parks inside of the city, by making payments in three annual installments, to be raised by assessments through three years. This cannot have reference to a "definite amount of money which shall have been first appropriated for the liquidation of the pecuniary liability" of said city. Literally, there is in such case no appropriation of money, for the money is yet to be raised by taxation on property in the district.

The land in question lying without the city limits, if it should be purchased, inures to the benefit of the whole city, and "payment therefor shall be made out of the general fund, or by a tax levy upon the taxable property within the city limits." The city has paid the annuity thus far out of the general fund, and presumably under ordinances made therefor, conformable to section 2 of article 3 of the charter. Suppose the city had purchased outright from Budd, in his lifetime, this land, at, say, \$50,000, to be paid out of the general fund in annual installments of \$3,000. Does said section 30 apply literally, so that the council should be required in advance to adopt an ordinance definitely appropriating \$50,000 for the payment of all the installments? Would not the evident spirit of article 10 be met by an approval of the purchase by the board of public works, and the adoption of an ordinance each fiscal year in assigning the appropriations, just as has been done in this case, setting apart \$3,000 to meet the annual installment? Said section 2 of article 3 provides that:

"Within the first month of each fiscal year, the mayor and common council shall by ordinance, as far as practicable, make all necessary apportionments of the revenue to be raised for such year, to the expenses of the several departments, and for all public works, under proper headings, and for such other objects as it may be necessary to provide for."

The qualification, "as far as practicable," clearly enough indicates that, in the practical application of this statute, it possesses flexibility sufficient to permit of adaptation to the requirements of a case like this. It has never, in actual practice, been deemed to interfere with the annual apportionment of funds to pay for the annual supply of water to the city under a 20-year contract, or with a like usage in respect of supplying the city with gas. It does not

stand to reason that, under contracts for payments accruing annually, the appropriating ordinance should provide for future years.

So it is said in *Crowder v. Town of Sullivan*, 128 Ind. 487, 28 N. E. 94:

"When municipal corporations contract for a usual or necessary thing, such as water or light, and agree to pay for it annually, as furnished, the contract does not create an indebtedness for the aggregate sum of all the yearly installments, since the debt for the year does not come into existence until the compensation for each year has been earned."

In short, it does not become a contract debt until the year of the maturing of the installment. *Carlyle Water, Light & Power Co. v. City of Carlyle*, 31 Ill. App. 325.

So it has been held that:

"If the corporation has the right to purchase real estate, and there is no restriction as to whether it shall be for cash, * * * if the power to purchase be established, the power to give the evidence necessarily ensues." *First Municipality v. McDonough*, 2 Rob. (La.) 250.

If the city were required to make an appropriation by ordinance in advance for the entire purchase money, it would imply that the city was limited to cash contracts, and the transaction would at once be open to attacks in nine instances out of ten, on the ground that the sum required was in excess of the constitutional limitations as to the amount of revenue the city was permitted to raise for that year, and thus practically prevent the city from establishing parks.

There is no claim made in this case that this annuity exceeds the annual revenues of the city for general purposes. As said in *Appeal of the City of Erie*, 91 Pa. St. 403:

"If the contracts or engagements of municipal corporations do not overreach their current revenues, no objection can lawfully be made to them, however great the indebtedness of such municipality may be, for in such case their engagements do not extend beyond their present means of payment, and so no debt is created."

Technically speaking, this \$3,000 is of the nature of a legacy, and the terms "legacy" and "annuity" are often used interchangeably. *Castor v. Jones*, 86 Ind. 294; *Mullins v. Smith*, 1 Drew. & S. 211; *Ward v. Grey*, 26 Beav. 491. The devise in this case, in legal effect, is the same as the devise of land by A. to B., burdened with the condition that B. support A.'s widow during her natural life; and such devise is a purchaser for value, and the fee vests on his acceptance. *Farwell v. Jacobs*, 4 Mass. 636; *Sheldon v. Purple*, 15 Pick. 528; *Richards v. Merrill*, 13 Pick. 408; *Fahrney v. Holsinger*, 65 Pa. St. 388; *Jones v. Jones*, 13 N. J. Eq. 240. This rule obtains even where the instrument of concession might specify a life estate in the grantee. *Harrington v. Dill*, 1 Houst. 410; *McRee v. Means*, 34 Ala. 377; *Lindsay's Heirs v. McCormack*, 2 A. K. Marsh. 229. It is in recognition of these principles that the courts have held that under a will devising real estate to the testator's son, with the stipulation that the son pay to a third party a given sum upon acceptance, the real estate in equity becomes chargeable

with the payment of the legacy, in the absence of something in the will to rebut this legal presumption, or to create an inference that the testator intended to exempt the estate devised from such charge. *Brooks v. Eskins*, 24 Mo. App. 296.

Why should the plaintiffs bother themselves about the question whether this be technically a purchase, gift, or devise? It is conspicuously manifest from the tenth article of the city charter, as it has been recently re-emphasized by the amended charter granted by the state legislature, February 27, 1892, that the legislature and the incorporators were impressively alive to the public necessity of parks. With the advancement of civilized life, these restful spots, where all the people may at times catch a breath of pure air, and feel the healthful glow in the contagion of nature's verdure and shade, are becoming inseparable from the idea of social well-being in our larger cities; and plenary power, therefore, was sought to be conferred on this city to accomplish this beneficent end. All the customary ways of acquisition of property for this purpose were opened up to it, by purchase, gift, devise, and even by the exercise of the high prerogative of eminent domain. How, then, is the power "to take and hold" to be affected by the concession of this land, commingling the elements of a devise, gift, and purchase? Judge Scott, in *Chambers v. City of St. Louis*, 29 Mo. 574, speaking responsive to this thought, said:

"It has been held where a corporation is prohibited from taking by devise, and is empowered to take by purchase, the word 'purchase' shall be construed in its vulgar, and not its legal, sense, which signifies an acquisition by any other mode than by inheritance."

The mere fact that uncertainty as to the duration of this annuity exists does not affect the existence of the power to so take; nor does it in any wise concern these plaintiffs. The power to take and hold, how much should be paid for the land, and the time of payments, in the common sense of the case, are reposed in the sound discretion of the park commissioners, the board of public works, and the municipal legislature. It does seem to me that it would be apex juris to subject this charter to the construction that, if the city had the opportunity to acquire the fee simple to a tract of land for a park worth \$1,000,000 by paying \$3,000 a year for the period of a human life, which the mortality tables fixed at 20 years, it could not accept, forsooth it could not at once pass an ordinance appropriating at the one time the whole of the installments. Such a construction would tend to defeat the broad policy of the state, designed to encourage and assist the municipality in establishing public parks. Courts should ever lean to that interpretation of a statute which would further the object of the legislation in preference to a construction based on purely artificial rules. *Tittmann v. Edwards*, 27 Mo. App. 492; *Wanschaff v. Society*, 41 Mo. App. 206. Where power is given by a statute, the courts should, as a rule, hold that anything necessary to make it effectual is given by implication. *Sheidley v. Lynch*, 95 Mo. 487, 8 S. W. 434.

The power to take and hold this property for the very purpose

designated by the devise being expressly granted in the charter to the city, the only objection thereto arises on the manner of its acceptance by the city, as to whether the ordinance should have been broader. So long as the parties thereto are content with the acceptance, and the city is paying the annuity required under ordinances making the annual appropriations in the customary mode for annual application of the general fund for the current year, and the charter authorizing the payment out of the general fund, it is not perceivable that these plaintiffs have any standing in court on the ground that the devise is void.

In this view of the case, it is not necessary that the court should consider the question raised as to whether the last clause of said paragraph of the will is void for uncertainty. The city having accepted, the contingency on which said clause would become operative can never arise.

The bill is dismissed.

SKIRVING v. NATIONAL LIFE INS. CO. OF MONTPELIER.

(Circuit Court of Appeals, Eighth Circuit. January 29, 1894.)

No. 321.

1. JUDGMENT—EQUITABLE RELIEF—INJUNCTION.

The collection of a judgment at law, fairly and regularly recovered by a purchaser in good faith for full value against a school district on its treasury warrants, will not be enjoined, even if there was a good legal defense to the action, when the consideration was received and is still being enjoyed, and the district officers declined to interpose technical defenses because of the moral obligation to pay. *Crampton v. Zabriskie*, 101 U. S. 601, distinguished.

2. SAME.

It is no reason for enjoining a judgment regularly recovered at law in a federal court that the record therein fails to show that the citizenship of the assignor of the plaintiff therein was such as to give the court jurisdiction, for judgments of federal courts, rendered upon personal service, are valid until reversed, even if the record fails to show the facts on which jurisdiction rests.

3. SAME—FEDERAL COURT—JURISDICTIONAL AMOUNT.

Query, whether a taxpayer seeking to enjoin in a federal court the collection of a judgment against a school district must not show that his proportion of the taxes necessary to pay the judgment will equal \$2,000

Appeal from the Circuit Court of the United States for the District of Nebraska.

In Equity. Suit by James Skirving, a taxpayer, to enjoin the National Life Insurance Company of Montpelier, Vt., from enforcing a judgment at law against school district No. 44 of Holt county, Neb. The circuit court dismissed the bill. Complainant appeals. Affirmed.

Statement by CALDWELL, Circuit Judge:

On the 15th day of April, 1889, the proper officers of school district No. 44 of Holt county, Neb., issued three orders upon the treasurer of the district, payable to the order of Clark & Leonard Investment Company,—one for \$1,000, due one year after date; and two for \$1,500 each, due, respectively, two

and three years after date. The payees of the orders indorsed them to the appellee, the National Life Insurance Company of Montpelier, Vt., on the 24th day of April, 1889. The insurance company purchased the orders in good faith, paying \$3,740 for them. The orders were issued and sold to raise money to build a schoolhouse for the district, and the money derived from their sale was used for that purpose. After the erection of the schoolhouse, the district accepted and used it, and is still using it, as a schoolhouse. On the 27th day of May, 1892, the appellee brought suit on the law side of the United States circuit court for the district of Nebraska against the school district on the orders. A summons was issued in the action, and the proper officers of the district accepted service thereof in writing, and at a term of the circuit court held on the 30th day of June, 1892, the plaintiff in the action recovered a judgment by default against the school district for \$4,996.98 and costs of suit. On the 9th day of July, 1892, the appellant filed this bill in the court in which the judgment was rendered against the school district, to enjoin its collection. The bill alleges that the appellant has been a resident of the district for several years, and is the owner of \$5,000 worth of real estate and a large amount of personal property subject to taxation in the district, but it does not allege that his proportion of the taxes to pay the judgment would be \$2,000, or any other sum, and the bill is not filed on behalf of the other taxpayers of the district or of the district. The grounds upon which it is sought to enjoin the judgment are that the officers of the school district had no authority to issue the orders, or to levy a tax to pay them; that, when issued, they were in excess of the amount of indebtedness the district was allowed by law to contract; that their issue was not authorized by a vote of the electors of the district; and that in a suit brought by the appellant in the state court against the treasurer, moderator, and director of the district and the Clark & Leonard Investment Company a decree was rendered on the 24th day of January, 1891, adjudging that the orders had been illegally issued, and enjoining the officers of the school district from paying, and the Clark & Leonard Investment Company from collecting, them. Long before the commencement of the suit in the state court, Clark & Leonard Investment Company had assigned the orders to the appellees who were not made parties to that suit. The prayer of the bill is that the appellee may be restrained "from proceeding at law against your orator touching any of the matters in question, or in any manner seeking to enforce the collection of the aforesaid judgment at law."

H. C. Brome, for appellant.

Stephen B. Pound and Lionel C. Burr, for appellee.

Before CALDWELL and SANBORN, Circuit Judges.

CALDWELL, Circuit Judge, after stating the facts as above, delivered the opinion of the court.

The officers of the district declined to interpose any technical defense to the action on the orders upon the ground that the school district had received the money and built a school house with it, and in justice and equity ought to repay it; and in this view the taxpayers of the district, save the appellant, seem to have concurred. There is not the slightest evidence to show that the plaintiff in the judgment at law was guilty of any fraud, misrepresentation, deceit, or misbehavior of any kind in obtaining its judgment against the district. It purchased the orders in good faith, paying full value for them; and, the orders not being paid at their maturity it brought suit in the regular manner, in a court of competent jurisdiction, and, after due service of summons on the defendant, obtained judgment for the amount of the orders.

The general rules regulating the exercise of the jurisdiction of eq-

uity to enjoin the collection of a judgment recovered at law are well settled. The jurisdiction is not favored, and the grounds upon which it will be exercised are narrow and restricted. It will not suffice to show that injustice is done by the judgment against which relief is sought, and that it would be a hardship to enforce it, or that the defendant had a good legal defense to the cause of action upon which the judgment was rendered; but it must also appear that the defendant was prevented from interposing his defense at law by the fraud or misconduct of the plaintiff, or by some accident or mistake occurring without any fault of the defendant or his agents, and that it would be contrary to equity and good conscience to enforce the judgment. 1 High, Inj. §§ 165-178, and cases cited; 1 Black, Judgm. §§ 356, 366, 378, and cases cited; Insurance Co. v. Hodgson, 7 Cranch, 332; Sample v. Barnes, 14 How. 70, 75; Creath's Adm'r v. Sims, 5 How. 192, 204.

Assuming, but not deciding, that the school district had a good legal defense to the orders, none of the other conditions essential to authorize a court of equity to enjoin a judgment is present in this case. The plaintiff was guilty of no fraud or misbehavior whatever. It asserted its claim against the school district openly, and in the accustomed and orderly manner in which suits are brought and prosecuted. The defendant was not prevented by fraud, accident, or mistake from interposing a defense to the action, if it had one; and certainly it is not shown that it would be contrary to equity and good conscience to allow the judgment to be enforced. On the contrary, the school district itself, through its proper officers, declined to interpose any defense to the suit on the orders upon the ground that it would be contrary to equity and good conscience to contest the repayment of the money under the circumstances. There was no fraud or bad faith on the part of any one connected with the business. The school district received the appellee's money, and used it to build a schoolhouse for the district, which was needed, and which the district accepted and is using. Upon these facts the moral obligation resting upon the district to repay the money was very great, and, after the demand has passed into a judgment, fairly and regularly obtained, a court of equity will not enjoin its collection.

Where it was sought to enjoin a county from paying county orders issued for a claim less meritorious than the claim upon which this judgment was rendered, the supreme court of Ohio said: "This court ought not to interpose by injunction to save the county from the payment of a demand having the sanction of moral obligation." Commissioners v. Hunt, 5 Ohio St. 488; Newcomb v. Horton, 18 Wis. 594. Certainly, after a judgment has been regularly obtained upon such a demand, it would be contrary to any man's sense of equity and good conscience to enjoin its collection upon the complaint of a single discontented taxpayer.

The appellant cites and relies on Crampton v. Zabriskie, 101 U. S. 601, but that case is not in point. That was a suit "brought by other taxpayers of the county to compel the board to reconvey the

land and Crampton to return the bonds, and to enjoin the prosecution of the action to enforce their payment." It will be observed that no judgment had been recovered in that case, and the bill was filed to compel the board to reconvey the land which was the consideration for the bonds upon which suit had been brought. The bill did not seek to keep the consideration received for the bonds, and repudiate the bonds, but its object was to cancel the contract, return the consideration received for the bonds, and then cancel them. In this suit the appellant seeks to have the school district keep the consideration it received for the orders, and to enjoin, at his own suit, the payment of the judgment rendered upon the orders.

It does not appear from the complaint and record in the law case that the citizenship of the assignors of these orders was such as would have enabled them to maintain a suit thereon in the circuit court, and it is urged that for this reason the court rendering the judgment was without jurisdiction, and the judgment void. There are two answers to this contention: The bill does not challenge the jurisdiction of the court rendering the judgment; but if it did, it is well settled that the judgments and decrees of the United States courts rendered upon personal service on the defendant are binding until reversed, though no jurisdiction be shown on the record. If the record fails to show the facts on which the jurisdiction rests,—as, for instance, that the plaintiff and the defendants are citizens of different states; or, where the plaintiff sues as assignee, that his assignor might have maintained the suit,—the judgment may be reversed for error upon a direct proceeding for that purpose, but it is not void, and cannot be attacked collaterally. *McCormick v. Sullivant*, 10 Wheat. 192; *Des Moines Nav. & R. Co. v. Iowa Homestead Co.*, 123 U. S. 553, 8 Sup. Ct. 217; *In re Sawyer*, 124 U. S. 200, 220, 221, 8 Sup. Ct. 482.

A much graver question of jurisdiction arises in the case applicable to the appellant. There is no pretense that his proportion of the tax upon the taxable property in the district required to pay the judgment would amount to \$2,000. The judgment itself exceeds that sum, but it is not certain by any means that the amount of the judgment is the criterion for ascertaining the amount in controversy in such a case as this. The bill, in effect, is one to enjoin the collection of taxes to pay the judgment. Upon the allegations in the bill the court cannot assume that appellant's taxes would be more than nominal. If the amount of the appellant's tax is to be regarded as the amount in controversy, it follows that the court below had no jurisdiction of the case. *Newcomb v. Horton*, 18 Wis. 594; *King v. Wilson*, 1 Dill. 555, 568; *Seaver v. Bigelow*, 5 Wall. 208; *Woodman v. Latimer*, 2 Fed. 842; *Massa v. Cutting*, 30 Fed. 1; *Terry v. Hatch*, 93 U. S. 44. But, as this point was not raised in argument, we express no opinion upon it.

The decree of the court below is affirmed.

OWEN et al. v. SHEPARD et al.¹

(Circuit Court of Appeals, Eighth Circuit. January 29, 1894.)

No. 284.

1. EVIDENCE—BURDEN OF PROOF—EXISTENCE OF CORPORATION.

The burden is on defendants to prove the existence of a corporation, where, being sued individually, as doing business under a company name, they deny individual liability, and aver that the company was a corporation, and that the services were rendered to it.

2. CORPORATIONS—EXISTENCE—COLLATERAL INQUIRY.

The rule that the regularity of the organization of a corporation cannot be inquired into collaterally has no application where individuals sued for services deny personal liability, and set up the existence of a corporation, to which the services were rendered.

3. SAME—EVIDENCE—COMPETENCY.

It is not competent to prove the organization of a business corporation under the Illinois laws by the testimony of the two persons claiming to have formed it, to the effect that, being in St. Louis, they crossed to Illinois with a lawyer, there complied with the laws, and got a charter; it appearing that the Illinois law requires at least three incorporators, prescribes various steps requiring considerable time for their accomplishment, and makes the certificate of the secretary of state to the complete organization of a corporation the legal evidence of that fact.

In Error to the United States Court in the Indian Territory.

Thomas Marcum and George E. Nelson, for plaintiffs in error.

S. S. Fears, S. O. Hinds, and W. T. Hutchings, for defendants in error.

Before CALDWELL, Circuit Judge, and THAYER, District Judge.

CALDWELL, Circuit Judge. This suit was brought by the defendants in error, Shepard, Grove & Shepard, who are lawyers practicing in the Indian Territory, against the plaintiffs in error, Robert L. Owen and James E. Reynolds, to recover fees for legal services. There was a trial to a jury, and a verdict and judgment for the plaintiffs, and the defendants sued out this writ of error.

The errors chiefly relied on relate to the rulings of the lower court in giving and in refusing instructions upon the question whether the Indian Trading Company was a legally constituted corporation. The defendants were sued individually, the complaint alleging that they were "doing business under the style of the Indian Trading Company." The answer denied that the defendants were liable personally, and averred that the Indian Trading Company was a corporation, and the contention of the defendants upon the trial below was that any services performed by the plaintiffs were performed for the alleged corporation, and not for the defendants personally. The defendants conducted a mercantile business in the Indian Territory under the style of the Indian Trading Company, and they retained the plaintiffs to assist in some legal proceedings which were conducted in that name. The defendants disposed of their stock of goods, ceased to do business as merchants, and the

¹ Rehearing pending.

Indian Trading Company vanished. Under the pleadings upon which the case was finally tried, the burden rested on the defendants to show the plaintiffs' services were rendered to a corporation as claimed by them. The defendant Owen is a Cherokee, and the defendant Reynolds a Choctaw, Indian. They agreed to embark in the mercantile business on rather an extended scale, the business to be carried on at the town of South McAlester, in the Choctaw Nation. They were told they could carry on this business without any financial risk or liability beyond the capital actually invested if they would form a corporation and conduct the business in its name. They assert they did form a corporation called the Indian Trading Company, under the laws of Illinois. The law of that state governing the formation of corporations contains the following provisions:

"(2) Whenever any number of persons, not less than three nor more than seven, shall propose to form a corporation under this act, they shall make a statement to that effect under their hands, and duly acknowledged before some officer in the manner provided for the acknowledgment of deeds, setting forth the name of the proposed corporation, the object for which it is to be formed, its capital stock, the number of shares of which such stock shall consist, the location of the principal office, and the duration of the corporation, not exceeding however, ninety-nine years; which statement shall be filed in the office of the secretary of state. The secretary of state shall thereupon issue to such persons a license as commissioners to open books for subscription to the capital stock of said corporation at such times and places as they may determine; but no license shall be issued to two companies having the same name. (3) As soon as may be, after the capital stock shall be fully subscribed, the commissioners shall convene a meeting of the subscribers for the purpose of electing directors or managers, and the transaction of such other business as shall come before them. Notice thereof shall be given by depositing in the post office, properly addressed to each subscriber, at least ten days before the time fixed, a written or printed notice, stating the object, time and place of such meeting. * * * (4) The commissioners shall make a full report of their proceedings, including therein a copy of the notice provided for in the foregoing section, a copy of the subscription list, and the names of the directors or managers elected, and their respective terms of office, which report shall be sworn to by at least a majority of the commissioners, and shall be filed in the office of the secretary of state. The secretary of state shall thereupon issue a certificate of complete organization of the corporation, making a part thereof a copy of all papers filed in his office in and about the organization of the corporation, and duly authenticated under his hand and seal of state, and the same shall be recorded in a book for that purpose, in the office of the recorder of deeds of the county where the principal office of such company is located. Upon the recording of the said copy, the corporation shall be deemed fully organized and may proceed to business. Unless such company shall be organized and shall proceed to business as provided in this act, within two years after the date of such license, then such license shall be deemed revoked, and all proceedings thereunder void." "(27) The certified copy of any articles of incorporation, and changes thereof, together with all indorsements thereon, under the great seal of the state of Illinois, shall be taken and received in all courts and places as prima facie evidence of the facts therein stated." 1 Rev. St. Ill. c. 32, tit. "Corporations."

There was no competent evidence to show that a single requirement of the statute quoted was complied with. All the evidence on the subject is that of the defendants, who testify, in substance, that they were advised the object they had in view could best be

accomplished by incorporating themselves under the laws of Illinois, and that, being in St. Louis, they crossed over the Mississippi river to East St. Louis, in Illinois, with a lawyer, and there complied with the laws of that state, and got a charter. The statement that they got a charter is a mere conclusion of law, having no probative force. It is not probable these Indians had a very accurate conception of what constituted a charter, or of the proper mode of obtaining it under the laws of Illinois. The two defendants only were present to form the corporation, and the statute requires not less than three nor more than seven persons. What the defendants did during their momentary stay in East St. Louis is not shown. The evidence required by the statute of Illinois to prove the existence of a corporation is the certificate of the secretary of state of the complete organization of the corporation, making a part thereof a copy of all papers filed in his office in and about the organization of the corporation, and duly authenticated under his hand and seal of state, and, in addition to this, proof that such copy had been recorded in the office of the recorder of deeds of the county where the principal office of the company is located. "Upon the recording of the said copy," says the statute, "the corporation shall be deemed fully organized and may proceed to business." In *Gent v. Insurance Co.*, 107 Ill. 652, 658, the court say:

"A corporation, until organized, has no being, franchises, or faculties. * * * Until organized as authorized by the charter, there is no corporation; nor does it possess franchises or faculties for it or others to exercise until it acquires complete existence."

If this alleged corporation ever had any legal existence, it was in the power of the defendants to furnish the proper evidence of the fact. They claim to be the original corporators, and as such they would be the proper custodians of the legal evidence of the incorporation of the company. They neither produced this evidence nor accounted for its absence. If the secretary of state had ever issued his certificate, and it had been lost, a certified copy could have been procured. The defendants probably made an abortive effort to form a corporation under the laws of Illinois, but it is highly probable that the artificial being which they attempted to bring into existence never had a legal birth; certainly there is not in this record any competent evidence to establish that fact.

The doctrine that the regularity of the organization of a corporation cannot be inquired into collaterally has no application to this case.

The defendants set up as an affirmative defense that the services sued for were performed, if at all, for a corporation named the Indian Trading Company, and not for the defendants as individuals or partners doing business under the style of the Indian Trading Company, as alleged by the plaintiffs. The defendants thus set up as a defense to the action the existence of the alleged corporation. Upon this issue we have seen the burden of proof rested on the defendants. The plaintiffs are not attacking the validity of the corporation collaterally; they are challenging the defendants

to prove their assertion that such a corporation ever had an existence. The company was not shown to be either a *de facto* or *de jure* corporation. The only semblance of a corporation was its name. But the name did not distinctly purport to be the name of a corporation. Individuals may carry on business under any name and style they may choose to adopt. The style of the firm need not, and often does not, express the name of any actual member of it. It need not contain any individual names at all. The name Indian Trading Company is equally appropriate for a partnership or for a corporation. By common usage the use of "company" is as applicable to partnerships and to unincorporated associations as to corporations. Poll. Partn. arts. 10, 11. The name, therefore, was no evidence that the company was a corporation. One cannot wink so hard as not to see that this so-called corporation was one of those elusive, evanescent, will-o'-the-wisp corporations existing only in name, and a fraud upon the laws of the state where it was attempted to be formed, and equally a fraud on the states or territories and their citizens in which it carried on its business. It is no uncommon thing nowadays for persons to do as these defendants did,—seek to acquire corporate life and power by a mere pretense of compliance with the law of a state in which they do not reside, and do not intend to carry on any business, in order that they may escape all liability for the hazards of the business in which they are engaged, and enjoy the privilege of litigating in the United States courts. These privileges are obtainable under existing laws and decisions of the courts, but not by simply adopting a supposed corporate name, or by a mere feigned compliance with the laws of the state of which it is claimed the corporation is a citizen. *Montgomery v. Forbes*, 148 Mass. 249, 19 N. E. 342; *Hill v. Beach*, 12 N. J. Eq. 31; *Smith v. Machinery Co.*, 19 Fed. 826; *Gas Co. v. Dwight*, 29 N. J. Eq. 244, 248; *Booth v. Wonderly*, 36 N. J. Law, 250; *Spell. Priv. Corp.* p. 928, § 829, note 2; *Demarest v. Flack*, 128 N. Y. 205, 28 N. E. 645.

In view of the want of any competent evidence to establish the organization of the corporation, the instructions relating to its existence were probably too favorable to the plaintiff in error.

An exception was taken to that part of the charge in which the court told the jury "that in determining the value of an attorney's services it is proper to consider from the evidence the character and professional standing of the person rendering the service in question, as well as the nature and importance of the services rendered; and the very best means of adjusting this value are the opinions of those who, in earning and receiving compensation for them, have learned what legal services in their various grades are worth." This charge is supported by the opinion of this court in the case of *Ward v. Kohn*, 58 Fed. 462; *Rogers, Exp. Test.* p. 380, § 158.

We have carefully examined the other assignments of error, and find they are without merit. They are not of sufficient importance to justify a separate consideration. The judgment of the lower court is affirmed.

FOSTER v. DANFORTH.

(Circuit Court, D. Vermont. February 19, 1894.)

1. ATTORNEY AND CLIENT—LIEN—SATISFACTION OF JUDGMENT INTER PARTES.
The satisfaction of a judgment between the parties cannot prejudice the lien of the attorney for services rendered in the procurement of such judgment; and execution may issue, notwithstanding, for the balance due him.
2. SAME—ATTORNEY OF RECORD—ASSISTANTS.
Such lien exists, however, only in favor of the attorney of record recognized as such by the rules of the court in which he brings the suit, and its benefit does not extend to attorneys employed to advise and assist him.
3. SAME—LIEN—COLLATERAL AGREEMENT.
In the settlement of certain suits, it was agreed that the fees of the attorney for the plaintiffs should be included in the compensation to be received by him in a suit which he was to bring on behalf of the defendant therein, in case judgment should be in his favor. Judgment was duly recovered, and the attorney claimed a lien thereon for his compensation, including the fees in the former suits. *Held*, that these fees were not due in respect of the judgment recovered, and the collateral agreement under which they were to be paid created no lien on such judgment.

At Law. Audita querela sued out by William Foster, Jr., against Ammi L. Danforth. Judgment for defendant as to part, and for plaintiff as to the residue.

F. G. Swington, for plaintiff.

Charles H. Darling, for Mason and Sheldon.

WHEELER, District Judge. This is an audita querela brought to set aside an execution issued on a judgment recovered in this court by Savage & Danforth, of whom the defendant is survivor, against the plaintiff, because the judgment has been satisfied between the parties. Charles H. Mason, Esq., the attorney of record of Savage & Danforth from the beginning, asserts a lien upon the judgment for his charges and disbursements, and opposes setting aside the execution without satisfaction of his lien. William B. Sheldon, Esq., who was employed by Savage & Danforth to assist about a suit in their favor against the New York, Rutland & Montreal Railway Company upon the judgment in which the suit in which this judgment was recovered is founded, and Stewart & Wilds, of whom Charles M. Wilds, Esq., was employed, in behalf of Savage & Danforth, to assist about the trial of the latter suit, have made similar claims, all of which have, by agreement of parties, been referred to Hon. Lavant M. Read, who has made report.

That the attorney in a suit has such a lien for his charges and disbursements in that suit, which the court will protect against proceedings of the parties in avoidance of it, seems to be well settled, especially in this state. *Bac. Abr.* "Attorney," F; *Mont. Liens*, 59, 63; *Welsh v. Hole*, 1 *Doug.* 238; *Griffin v. Eyles*, 1 *H. Bl.* 122; *Machine Co. v. Boutelle*, 56 *Vt.* 570. The report shows that Mr. Mason's services in the suit were reasonably worth \$2,000, that his disbursements amounted to \$593.14, making \$2,593.14, of which he has been paid \$88.91, leaving \$2,504.23, of which \$326.43 accrued

after the settlement between the parties, for what was warrantably done, and could not have been warrantably omitted, to protect the judgment then pending on writ of error. Under these circumstances, these latter charges appear to be as recoverable, and to attach as well to the judgment, as any of them. Upon principle and authority, the execution should remain sufficiently in force for the collection of this balance by the attorney.

Mr. Mason had before prosecuted a great number of suits for laborers against Savage & Danforth, which they settled, paying him his taxable costs, and agreeing that, "if they should recover in their suit against the railway company, his fees should be sufficient to include pay for his services in said labor suits," which the report finds to have been worth \$500; and that amount is claimed, therefore, here. But the sum of \$2,000 covers all that the services in procuring this judgment were reasonably worth. Those services were not rendered in that suit, nor for Savage & Danforth in any suit, but for the laborers in suits against them. The agreement to include pay for them with the fees in the suit for Savage & Danforth is argued to have been a mere mode of fixing compensation for services in that suit. It was, however, in reality, a mode of providing compensation for services done for the laborers by adding it to that for services in the suit. The right to charge for those services depends wholly upon the collateral agreement of Savage & Danforth, which could not make what was wholly foreign to that suit a charge upon the judgment. A lien on a judgment extends only to services and disbursements in that suit, although a lien on papers may extend to all services as an attorney, which, however, might not reach those assumed for others. *Machine Co. v. Boutelle*, 56 Vt. 570. Liens depend, not only upon agreement or employment, but upon possession or control. *Lickbarrow v. Mason*, 6 East, 27; *Mont. Liens*, 4. An attorney has, by virtue of his office, and of the control given him by the court, possession and control of the case of his client, which will be protected by the court, and cannot be displaced by the client without payment of his fees and disbursements in the case. *Bac. Abr. "Attorney," E*; *In re Paschal*, 10 Wall. 483. This possession and control do not appertain to counsel or attorneys employed to advise and assist, as Mr. Sheldon and Mr. Wilds were; but only to the attorney of record bringing the suit, as recognized by the rules and practice of the court to be such, while he so continues, or to another substituted in that place. They have not the possession and control necessary for upholding a lien, as he has, but must depend upon those who employ them for their pay. The question in cases like this is not whether, or how much, they should be paid, but whether they have a lien paramount to the right of the party. Here, however, the parties have stipulated that the judgment shall include \$600 for Stewart & Wilds, making \$3,104.23, for which the judgment and execution are to stand. Judgment for defendant as to \$3,104.23 of judgment and execution, with costs, and for the plaintiff that the balance be set aside, without costs.

BOWDEN et al. v. BURNHAM et al.

BARNES et al. v. SAME.

(Circuit Court of Appeals, Eighth Circuit. January 29, 1894.)

Nos. 273 and 274.

1. REVIEW ON ERROR—TRIAL TO COURT—GENERAL FINDINGS.

When the case is tried to the court without a jury, a general finding has the same effect as the verdict of a jury; and the facts are not reviewable by bill of exceptions, or in any other manner.

2. FEDERAL COURTS—STATE PRACTICE.

Federal courts may include in one attachment and suit debts due and not due, without regard to state practice in respect to such joinder. *O'Connell v. Reed*, 5 C. C. A. 586, 56 Fed. 531, followed.

3. SAME—JURISDICTION—CITIZENSHIP—AMENDMENT.

The right of amendment exists independently of any state statute, and may be exercised at any stage of the cause, even after submission, and extends to the verdict and judgment, and is as applicable to attachment suits as to any others. When a complaint is amended its legal effect is the same as though it had originally read as amended; and an amendment making the proper jurisdictional averments establishes the existence of the jurisdiction from the commencement of the suit, and not simply from the date of the amendment.

4. SAME—ASSIGNED CHOSSES IN ACTION—CITIZENSHIP OF ASSIGNORS—JURISDICTIONAL AMOUNT.

The provision of the judiciary acts that an assignee of a chose in action cannot sue in a federal court unless his assignor could have maintained the action therein refers only to the citizenship of the assignor, and not to jurisdictional amount; and an assignee of choses in action aggregating \$2,000 may maintain the suit, if his assignors were citizens of other states, although they could not have maintained separate suits, because none of their claims amounted to \$2,000.

5. ATTACHMENT—INTERVENTION—REDELIVERY BOND.

Under the Kansas statutes, (Code, § 199,) the execution by interveners, of a redelivery bond estops them from denying that the attached property belonged to the defendant in attachment, or that it was subject to the attachment.

In Error to the Circuit Court of the United States for the District of Kansas.

At Law. Action by James K. Burnham and others, doing business under the firm name of Burnham, Hanna, Munger & Co., against A. S. Bowden and R. A. Bowden, individually, and as partners under the name of Bowden Bros. An attachment was levied on defendants' property, and thereupon Barnes, Brown & Denton intervened, claiming an interest in the property as mortgagees. The issues arising on the intervention were tried with the other issues in the action, before the court, a jury having been waived, and judgment was rendered for plaintiffs. Defendants and the interveners separately brought error, and the causes were heard together. Affirmed.

C. N. Sterry, for plaintiffs in error.

W. H. Rossington, Charles Blood Smith, E. J. Dallas, H. C. Solomon, and William T. Bland, for defendants in error.

Before CALDWELL, Circuit Judge, and THAYER, District Judge.

CALDWELL, Circuit Judge. The defendants in error, Burnham, Hanna, Munger & Co., citizens of the state of Missouri, brought suit by attachment against plaintiffs in error, A. S. Bowden and R. A. Bowden, individually and as partners, citizens of Kansas, on notes and accounts for various sums, amounting in the aggregate to \$2,764.56, \$11.35 of which was due, and the balance not due. The judge made an order allowing an attachment for the aggregate sum, and the clerk issued the writ accordingly. As to some of the notes and accounts sued on, the plaintiffs sued as assignees. The original complaint failed to state the citizenship of the assignors, but an amended complaint was filed by leave of the court, which showed that the assignors were citizens of states other than Kansas. The defendants filed an answer containing a general denial, and alleging (1) that the assignment to the plaintiffs of the claims sued upon was merely colorable, and made for the purpose of giving the court jurisdiction; (2) that there was an improper joinder of defendants; (3) traversed the affidavit upon which the attachment was procured; (4) averred that the court had no jurisdiction, because the assignors of the claims sued on could not have brought suit thereon in the circuit court, the claims taken separately being less than \$2,000 in amount, and that, deducting the amount of the assigned claims, the amount in controversy was less than \$2,000; (5) that there was a misjoinder of causes of action, by uniting a claim for \$11.35, which was due, with claims amounting to over \$2,700 which were not due. The defendants also filed a motion to discharge the attachment upon the ground that the court had no jurisdiction of the action or the subject-matter, or over the property attached, and that the allegations in the affidavit upon which the attachment was granted were not true. The plaintiffs filed a replication to the answer, and thereupon, by a stipulation in writing filed with the clerk in conformity to section 649 of the Revised Statutes, a jury was waived, and all the issues in the cause submitted to the court, which found a general verdict for the plaintiffs, and rendered judgment accordingly.

The record purports to contain all the evidence, and it is said in the brief filed on behalf of the plaintiffs in error that this court can review the decision of the lower court upon the evidence, and most of the briefs of counsel on both sides are taken up with the discussion of the evidence in the case. But, upon the record before us, we cannot look into the evidence. When a case is tried by the court without a jury, a general finding of the court has the same effect as the verdict of a jury, and is conclusive in this court as to the facts. Such a finding cannot be reviewed in this court by a bill of exceptions, or in any other manner. It prevents all inquiry in this court into the special facts and conclusions of law upon which the finding rests. *Norris v. Jackson*, 9 Wall. 125; *Miller v. Insurance Co.*, 12 Wall. 285, 297; *Insurance Co. v. Fol-*
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son, 18 Wall. 237; Martinton v. Fairbanks, 112 U. S. 670, 5 Sup. Ct. 321; Boardman v. Toffey, 117 U. S. 271, 6 Sup. Ct. 734; Lehnen v. Dickson, 148 U. S. 71, 13 Sup. Ct. 481.

In Cooper v. Omohundro, 19 Wall. 65, the supreme court said:

"Where issues of fact are submitted to the circuit court, and the finding is general, nothing is open to review, * * * except the rulings of the circuit court in the progress of the trial; and the phrase, 'rulings of the court in the progress of the trial,' does not include the general finding of the circuit court, nor the conclusions of the circuit court embodied in such general finding."

In the case of Martinton v. Fairbanks, supra, the court say:

"The theory of the plaintiff in error seems to be that the general finding in this case, like a general verdict, includes questions of both law and fact, and that by excepting to the general finding he excepts to such conclusions of law as the general finding implies. But section 649, Rev. St., provides that the finding of the court, whether general or special, shall have the same effect as the verdict of a jury. The general verdict of a jury concludes mixed questions of law and fact, except so far as they may be saved by some exception which the party has taken to the ruling of the court upon a question of law. * * * The provision of the statute that the finding of the court shall have the same effect as the verdict of a jury cuts off the right to review in this case."

The objection that one of the debts sued for, amounting to \$11.35, was due, and the others not due, and that the judge's order allowing the attachment included the debt due as well as those not due, was properly overruled. O'Connell v. Reed, 5 C. C. A. 586, 56 Fed. 531.

The objection to the jurisdiction of the court is grounded on the fact that the original petition did not disclose that the assignors of the claims which the plaintiffs sued on as assignees were citizens of states other than Kansas, and the further fact that, rejecting those claims, the amount claimed by the plaintiffs was less than \$2,000. But the court very properly granted the plaintiffs leave to amend their complaint, (section 954, Rev. St. U. S.), and it was amended. Nevertheless, the plaintiff in error asserts that as the complaint, at the time the attachment was issued, did not contain the necessary jurisdictional averments, every step taken in the cause prior to the amendment was void, and that the amendment of the complaint could not impart vitality or validity to anything done before the amendment was made. This contention is wholly untenable. It is every-day practice to allow amendments of the character of those made in this case, and when they are made they have relation to the date of the filing of the complaint or the issuing of the writ or process amended. When a complaint is amended, it stands as though it had originally read as amended. The court in fact had jurisdiction of the cause from the beginning, but the complaint did not contain the requisite averments to show it. In other words, the amendment did not create or confer the jurisdiction; it only brought on the record a proper averment of a fact showing its existence from the commencement of the suit.

The right of the federal court to allow amendments under section 954 of the Revised Statutes of the United States is well set-

tled. The right exists quite independently of any state statute, and may be exercised at any stage of the cause, even after submission, and extends to the verdict and judgment, and is as applicable to attachment suits as to any others. *Tilton v. Coffield*, 93 U. S. 163; *O'Connell v. Reed*, supra; *People's Sav. Bank & Trust Co. v. Batchelder Egg-Case Co.*, 4 U. S. App. 603, 2 C. C. A. 126, and 51 Fed. 130; *Erstein v. Rothschild*, 22 Fed. 61; *Bamberger v. Terry*, 103 U. S. 40; *Dow v. Humbert*, 91 U. S. 294, 297; *Construction Co. v. Seymour*, Id. 646, 655; *Hardin v. Boyd*, 113 U. S. 756, 5 Sup. Ct. 771; *Tiernan's Ex'rs v. Woodruff*, 5 McLean, 135; *Parks v. Turner*, 12 How. 39, 46; *Stockton v. Bishop*, 4 How. 155, 168; *Swatzel v. Arnold*, 1 Woolw. 383.

In *Roach v. Hulings*, 16 Pet. 319, the court say, "Both the verdict and judgment are within the terms and intent of the statute, and ought to be protected thereby;" and in *Shaw v. Railroad Co.*, 101 U. S. 557, 567, the court say, "As the verdict was amendable in the court below, we will regard the amendment as made."

It is said the court did not have jurisdiction for the further reason that the several assignors of the claims assigned to the plaintiffs could not have brought suit thereon in the circuit court, because the claim of each was less than \$2,000 in amount.

The act of congress provides that the circuit court shall not "have cognizance of any suit * * * to recover the contents of any note or other chose in action in favor of any assignee * * * unless said suit might have been prosecuted in such court to recover the contents if no assignment had been made." Act Aug. 13, 1888, (25 Stat. 433, § 1.) The prior acts of congress regulating the jurisdiction of the circuit court contained substantially the same provision, and it has been the uniform holding in the circuits that the clause of the section we have quoted has relation to the citizenship of the assignor, and not to the amount of the note or other chose in action assigned. The essential requirement of this clause of the statute is satisfied when the citizenship of the assignor is such that he could have maintained a suit against the debtor in the circuit court.

When the plaintiffs had acquired, in good faith, from citizens of states other than the state of which the defendants were citizens, claims amounting in the aggregate to \$2,000, they had a right to sue the defendants on all of such claims in one action in the circuit court, although no one of the claims amounted to \$2,000. The requisite amount and the citizenship necessary to confer the jurisdiction are united in the plaintiffs; and the jurisdiction is not affected by the fact that the several assignors of the claims could not have maintained separate suits thereon, because the claim of each was less than \$2,000 in amount. *Stanley v. Board*, 15 Fed. 483; *Hammond v. Cleaveland*, 23 Fed. 1; *Bernheim v. Birnbaum*, 30 Fed. 885; *Chase v. Roller-Mills Co.*, 56 Fed. 625.

Barnes, Brown & Denton intervened in the lower court in the principal case, and claimed that they had an interest in the property attached, and were in possession of the same at the time it

was attached, as mortgagees, and moved the court to discharge the order of attachment, and the levy made thereunder. The issues arising on this interplea and the issues in the attachment suit were tried together before the court, which found generally in favor of the plaintiffs in the attachment suit, and rendered judgment accordingly. In this court there is but one record in both cases, and, as they have been argued as one cause, they will be decided together. The only error assigned on behalf of the interpleader is that, "upon and under the evidence heard upon the hearing of said motion," the court ought to have discharged the attachment. It appears that the interveners executed to the marshal a redelivery bond for the property attached. Under the statutes of Kansas this bond had the effect to estop them from denying that the property belonged to the defendant in the attachment, or that it was not subject to the attachment. Code, Kan. § 199; Sponenbarger v. Lemert, 23 Kan. 55, 62; Haxtun v. Sizer, Id. 310; Wolf v. Hahn, 28 Kan. 588; Case, Bishop & Co. v. Schultz & Hosea, 31 Kan. 96, 99, 1 Pac. 269; Peterson v. Woollen, 48 Kan. 770, 30 Pac. 128.

To avoid the legal effect of the execution of the redelivery bond, the interveners claimed they were induced to execute it by the false and fraudulent representations of the plaintiffs' agent or attorney as to its legal effect, and there is a good deal of testimony in the record relating to this issue. But the finding of the lower court upon this, as upon all other issues of fact in the case, was general; and, as we have seen, where a case is tried by the court without a jury, and its finding upon the facts is general, such finding cannot be reviewed in this court.

The judgment of the circuit court is affirmed.

CITY OF LINCOLN v. SUN VAPOR STREET-LIGHT CO. OF CANTON.

(Circuit Court of Appeals, Eighth Circuit. January 29, 1894.)

No. 328.

1. APPEAL—BRIEFS—SPECIFICATIONS OF ERROR—COURT RULES.

The provisions of the twenty-fourth rule of court, (47 Fed. xl.) prescribing the contents and manner of statement of briefs for plaintiff in error, particularly in respect to assignments and specifications of error, and the presentation of the questions to be discussed, will be enforced by the court, to the end that the vital issues in the case may be clearly presented, and immaterial and frivolous matters excluded from consideration.

2. MUNICIPAL CORPORATIONS — POWERS OF COUNCIL — CONTRACTS BY SIMPLE RESOLUTION.

A contract for lighting streets by gasoline lamps, requiring no plant but the posts and lamps, which are to remain the property of the contractors, may be made by simple resolution of council, under the general charter power to make contracts necessary to the exercise of the corporate powers, and further provisions recognizing the power to contract by resolution or order concurred in by a majority of the members elected; and provisions requiring formal ordinances in making contracts for "gas works, electric or other light works," etc., do not apply.

3. SAME—CONTRACTS—PRESUMPTIONS.

Contracts formally executed by the proper officers of the city by authority of its council, and not necessarily beyond the scope of its powers, will, in the absence of proof to the contrary, be presumed to have been made by lawful authority.

4. REVIEW ON ERROR—SUFFICIENCY OF EVIDENCE.

On a writ of error the court cannot consider a proposition that the jury violated their instructions, in that, being instructed that there could be no recovery unless the claim sued on was presented to the city clerk within three months of its accrual, they awarded a recovery, although the uncontradicted evidence was that the claim was not so presented; for this is simply a contention that the evidence was insufficient to support the verdict, which question cannot be considered in a federal appellate court, in the absence of a request for a peremptory instruction to the jury.

5. SAME—MOTION FOR NEW TRIAL—NOT REVIEWABLE.

The fact that the question of the sufficiency of the evidence to support the verdict was passed upon by the court below on a motion for a new trial will not authorize a review of its action on such motion.

In Error to the Circuit Court of the United States for the District of Nebraska. Affirmed.

N. C. Abbott, William A. Selleck, and Arthur W. Lane, for plaintiff in error.

A. J. Sawyer, N. Z. Snell, and A. L. Frost, for defendant in error.

Before CALDWELL and SANBORN, Circuit Judges, and THAYER, District Judge.

SANBORN, Circuit Judge. The city of Lincoln, Neb., the plaintiff in error, insists that the circuit court for the district of Nebraska erred in rendering judgment against it for damages for the breach of a contract between that city and the Sun Vapor Street-Light Company of Canton, Ohio, the defendant in error. The contract was for lighting the city of Lincoln. The case was tried to a jury, and the judgment is upon the verdict. In this court it was not argued orally, but was submitted on briefs. When the writ of error was sued out, counsel for the city assigned 21 errors.

The twenty-fourth rule of this court provides that the brief of the plaintiff in error in this court "shall contain, in order here stated:

"(1) A concise abstract or statement of the case, presenting succinctly the questions involved, and the manner in which they are raised.

"(2) A specification of the errors relied upon which, in cases brought up by writ of error, shall set out separately and particularly each error asserted and intended to be urged; and in cases brought up by appeal the specification shall state, as particularly as may be, in what the decree is alleged to be erroneous. When the error alleged is to the admission or to the rejection of evidence, the specification shall quote the full substance of the evidence admitted or rejected. When the error alleged is to the charge of the court, the specification shall set out the part referred to totidem verbis, whether it be in instructions given or in instructions refused. When the error alleged is to a ruling upon the report of a master, the specification shall state the exception to the report and the action of the court upon it.

"(3) A brief of the argument, exhibiting a clear statement of the points of law or fact to be discussed, with a reference to the pages of the record and the authorities relied upon in support of each point. When a statute of a state is cited, so much thereof as may be deemed necessary to the decision of the case shall be printed at length. * * *

"(4) When there is no assignment of errors, as required by section 997 of the Revised Statutes, counsel will not be heard, except at the request of the court; and errors not specified according to this rule will be disregarded; but the court, at its option, may notice a plain error not assigned or specified." 47 Fed. xi.

The entire rule is a copy of the twenty-first rule of the supreme court. 3 Sup. Ct. xii. Only the portion of it material in this case is quoted here. In our opinion, the strict and careful observance of this rule directs the attention of counsel and the court to the merits of the case presented, to the vital questions at issue, and excludes from their consideration frivolous and immaterial questions. If the rule is observed, the arguments of counsel and the consideration of the court are concentrated upon the important questions in controversy, instead of being scattered and dissipated by the argument and consideration of numerous side issues, that, if at all material, are generally governed by the decision of the main questions, and in this way a just result is more speedily and certainly attained. It often occurs that, through abundance of caution, counsel assign many errors, when they obtain their writ of error, which they find it entirely unnecessary to refer to, and themselves abandon upon reflection, and after an examination of the authorities upon which they intend to rely in the presentation of their case to this court. Every gentleman of the bar understands and appreciates the necessity of concentrating and confining his own attention and investigation, as well as the attention and consideration of the court, to the crucial questions in his case. This rule enables him to accomplish this result after he has carefully examined the authorities and considered the reasons which support his positions, and when he is best prepared to select the errors he deems of importance. The rule should be carefully observed.

The brief of counsel for the plaintiff in error contains 23 printed pages. The record contains pleadings, evidence, instructions given and instructions refused, the verdict, judgment, assignment of errors, and writ of error, and covers 62 printed pages. No specification of the errors relied on which sets out separately or particularly each error asserted and intended to be urged in a separate subdivision of the brief is found. After the statement of the case, and before the argument, the following statement appears, which is the nearest approach to such a specification found in this brief:

"In discussing the law of this case we desire to urge the following points, on each of which we think the record shows that reversible error was committed in the trial court:

"(1) That under the law of the state governing the city it was necessary for the city, by its proper officers, to have first passed an ordinance authorizing such a contract before the contract could have been entered into by the city officers, and there could be no ratification of a contract made by the officers of a city without authority. The contract being void, no ratification was possible.

"(2) That before any valid and binding contract can be made by city officers, it is necessary that an appropriation shall first have been made to meet the expenses incurred, or to be incurred, under such contract.

"(3) That, in order to maintain a suit for unliquidated damages against the

city, the plaintiff must have first filed with the city clerk a statement of his claim, giving his full name, the time, place, nature, circumstance, and cause of injury or damage complained of, and that such statement must have been filed within three months of the time when his cause of action accrued.

"(4) That the verdict is contrary to, and in direct violation of, the instructions of the court as given to the jury."

Whether the reversible error here complained of was in the admission or rejection of evidence, or in the charge of the court, does not appear from this specification, nor does the substance of any evidence admitted or rejected, or any portion of the charge of the court, appear from it, nor is there any reference to the pages of the record where any of this may be found. Argument follows the statement we have quoted. But there is only one reference in the entire brief to any page of the record in support of any of the assertions or points contained in it, and that is to page 161, while the entire record contains but 62 pages. The rule declares that "errors not specified according to this rule will be disregarded;" and it is the intention of this court to enforce this rule. This is the first case in which we have so sharply called attention to it, and, that no injustice may be done, we have carefully read this record, considered the four points urged in the statement in this brief, and are satisfied that neither of them can be sustained, for the following reasons:

1. The contract in question was in writing. It was formally signed by the mayor on behalf of the city, and sealed with the corporate seal, May 12, 1890. It was accepted and approved by a motion passed by the city council September 29, 1890, and for 14 months the city was lighted by the company under this contract, and its monthly bills for the light were paid by the city without objection. The plaintiff in error pleaded and proved that no ordinance was passed by the city council authorizing or ratifying this contract. Was the contract, therefore, void? The provisions of the statutes of Nebraska material to the determination of this question are:

"Each city governed by the provisions of this act shall be a body corporate and politic, and shall have powers: * * * Fourth. To make all contracts, and to do all other acts in relation to the property and concerns of the city necessary to the exercise of its corporate powers." Comp. St. Neb. 1889, c. 13a, § 9.

"On the passage or adoption of every resolution or order to enter into a contract, or accepting of work done under contract, by the mayor or council, the yeas and nays shall be called and recorded, and to pass or adopt any by-laws, ordinance, or any such resolution, or order, a concurrence of a majority of the whole number of members elected to the council shall be required." Id. § 33.

"All ordinances and resolutions or orders for the appropriation or payment of money shall require for their passage or adoption the concurrence of a majority of all members elected to the council. Ordinances of a general or permanent nature shall be fully and distinctly read on three different days, unless," etc. Id. § 43.

"In addition to the powers herein granted, cities governed under the provisions of this act shall have power by ordinances: * * * XII. To make contracts with and authorize any person, company or association, to erect gas

works, electric or other light works, in said city, and give such persons, company or association the privilege of furnishing light for the streets, lanes and alleys of said city, for any length of time not exceeding five years." Id. § 67.

The contract before us provides for lighting the city by gasoline street lamps for one year, with a privilege to the city of extending the term of the contract, from year to year, for three years more. In order to carry out this contract it was not necessary to erect any light works of a permanent character. Nothing was required but the gasoline lamps and their posts, and the contract provided that these should remain the property of the company after the expiration of its term. The same number of votes was required to authorize or ratify this contract, or to accept or pay for any service rendered under it, by resolution or motion in the city council, that would have been required to pass an ordinance directing its execution. The power to enter into contracts for lighting its streets is one of the ordinary or incidental corporate powers of a populous city. It is necessary for it to make such contracts to properly exercise its corporate powers. This power was clearly granted to the plaintiff in error by the provisions of its charter found in sections 9, 33, and 43, *supra*, without the grant of additional powers contained in the twelfth subdivision of section 67. The contracts referred to in that subdivision undoubtedly relate to gas works, electric-light works, and other plants of a much more permanent and extensive character than gasoline lamps and their posts, and in our opinion the city was fully authorized to make and to ratify the contract in question by the motion passed by its council.

2. The third defense pleaded in the answer was that no appropriation had been made to meet the expense incurred by this contract at the time it was executed; but no evidence was offered to sustain this plea. It is therefore unnecessary to consider it. It was within the scope of the general powers of the city to make a contract for lighting its streets. If the contract was void because the city failed to make the necessary appropriation for it, it was so because the city itself failed to exercise its power in a lawful manner; and this was an affirmative defense. The contract, signed by the proper officers of the city, and sealed with the corporate seal, the motion passed by the city council approving and ratifying it, and the fact that the company had placed its lamps and posts in the city streets, lighted them, and received compensation therefor from the city, under the contract, for 14 months, without objection to its validity, are at least presumptive evidence that the contract was made in a lawful manner, and the powers of the city properly exercised. A contract of a corporation formally executed by its proper officers by authority of its governing board, and not in itself necessarily beyond the scope of its powers, will, in the absence of proof to the contrary, be presumed to have been made by lawful authority. Acts done by the corporation which presuppose the existence of other acts to make them legally operative are presumptive proofs of the latter. *Lincoln v. Iron Co.*, 103 U. S. 412, 416; *Bank v. Dandridge*,

12 Wheat. 64, 70; The Omaha Bridge Cases, 10 U. S. App. 98, 189, 2 C. C. A. 174, 240, 51 Fed. 309, and cases cited; Union Water Co. v. Murphy's Flat Fluming Co., 22 Cal. 620, 629.

3. The third point urged is that the company must have filed a statement of its claim with the city clerk within three months after it accrued, in order to maintain its action. The court so instructed the jury, and a careful perusal of the 21 supposed errors assigned when the writ was issued discloses none which challenges any ruling of the court upon this question.

4. The fourth point urged is that the verdict was in direct violation of the instructions given by the court to the jury. The contention of the counsel for the city here rests upon the proposition that the court instructed the jury that the company could not recover unless it proved that it had filed the statement of its claim with the city clerk within three months of its accrual, and that the uncontradicted evidence was that it had not done so; in other words, the point is that the evidence was not sufficient to sustain the verdict. If the city wished to test, by writ of error in this court, the sufficiency of the evidence to sustain a verdict for the company, it should have requested the court below, at the close of the evidence, to peremptorily instruct the jury to return a verdict in defendant's favor. *Village of Alexandria v. Stabler*, 4 U. S. App. 324, 1 C. C. A. 616, 50 Fed. 689; *Railroad Co. v. Hawthorne*, 144 U. S. 202, 12 Sup. Ct. 591. It did not do this, and the sufficiency of the evidence cannot be considered here. In an action at law brought here by writ of error for review, this is a court for the correction of the errors of the court below solely; it is not a court for the correction of the mistakes of the jury, or for the retrial of issues of fact which they have determined with the consent of the litigants. In order to obtain a review of any question by writ of error in this court it must appear that the court below decided that very question, for there can be no review of that which has never been passed upon. In this case the city consented to the submission of the evidence to the jury, and requested the general instruction on this subject which was given by the court. The court below was not requested to decide, and did not determine, whether or not there was sufficient evidence to warrant a verdict before it was rendered, and hence it could not have committed any error in this regard, and there is nothing here for us to consider.

It is true that the question of the sufficiency of the evidence was subsequently submitted to the court below on a motion for a new trial; but the action of the court upon that motion was discretionary, and is not reviewable in this court. *McClellan v. Pyeatt*, 4 U. S. App. 319, 323, 1 C. C. A. 613, 50 Fed. 686; *Village of Alexandria v. Stabler*, supra; *Railroad Co. v. Howard*, 4 U. S. App. 202, 1 C. C. A. 229, 49 Fed. 206; *Mining Co. v. Fullerton*, 58 Fed. 521.

The result is that there was no substantial error in the trial of this case, and no error whatever has been specified according to the rules of this court. The judgment of the circuit court is accordingly affirmed, with costs.

UNITED STATES v. BACHE et al.

(Circuit Court of Appeals, Second Circuit. February 9, 1894.)

No. 51.

CUSTOMS DUTIES—CLASSIFICATION—BREAKAGE OF GLASS IN TRANSIT.

Where window glass is broken in transit, so that part of it is useless except for remanufacture, the broken part is not admissible, under paragraph 590 of the free list, as broken glass, but the whole is dutiable as window glass, unless there is an abandonment to the government, under section 23 of the act of June 10, 1890. 54 Fed. 371, reversed.

Appeal from the Circuit Court of the United States for the Southern District of New York.

Application by Semon Bache & Co. for a review of a decision of the board of general appraisers sustaining the action of the collector in the classification for duty of certain glass imported by them. The circuit court reversed the decision of the board. 54 Fed. 371. The United States appeal. Reversed.

Edward Mitchell, U. S. Atty., and James T. Van Rensselaer, Asst. U. S. Atty.

W. Wickham Smith, (Charles Curie and David Ives Mackie, on the brief,) for appellees.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

SHIPMAN, Circuit Judge. Semon Bache & Co. imported from Europe into the port of New York, both before and after October 6, 1890, sundry invoices of glass, which were purchased in a sound condition, but a portion of which suffered damage by breakage during the voyage and before arrival in this country. This appeal relates only to that part of the glass which was imported after the tariff act of October 1, 1890, went into effect.

The collector assessed duty thereon as "common window glass," under paragraph 112 of that act, in accordance with the size as stated in the invoice. Against this classification the importers protested, upon the ground that upon the voyage of importation "considerable quantities of this glass became broken into pieces which could not be cut for use, and were, at the time of their arrival in this country, fit only to be remanufactured, and were, therefore, exempt from duty by virtue" of paragraph 590 of the same act, which included in the free list "glass, broken and old glass, which cannot be cut for use, and fit only to be remanufactured."

The board of general appraisers found the following facts:

"(1) The merchandise consists of window, cylinder, and other kinds of glass, of the particular description named in the several invoices and entries, contained in cases or packages, marked and numbered as shown by the accompanying papers in the appended list of cases.

"(2) A part of said merchandise was imported under the new tariff act, and since October 6, 1890, and a part of it under the tariff act of March 3, 1883, prior to the time when the present tariff law went into effect. But all of the merchandise was imported after August 1, 1890, when the act of June 10, 1890, known as the 'Customs Administrative Act,' went into effect.

"(3) Said glass was purchased in a sound and unbroken condition in the markets of the country whence exported, and a considerable quantity of it was damaged by being broken during the voyage, and before arrival at the port of New York, in such manner as to be unfit for any other use than to be remanufactured.

"(4) The importers in each case appeared before the board of general appraisers, and offered to produce evidence showing the amount of damage done to each package or case, and this evidence was held by the board to be irrelevant, and was excluded on the ground that allowances for damage of the kind under consideration were abolished by section 23 of said act of June 10, 1890.

"(5) There was no evidence of any offer on the part of the importers in any case to abandon any portion of the merchandise to the government, and we accordingly find there was no such offer."

The board sustained the action of the collector upon the ground that claims for the reduction of duties by reason of damage, and not total loss, which occurred in transit, were governed by section 23 of the act of June 10, 1890, commonly known as the "Customs Administrative Act," and that this section prohibits the board from taking action upon such claims. The circuit court, upon appeal, reversed the decision of the board of general appraisers.

The theory of the importers, which was sustained by the circuit court, is that those goods only are subject to duty which are imported,—that is, brought into this country; that in this case a portion of the invoiced goods had ceased to exist. As stated by the circuit court:

"This was no longer window glass, sixteen by twenty-four inches square. In its place was a quantity of broken glass. The character of the merchandise was entirely changed during the voyage. For tariff purposes, it was different merchandise. The glass schedule no longer described it. The language of the free list covered it with perfect accuracy."

The question in the case cannot be fully presented without a statement of the statutory system, since 1799, in regard to rebates of duties on account of damage to imported merchandise in transit. Section 2927 of the Revised Statutes, which was a substantial reproduction of a section of the act of 1799, is as follows:

"In respect to articles that have been damaged during the voyage, whether subject to a duty ad valorem, or chargeable with a specific duty, either by number, weight, or measure, the appraisers shall ascertain and certify to what rate or percentage the merchandise is damaged, and the rate of percentage of damage, so ascertained and certified, shall be deducted from the original amount, subject to a duty ad valorem, or from the actual or original number, weight, or measure, on which specific duties would have been computed.

"No allowance, however, for the damage on any merchandise, that has been entered, and on which the duties have been paid or secured to be paid, and for which a permit has been granted to the owner or consignee thereof, and which may on examining the same prove to be damaged, shall be made, unless proof to ascertain such damage shall be lodged in the custom house of the port where such merchandise has been landed, within ten days after the landing of such merchandise."

Had this section been in existence at the date of the importation, it would hardly be contended that the duty upon glass damaged during the voyage by breakage, should not be estimated in accordance with its provisions, rather than by the provision in the

free list in regard to "glass broken," which had been in existence since 1857. The statutory system applicable to damaged merchandise in transit had been a continuous, and was a general, one, which made complete allowances for such damage, but required proof of the claims to be made and lodged within a specified time in the customhouse of the port where such merchandise was landed.

It could hardly be supposed that allowances for broken glass were not to be regulated according to the general system, which had existed for 90 years, unless specially excepted; and the provision placing upon the free list importations of broken glass, i. e. of glass invoiced as such, was not intended to create a special exception. By section 23 of the act of June 10, 1890, the following provision was made in regard to the subject of duties upon damaged goods:

"That no allowance for damage to goods, wares, and merchandise imported into the United States shall hereafter be made in the estimation and liquidation of duties thereon; but the importer thereof may, within ten days after entry, abandon to the United States all or any portion of goods, wares and merchandise included in any invoice, and be relieved from the payment of the duties on the portion so abandoned: provided, that the portion so abandoned shall amount to ten per centum or over of the total value or quantity of the invoice; and the property so abandoned shall be sold by public auction or otherwise disposed of for the account and credit of the United States under such regulations as the secretary of the treasury may prescribe."

This section prohibited allowance for damage, unless, within a specified time, the importer should abandon to the United States his damaged goods, in which event he would be relieved from payment of duties on the portion so abandoned, provided it amounted to 10 per centum or over of the total value or quantity of the invoice. This provision is also general. It prescribed the prerequisites for damage allowance, and is applicable to all articles, except those which are or may be specially excepted, as is now the case, with respect to damage upon imported wines and liquors, by the provisions of paragraph 336 of the act of October 1, 1890. This modification or alteration of section 2927 does not change the fact that thus far, under the tariff acts, allowances for damage have been regulated by a general system. It is not to be supposed that it was the intention of the legislature to take one article out of the general system, unless such intention is clearly manifest. The mere statutory provision by which imported broken glass is duty free does not, in our opinion, modify the system in respect to the article of damaged glass.

The cases of *Marriott v. Brune*, 9 How. 619, *Lawrence v. Caswell*, 13 How. 488, and *U. S. v. Nash*, 4 Cliff. 107, in which it was held that, if the quantity or the weight stated in the invoice has been diminished by leakage or by loss on the voyage, the duty is chargeable on the quantity or the weight actually imported, are not conclusive with respect to the duties to be imposed upon damaged goods, where the allowance for damage is especially regulated by statute.

The decision of the circuit court is reversed.

In re ROSENWALD et al.

(Circuit Court, S. D. New York. January 6, 1894.)

CUSTOMS DUTIES—CLASSIFICATION — SUMATRA LEAF TOBACCO UNSTEMMED—EXAMINATION OF.

Certain Sumatra leaf tobacco, unstemmed, imported from Bremen, Germany, June 25, 1890, consisting of fifty-four bales, packed in the usual way, and divided into seven plantation lots, of which merchandise nine bales, being one in six of the whole importation, and in two instances two bales from each plantation lot, were examined by the United States examiner and appraiser at the port of New York by opening each of the nine representative bales, and drawing from different parts of each bale ten "hands" of the tobacco, carefully examining such hands as to fineness of texture and the quality of the tobacco, weighing each of such hands to ascertain where the leaves of the tobacco ran more than 100 to the pound or less, the classification of the merchandise by the collector and the liquidation of the entry being based upon the percentages of tobacco showing more or less than 100 leaves to the pound as applied to the sample bale, and also to the entire plantation lot represented by such bale or bales. All the percentages of tobacco thus shown to be of leaves requiring more than 100 to weigh a pound were assessed for duty by the collector at 75 cents per pound, under the provisions of Schedule F (Tariff Ind., New, par. 246) of the tariff act of March 3, 1883, and all the percentages showing leaves running less than 100 to the pound were assessed for duty at 35 cents per pound, under the same schedule and act, (paragraph 247.) Claimed by the importers' protest that there had been no legal examination of the tobacco sufficient to show that any part thereof was properly dutiable at 75 cents per pound, and that, consequently, all of the importation should bear a duty of only 35 cents per pound, under Tariff Ind., New, par. 247. The board of United States general appraisers affirmed the classification by the collector. *Held*, that the decision of the collector and of the board of general appraisers was erroneous, and that the examination of the tobacco was not sufficient to show any bale thereof to be dutiable at 75 cents per pound, and that, as a consequence, the whole of the importation should be subject to duty only at 35 cents per pound.

At Law.

Appeal by the importers from a decision of the board of United States general appraisers affirming the decision of the collector in the classification for customs duties of certain Sumatra leaf tobacco, unstemmed, imported into the port of New York, June 25, 1890. The examination of the tobacco by the United States examiner and appraiser was as above set forth in the syllabus to this case. The provision of the tariff act of March 3, 1883, under which the collector classified a part of the tobacco for duty, was in Schedule F, (Tariff Ind., New, par. 246,) as follows: "246. Leaf tobacco, of which eighty-five per cent. is of the requisite size and of the necessary fineness of texture to be suitable for wrappers, and of which more than one hundred leaves are required to weigh a pound, if not stemmed, seventy-five cents per pound; if stemmed, one dollar per pound." The provision under which the importers claimed in their protest was paragraph 247 of the same schedule, as follows: "247. All other tobacco in leaf, unmanufactured and not stemmed, thirty-five cents per pound." The testimony of the United States examiner was taken in the circuit court before a referee, under order of the court, and it was afterwards stipulated by counsel for the importers that all the leaves of the tobacco in the ten hands from each of the nine representative bales of tobacco examined were of the requisite size and fineness of texture to be suitable for wrappers, and that the percentages of light and heavy leaves (namely, leaves running more than 100 to the pound and less) were correctly given by the examiner. The testimony was also taken in behalf

of the government of several experienced dealers in the wholesale tobacco trade, showing that the examination made by the government officer was fully as thorough as the examination of similar unstemmed Sumatra leaf tobacco upon purchases and sales at wholesale in the trade dealing in that merchandise at the time of the passage of the tariff act of March 3, 1883, and since. The trade testimony also showed that the withdrawal of even 25 to 50 hands of tobacco from a bale, which commonly contained from 600 to 700 hands, would injure the commercial value of the bale as an original package. It appeared also that there was no transaction known to the tobacco trade where the character of the merchandise depended upon 85 per cent. thereof having certain requisites of size, fineness, and weight. No testimony was offered either before the board of general appraisers or in the circuit court in support of the importers' contention. On the trial in the circuit court it was contended by the United States attorney that the record and evidence showed that all the requirements of law in relation to the examination and inspection of this merchandise had been complied with; that every bale of the tobacco, upon entry, had been separately weighed by the United States weighers, and returns of such weight, giving the gross and tare, had been regularly made by such weighers; that more than one package in ten of the merchandise, namely one package in six, had been designated for examination by the collector, under section 2901 of the United States Revised Statutes, and was a full compliance with that provision of the law, the sending of any further packages of the merchandise for examination resting with in the sound discretion of the collector, and the exercise of such discretion by an officer of the government being presumably correct, (citing *Arthur v. Unkart*, 96 U. S. 121;) that the examination of the tobacco by the examiner in drawing ten hands from each of the nine representative bales, as shown by the testimony and admitted by the stipulation, was thorough, as far as the hands and the leaves examined by him were concerned, and that the percentages of weights returned by the examiner in accordance with a table prepared for the use of such officers by the customs department of the government were correctly and truly given; that such examination of the merchandise, being equivalent to that usually made in trade, was sufficient to indicate the character of all the tobacco in the importation, (citing *Sampson v. Peaslee*, 20 How. 571; *Yznaga v. Peaslee*, 1 Cliff. 493; article 449, treasury regulations of 1884.) It was also claimed that the sufficiency of the examination of this tobacco was res adjudicata in this court, (In re *Blumlein*, 49 Fed. 232, per *Wheeler, J.*;) and that such decision of Judge Wheeler had not been reversed by the circuit court of appeals, which affirmed the judgment of the circuit court in that case, and did not overrule his finding that the examination of the tobacco was sufficient. *U. S. v. Blumlein*, 5 C. C. A. 142, 55 Fed. 383. The United States attorney also cited numerous decisions of the treasury department, running back a number of years, showing the continuous practice of determining the dutiable characteristics of merchandise by samples of representative packages, notably treasury decisions, synopsis 8299, as to the requisite examination of leaf tobacco; synopsis 3579, as to the tare of sugar; synopsis 4932, as to the tare on bales of hay; synopsis 5284, that Sumatra tobacco was to be allowed schedule tare because of easy damage to the leaf; synopsis 2658, weight of cigars to be ascertained by weighing two boxes in ten; synopsis 1664, tare by percentage on sugar in kegs; synopsis 3579, tare by representative packages; treasury regulations of 1884, art. 1467, as to determining weight of railroad iron from average; also section 2915, Rev. St. U. S., as to samples of packages of sugar in order to ascertain the true quality thereof; and article 979 of treasury regulations of 1884, relating to the sampling of sugar for examination and classification,—and it was argued that if the classification of sugar under the tariff act of March 3, 1883, which provided for different specific rates on sugars of different standards, covering a wider range of duties than that provided for leaf tobacco, could be determined from samples of at least one in ten, the determination as to the character and weight of leaf tobacco could be ascertained in like manner from a practical and commercial examination of not less than one package in ten. It was contended that the government was entitled to duties at the rate of 75 cents per pound on all of the tobacco

contained in three of the plantation lots, where the examination of the sample bale indicated that 85 per cent. or more of the tobacco was of the requisite size, fineness, and weight to be suitable for wrappers, under the provision of said Tariff Ind. (New,) par. 246. In behalf of the importers it was argued that the examination was entirely insufficient and illegal, and that all of the tobacco was dutiable only at 35 cents per pound.

Edward Mitchell, U. S. Atty., and James T. Van Rensselaer, Asst. U. S. Atty.

Curie, Smith & Mackie, (William Wickham Smith, of counsel,) for importers.

LACOMBE, Circuit Judge. I am not satisfied that the examination given was sufficient to answer the requirements of the statute. It should be such as to determine whether the tobacco has or has not the distinctive features which place it in one or other of the paragraphs imposing duty. About one-sixtieth of each bale was examined, with this result:

Plantation Lots.	Length.	Color.	Mks.	Bales Ordered for Examination.	Percentage.	
					35c.	75c.
2578/2589	Deli	Lankat	SL 1	2574	70	80
"		"	"	2584	50	70
2590/2598		"	SS 1	2590	10	90
2594/2596		"	SSL 1	2596	30	70
2597/2600	Deli	"	B 1	2600	20	80
2601/2612		my/a	S 1	2602	80	20
"		"	"	2612	10	90
2618/2616		"	SL 1	2616		100
2617/2626		"	SS 1	2626	10	90

There appear here too great variances, even in the tobacco from the same plantation, to warrant the assumption that the other 59-60 of the examined bale, as well as the contents of the unexamined bales, contain tobacco of both grades in the proportions found to exist in the trifling amount examined. It will not do to say that the examination was such as a merchant makes when buying tobacco, because the merchant in that case is looking only for such distinguishing characteristics as are known to trade. The statute has prescribed a duty test for tobacco wholly unknown to trade, and, to determine whether imported tobacco possesses the noncommercial characteristics which subject it to a higher duty, the examination should be full enough to insure accuracy, which this examination seems to have failed to do.

Decision of the appraisers reversed. All should be reliquidated at 35 cents, as the government has not by competent proof shown that any single bale of it was 75-cent tobacco.

HILLS et al. v. ERHARDT, Collector.

(Circuit Court, S. D. New York. October 10, 1893.)

CUSTOMS DUTIES—CLASSIFICATION—"CANDIED CITRON."

Candied citron, being the rind or peel of the citron fruit prepared by pickling in strong brine, then cutting the fruit into halves or quarters, and soaking in fresh water to extract the brine, afterwards boiling in sugar syrup until the fruit is thoroughly saturated with the sugar, thereafter drying the same until the syrup has drained off, and then glazing the fruit with another preparation of sugar, the article when so finished and imported being in a soft and semitransparent condition, and packed in drums or boxes,—held properly dutiable as classified by the defendant, collector of customs at the port of New York, as "fruit in sugar," at 35 per cent. ad valorem, under Schedule G of the tariff act of March 3, 1883, (Tariff Ind., New, par. 302,) providing for "comfits, sweetmeats, or fruits preserved in sugar, spirits, syrup, or molasses, not otherwise specified or provided for in this act, and jellies of all kinds, thirty-five per centum ad valorem," and not duty free as "dried fruit," under the provision of the free list of said tariff act, (Tariff Ind., New, par. 704,) which is as follows: "Fruits, green, ripe, or dried, not specially enumerated or provided for in this act."

At Law.

Action brought by the plaintiffs, importers, against the defendant, collector of customs at the port of New York, to recover the amount of an alleged overpayment of duties on certain merchandise imported by the plaintiffs during the months of May, July, and September, 1889, which merchandise was classified for duty by the defendant collector, as "fruit in sugar," at 35 per centum ad valorem, under the provisions of Schedule G (Tariff Ind., New, par. 302) of the tariff act of March 3, 1883, which is as follows: "302. Comfits, sweetmeats, or fruits preserved in sugar, spirits, sirup, or molasses, not otherwise specified or provided for in this act, and jellies of all kinds, thirty-five per centum ad valorem." Against this classification the plaintiffs duly protested, claiming that their merchandise was duty free, as "dried fruit," under the provision of the free list of the same tariff act, (Tariff Ind., New, par. 704,) which is as follows: "704. Fruits, green, ripe, or dried, not specially enumerated or provided for in this act."

Thereafter plaintiffs duly appealed to the secretary of the treasury, who affirmed the decision of the collector. The present suit was duly commenced within the period provided by law for the recovery of the amounts of duties alleged to have been overpaid. On the trial it was shown by witnesses for the plaintiffs that the merchandise in question was prepared from the citron fruit grown in Italy; that the fruit, when gathered, was at once put into a strong pickle of brine, and kept therein often for a period of months; that, after such pickling, the fruit was cut into halves or quarters, and thoroughly soaked in fresh water, so as to entirely exclude the brine; that the next process was boiling the fruit in a syrup composed of sugar and water; that, after such boiling, the pieces of the rind or peel were placed upon shelves, so that the syrup might drain off, and leave the fruit comparatively dry; that the concluding process of manufacture was the glazing of the fruit by a further application of sugar, leaving the article in a soft, semitransparent condition, and thoroughly saturated with sugar, although none of the syrup remained in a liquid state in the packages or drums in which the merchandise was packed for the market. A number of witnesses were produced by the plaintiffs from the wholesale trade in this country dealing in this article, whose testimony tended to show that the goods were known in trade and dealt in as "candied citron" or "Leghorn citron," and were regarded as coming within the general class of "dried fruits," and designated under that class in certain well-known trade journals. Some testimony was also offered in behalf of the plaintiffs that the terms "comfits" and "sweetmeats" were restricted in trade to fruits or articles of confectionery, and did not include

the candied citron in question; also that "preserved fruits" or "fruits preserved in sugar" included in the wholesale trade only the class of articles put up in bottles or jars with liquid syrup, and in a condition to be used upon the table without further culinary or other preparation; that the "candied citron" in question was never used except as introduced into cakes, pies, or other pastries, and subject to a further process of cooking in such use.

On behalf of the defendant the testimony of several witnesses from the wholesale trade was produced, tending to show that the term "dried fruits," as understood in trade at the date of the passage of the tariff act, included properly those fruits which had been subjected only to a process of drying or dessicating either by natural or artificial heat, such as apples, peaches, plums, raisins, figs, and the like, and did not include the "candied citron" in question, which, although partially dried, was in reality a fruit which had been and was preserved by a treatment in sugar, known and generally dealt in commercially by the terms "candied citron" or "Leghorn citron;" that the terms "comfits" and "sweetmeats" had no restricted trade meaning other than the commonly understood meaning of those words as given in the dictionaries; and that the description "fruits preserved in sugar" likewise had no restricted trade meaning confining that term to any particular kind or class of fruits, the preservation of which was insured by the presence of sugar in liquid form or otherwise.

At the close of the testimony motions for a direction of a verdict were made by plaintiffs and defendant respectively, and denied by the court.

Comstock & Brown, for plaintiffs.

Edward Mitchell, U. S. Atty., and James T. Van Rensselaer, Asst. U. S. Atty., for defendant.

LACOMBE, Circuit Judge, (charging jury.) The collector of the port laid upon this article a duty of 35 per cent. The importers claim that he was wrong in so doing, and that the article should pay no duty, and in support of their contention they referred to a paragraph in the free list, (par. 704,) which reads: "Fruits, green, ripe, or dried, not specially enumerated or provided for in this act." Now, this article is a fruit, and it is dried; therefore it would be within the general designation of that paragraph, unless testimony should satisfy you that the phrase "dried fruits" had acquired some particular trade meaning, which excluded this particular article.

The first question, then, for you to determine is this: whether there is in the trade and commerce of this country which deals in articles like this such a special meaning for the phrase "dried fruits" as will exclude this citron. If you reach that conclusion, then (the article not being within the paragraph under which the plaintiffs seek to classify it) your verdict must be for the defendant. If, however, you reach the conclusion either that there is no trade meaning for the phrase "dried fruits" which excludes citron, or that there is some trade meaning to the phrase "dried fruits" which includes citron, you still have another question to pass upon. The paragraph I have read, you will notice, is qualified with a proviso. It is: "Fruits, green, ripe, or dried, not specially enumerated or provided for in this act." So, although this citron be a dried fruit in fact, although you reach the conclusion that it is also a dried fruit in commerce, if it is specially provided for elsewhere in the tariff act, then it is that special provi-

sion that we must turn to for its rate of duty. The government claims that it is provided for specially under paragraph 302, which reads: "Comfits, sweetmeats, or fruits preserved in sugar, spirits, syrup, or molasses, not otherwise specified or provided for in this act."

The second question, then, which you are to determine is this, namely, is this article within the trade meaning of that particular phrase, that particular enumeration, "comfits, sweetmeats, or fruits preserved in sugar?" If you reach the conclusion that the article is, according to the commercial understanding of terms, included within that enumeration, "comfits, sweetmeats, or fruits preserved in sugar," your verdict must be for the defendant, because that is what the collector said it was. If, on the contrary, you reach the conclusion that it is not included in the understanding of trade and commerce and among commercial men who deal in these articles in the enumeration "comfits, sweetmeats, or fruits preserved in sugar," then your verdict must be for the plaintiffs. In neither event will you concern yourselves with the amount of dollars involved, for that will be added to the verdict. Your verdict will be either for the plaintiffs or for the defendant.

The United States Attorney: I ask your honor to charge further that if the jury finds on all the testimony—

The Court: I will charge this: From the definitions which have been read here from the dictionary it is apparent that if the dictionary is the final resort to determine the meaning of the phrase of the tariff act, this enumeration of "comfits, sweetmeats, or fruits preserved in sugar" is broad enough to cover these articles; but I further charge that in the interpretation of tariff acts, and in the construction of them, the dictionary is not the final authority. Tariff acts are framed for the dealings of commercial men, and the regulations of the trade of the country; and if names and phrases have acquired a peculiar meaning in that trade and commerce, which is not the same as that of the dictionary, we are to be guided by the trade meaning, and not by the dictionary meaning.

The United States Attorney: I ask your honor to charge that the presumption is that the collector classified them properly.

The Court: I do so charge. The collector is a public officer, and the presumption is that a public officer discharges his duty. It was his duty to classify these articles correctly. The case comes into court, therefore, with that presumption, and it is for the plaintiffs to satisfy you by a fair preponderance of proof that there was some error in the collector's classification.

Verdict for defendant.

MACKIE v. ERHARDT, Collector.

(Circuit Court, S. D. New York. October 6, 1893.)

CUSTOMS DUTIES—CLASSIFICATION—"THOMPSON'S PATENT PRUNE WINE."

So-called "Thompson's Patent Prune Wine," being a compound composed principally of raisins and prunes crushed in water and fermented, to which mixture alcohol was added after fermentation, to preserve the compound from souring and spoiling, the alcohol at the time of importation varying between 14.6 and 16.28 per cent. by weight, *held* properly dutiable, as an "alcoholic compound," at two dollars per gallon for the alcohol contained therein, and 25 per cent. ad valorem under Schedule A (Tariff Ind., New, par. 103) of the tariff act of March 3, 1883, and not under section 2513, Rev. St. U. S., as amended by the said tariff act, at 20 per cent. ad valorem, as a nonenumerated manufactured article.

At Law.

Action against the collector of the port of New York to recover amount of duties alleged to have been paid in excess on importations of certain so-called "Thompson's Patent Prune Wine" entered by the plaintiff, importer, at the port of New York during the months of July, August, and October, 1889, which merchandise was assessed for duty by the defendant collector as an "alcoholic compound," and duty assessed thereon at the rate of two dollars per gallon for the alcohol contained and 25 per cent. ad valorem, under the provisions of Schedule A (Tariff Ind., New, par. 103) of the tariff act of March 3, 1883, which is as follows: "103. Alcoholic compounds, not otherwise specially enumerated or provided for, two dollars per gallon for the alcohol contained and twenty-five per centum ad valorem."

Against this classification the plaintiff duly protested, claiming the importations to be dutiable under the provisions of section 2513, Rev. St. U. S., as amended by the tariff act of March 3, 1883, at 20 per cent. ad valorem, as a nonenumerated manufactured article. The importer duly appealed to the secretary of the treasury, who affirmed the assessment of duty by the collector. From the testimony of the manufacturer, taken by deposition, it appeared that the prune wine in question was manufactured in Dublin, Ireland, by crushing raisins and prunes in water, allowing the resulting compound to ferment, drawing the liquid into casks, and depositing the same in bonded warehouse, where a certain amount of alcohol was added to the mixture by the British excise or customs officers at the cost of and on behalf of the manufacturer; that about 6 per cent. of alcohol was evolved by the fermentation of the raisins and prunes, and that this amount, together with the alcohol added by the British excise officers, was necessary to prevent the compound from further fermenting and becoming sour and unmerchantable; that the prune wine would not be a salable article without the presence of the alcohol contained therein. It also appeared from the testimony that the liquor was never used as a beverage in the nature of wine, but was employed exclusively in mellowing and aging whiskies and other liquors. On the trial it was proved by the chemist's reports furnished to the appraiser that the amount of alcohol contained in the merchandise as imported varied between 14.6 per cent. and 16.28 per cent. by weight, and by volume between 18.9 and 20 per cent. It was also shown by the testimony that this so-called "prune wine" assimilated in many essential particulars as to composition and use to the so-called "prune juice" of commerce. At the close of the testimony the United States attorney moved the court to direct a verdict in favor of the defendant, on the ground that the evidence showed the liquor to be an alcoholic compound, containing alcohol in large percentages; that there was no adjudicated case holding that any specific amount or percentage of alcohol was necessary to constitute the article an alcoholic compound; that, if not an alcoholic compound, the merchandise was dutiable by similitude to "fruit juice," under Schedule G (Tariff Ind. New, par. 301) of the tariff act

of March 3, 1883, and section 2499, Rev. St. U. S., which, however, could not be allowed in this case, inasmuch as this latter claim was not raised by the protests of the importer.

Stephen G. Clarke, for plaintiff.

Edward Mitchell, U. S. Atty., and James T. Van Rensselaer, Asst. U. S. Atty., for defendant.

LACOMBE, Circuit Judge, (orally.) The phrase "alcoholic compounds," in its ordinary signification, is sufficiently comprehensive to include these articles. I have not heard, in the case presented here, sufficient, in my judgment, to warrant the conclusion that it is used by congress in any other than its ordinary signification. It may be that these articles are otherwise specially enumerated and provided for in the act, but there is no specific testimony to that effect, nor does the protest so claim. It simply claims that they are nonenumerated articles. It stands or falls by the phraseology of paragraph 103. I think the articles are alcoholic compounds, within the meaning of that paragraph, and shall direct a verdict for the defendant.

DUFF MANUFACT'G CO. v. FORGIE.¹

(Circuit Court of Appeals, Third Circuit. January 23, 1894.)

No. 25.

1. PATENTS—LIMITATION OF CLAIMS—LIFTING JACKS.

A patent whose subject is "a lifting jack," and the claims of which are restricted by the words "in a lifting jack," cannot be extended so as to cover an adaptation of the jacking mechanism to the production of a horizontal circular motion, for the purpose of unscrewing oil-well tools. 57 Fed. 748, affirmed.

2. SAME—INFRINGEMENT—EQUIVALENTS.

A horizontal, semicircular, immovable, toothed rack bar, along which a jack is made to travel by means of the jacking mechanism for the purpose of unscrewing oil-well tools, is not the equivalent of a straight, toothed, movable lifting bar in a lifting jack.

3. SAME—LIMITATION OF CLAIM.

The Barrett patent, No. 312,316, for an improvement in lifting jacks, is restricted to a jack for lifting and not for producing horizontal circular motion. 57 Fed. 748, affirmed.

Appeal from the Circuit Court of the United States for the Western District of Pennsylvania.

In Equity. Suit by the Duff Manufacturing Company against William Forgie for infringement of patents. Decree for complainant. 57 Fed. 748. Defendant appeals. Affirmed.

James S. Kay, (Robert D. Totten, on the brief,) for appellant.

William L. Pierce, (Jos. R. Edson, on the brief,) for appellee.

Before DALLAS, Circuit Judge, and BUTLER and GREEN, District Judges.

GREEN, District Judge. The bill of complaint in this case was filed by the appellant, as complainant, to restrain an alleged in-

¹ Rehearing denied.

fringement of certain "jacking mechanisms" which it was charged had been invented by one Josiah Barrett, and for which he had obtained three letters patent. The first was granted February 17, 1885, and is numbered 312,316; the other two were granted July 14, 1891, and are numbered, respectively, 455,993 and 455,994. These letters patent all relate to "improvements in lifting jacks," and they have been duly assigned by the patentee to the complainant and appellant in this suit. The court below in determining the issues in this case, for reasons fully stated in its very exhaustive opinion, came to the conclusion that, so far as the latter two patents were concerned, the devices made and used by the defendant were infringements, but that, as to the letters patent earlier in date, the claims were by their phraseology so narrowed in meaning and restricted in application that the devices made by the defendant must be regarded as wholly outside the limit of their operation. In accordance with these conclusions a decree was had, and from so much of that decree as denied the infringement of the earlier letters patent, this appeal has been taken.

The only question, therefore, before this court is, does the mechanical device which the defendant has been manufacturing and using, and the admitted purpose of which is to screw together and to unscrew oil-well drilling tools, infringe any of the claims of patent in question, No. 312,316. This patent deals, in terms, with "lifting jacks;" and the inventor declares, in the specifications, that he has invented a certain new and useful improvement in such machines, which has for its object, and which accomplishes for the first time successfully, a continuous movement of the "lifting bar," a most material part of the jack, by up stroke or down stroke of the operating lever.

The patentee, throughout the specification of the patent and in every claim therein, invariably characterizes his invention as an improvement for a "lifting jack." There are seven distinct claims in the patent, and each one is prefaced with the words "in a lifting jack," etc. In all the claims, save one, he limits his invention still further by the use of the words "a toothed lifting bar," as descriptive of a material part of his invention. In construing these claims the court below held that they necessarily limited the improvement invented to a mechanism known as a "lifting jack,"—that is to say, a jack whose chief, if not sole, operative purpose was "to lift;" that, as the device or jack manufactured and used by the defendant was not capable of lifting, nor did it, indeed, lift vertically, but in operation rather moved or pushed horizontally only, it could not fairly be adjudged to be included within the descriptive words of the claims, and hence was not an infringement.

This position, as taken by the court below, seems to be impregnable. It is the chief office of a claim to particularize and limit the monopoly of use which is secured to the inventor by the letters patent. Within the limits which are by the claim marked out and definitely established as the scope of the invention, no one can venture to intrude without becoming a trespasser upon the exclusive

rights secured to the inventor. The very purpose of a claim is to establish the line of demarcation between a permissive and lawful use and the forbidden and unlawful use. In its scope, its operative power, its comprehensive effect, the public have no less interest than the inventor. In drafting a claim the applicant for the grant of a monopoly is directly dealing with the rights of the public, and, in such cases, strictness, rather than elasticity, of construction must obtain. The language by which the comprehensive boundaries of a claim are to be made distinctive and clear lies wholly within the selection of the inventor. He alone may choose the words to describe and particularize his invention. When chosen and used, such words must be held to be binding upon him.

Applying these elementary principles to the claims of the letters patent under consideration, the conclusion reached by the court below is inevitable. The learned judge who delivered the opinion of the court says:

"The words employed (in specification and claims) all show that the only species of mechanism, power, or application in mind was in an up and down motion, that it was adapted to a lifting jack, and that the patentee had no purpose to apply it elsewhere. There is not the remotest hint in specification or claim of its application to any other form of mechanism or variety of jack. * * * What he claimed he should be allowed, in letter and in spirit; what he did not claim, either in letter, spirit, or suggestion, he must be held to have abandoned." *Manufacturing Co. v. Forgie*, 57 Fed. 748.

And upon the finding that the device of the defendant (appellee) was, in no sense of the word, or in mechanical function, a lifting jack, there was judgment of noninfringement. This seems to be an end of this case. But on the argument of the appeal it was most strenuously contended by the counsel for appellant that, in view of the circumstances of this case, as well as of the general nomenclature and state of the art, this construction of the claims of the letters patent was too strict, and worked great injustice. The insistence was that the term "lifting jack" had lost its original restricted and specific meaning, and had taken on the broader comprehensiveness of a generic term; that, in fact, it comprehended in the art all "jacks" in which the mechanical generation and pressure of force were similar to the jack in question; that the device which the defendant had been manufacturing and using was, in very truth, the jack invented and adapted by Barrett; and that the sole alteration made by the defendant was to be found only in a change of position of the jack itself. Instead of standing upright, it was placed upon its side, and operated in that position; the result being that a "jack" technically known as a "lifting jack" became, without alteration, capable of moving or pushing horizontally.

If this contention was in thorough harmony with the facts, it would undoubtedly have great weight. If the novel use be simply a double use, infringement is not thereby escaped. But, before it be conceded that this is an example of "double use," it must be remembered it is an absolutely essential ingredient of a double use that the alleged infringing device or mechanism must be identical with the patented invention. The facts in this case seem to show

that such identity in the devices of these parties does not exist. The chief design of Barrett's invention was to obtain a continuous movement of the "lifting bar," progressively or retrogressively, by the upward or downward movement of the lever of the jack. Now the function of the "lifting bar" was to transmit force, generated by the jack, to the object which was to be lifted, or, to speak more broadly, to be moved. In the operation of the jack it became and was, indeed, quite as important as any other part of the mechanism. The mechanism of the jack, other than the bar, is confined within a fixed structure and practically immovable. The lifting bar alone, by its steady progressive pressure against the object to be lifted or moved, accomplished the desired result. To maintain constant pressure against a moving object the bar must necessarily be movable; and it was to invest this movable lifting bar with a retrograde, as well as an advancing, action that the somewhat complicated combination of lifting bar with pivotal levers, prawns, spring-actuated levers, and movable plates was made by Barrett. Eliminate from this mechanical combination the movable "lifting bar," and the invention of Barrett would be stripped of efficiency and power. So far as accomplishing the work it was intended to do, it would be a complete failure.

Now it cannot be denied that in the mechanical device manufactured and used by the defendant there is no "lifting bar;" but the jack, wanting a lifting bar, is itself movable. When in operation it moves or travels upon a fixed and permanent rack bar. This rack bar is semicircular in shape and, viewed sectionally, not unlike the rail known as a T rail. Its purpose is to afford to the prawns of the operating lever the support sufficient to generate power, actuating the jack itself; and as it was necessary in the appellant's jack that the lifting bar should, to accomplish its work, be movable, equally is it necessary in the defendant's device that the rack bar, to fulfill its part in the scheme, should be immovable. The aim of the one was readily to communicate force; the design of the other was positively to resist force. From this brief description it is apparent that in the defendant's device there is wholly wanting the "lifting bar" of the appellant's jack. Nor is it understood that this is seriously disputed, but the insistence is that the rack bar of the defendant's device is simply an equivalent for the "lifting bar" of the appellant's jack.

We cannot assent to this proposition. An equivalent, in the law of patents, is defined to be "any act or substance which is known in the arts as a proper substitute for some other act or substance, employed already as an element in an invention, whose substitution for that other act or substance does not in any manner vary the idea of means. It possesses three characteristics: (1) It must be capable of performing the same office in the invention as the act or substance whose place it supplies; (2) it must relate to the form of embodiment alone, and not affect in any degree the idea of means; (3) it must have been known in the arts, at the date of the patent, as endowed with this capability." 1 Rob. Pat. § 247. Compared

with the lifting bar of Barrett's jack, the rack bar of the defendant's device possesses neither one of these necessary characteristics. It cannot perform the office of the lifting bar; it does affect and vary the idea of means; it was not known in the arts, at the date of the patent, as an equivalent for the lifting bar. Certainly, it would have demanded an especially vivid imagination to find for a toothed lifting bar, necessarily movable and perfectly straight, whose purpose it was to transmit power when generated, an equivalent in a rack bar, semicircular in shape, permanently immovable, whose purpose it was to aid in the generation of power, by its resistance to force.

It is impossible, then, to yield assent to the proposition that the two bars are simply equivalents. It follows that the device of the defendant is not the device protected by the letters patent under consideration, and consequently the charge of infringement fails. The result is that, upon both grounds discussed, the judgment below is affirmed.

LAMSON CASH RY. CO. v. GODEHARD et al.

(Circuit Court of Appeals, Eighth Circuit. January 29, 1894.)

No. 283.

1. PATENTS—LIMITATION OF CLAIMS—CASH CARRIERS.

In a patent for a store-service apparatus, a claim for "a way or ways," combined with described carriers and propelling devices, must be limited to a way consisting of two or more wires, when the patentee states in the specifications that he uses "two or more fine wires," to avoid enumerated objections to a single wire, and the state of the art is such as to preclude a broad interpretation of the claim.

2. SAME.

This limitation cannot be removed by any inference as to a broader intent in the use of the words "way or ways" which may arise from the fact that the limitation is expressly incorporated into a subsequent claim, when the latter differs in other respects from the one in question.

3. SAME—INFRINGEMENT.

The Hayden patent, No. 303,006, for a store-service apparatus, is limited to a way composed of two or more wires, and is not infringed by a device made under the McCormick patent, No. 399,428.

Appeal from the Circuit Court of the United States for the District of Kansas.

In Equity. Suit by the Lamson Cash Railway Company against Herman Godehard and Ollie Stevenson for infringement of patent. Bill dismissed. Complainant appeals. Affirmed.

J. Steuart Rusk, (Edwin C. Gilman, M. B. Philipp, H. T. Munson, M. H. Phelps, W. P. Douthitt, Howell Jones, and Rankin Mason, on the brief,) for appellant.

J. W. Deford and C. N. Sterry, for appellees.

Before CALDWELL, Circuit Judge, and THAYER, District Judge.

THAYER, District Judge. This is an appeal from a decree dismissing a bill of complaint in a suit which was commenced by the

appellant in the circuit court of the United States for the district of Kansas for the purpose of restraining an alleged infringement of letters patent No. 303,006, which were issued to Harris H. Hayden on August 5, 1884, and have since been duly assigned to the appellant. The invention relates to a mechanical contrivance, now much in use in large stores, whereby a small receptacle, fitted with grooved wheels, is made to run on a wire from one point to another, usually from the sales counter to the cashier, for the purpose of carrying cash or small parcels. The alleged infringing device, which is used by the appellees, is made in strict conformity with the specification of United States letters patent No. 399,428, which was issued to Charles W. McCormick on March 12, 1889; but it is contended by the appellant that the McCormick device embodies all of the elements of the combination covered by the first and second claims of the older patent issued to Hayden, and that it is an infringement of the Hayden patent. The mechanical contrivance described in each of said patents consists of a wire way or track, a small receptacle or carrier provided with wheels, which is intended to run without friction on said track, a propeller at each station, so arranged as to strike the carrier and give it an initial velocity, and a cord depending from each station, whereby the operator is enabled, by a sudden pull, to force the propeller against the carrier and impart motion. In the Hayden device the propeller is simply a perforated block or slide which moves freely on the wire way. A cord attached to the forward end of this slide, thence passing over a stationary pulley some distance in advance of the slide, thence doubled back over another stationary pulley at the rear of the slide, and depending to the counter, enables the operator, by a sharp pull on the cord, to force the sliding block against the carrier with such momentum as will send it to its destination. McCormick's patent shows a somewhat different contrivance for imparting motion to the carrier. It may be described with sufficient accuracy as follows: Two hollow tubes extend forward for some distance from the station, forming a figure like the letter V. The wire way is attached to the station at the angle formed by the junction of these tubes. An endless cord, moving on pulleys fixed at both ends of these tubes, passes through the tubes and across the wire way at right angles therewith. The ends of this cord depend to the counter from the inner end of the tubes, where they unite, so as to be within easy reach of the operator. The endless cord is attached to a movable slide on the wire way where the cord crosses the wire. When the device is ready for use, the slide is drawn back to the station, and the cord becomes bent or curved like a bowstring. By a sharp pull on the depending ends of the cord the slide is drawn forward on the wire way until the cord becomes straight or taut, and, coming in contact with the carrier, sends it to its destination. McCormick also employs springs to clasp and hold the carrier in place before its discharge. These springs are so arranged as to impart to the carrier some momentum in addition to what it receives

from the slide. In the McCormick device, also, the motion of the slide and the carrier is constantly accelerated from the time they begin to move until the bowstring becomes taut, the result being that the momentum of the carrier is greatest at the instant it leaves the slide.

It is contended by the appellant that the mechanism employed by McCormick for imparting motion to the carrier is merely a mechanical equivalent for the mechanism employed by Hayden for accomplishing the same object, and that all of the elements described in Hayden's first and second claims, namely, the wire way, the carrier designed to move thereon, the propeller or slide for pushing the carrier, and the depending cord attached to the propeller, are found in the McCormick device, and substantially in the same relation to each other. On the other hand, it is insisted by the appellees that the devices employed by McCormick to impart motion to the carrier are radically different from those described and employed by Hayden; furthermore, that the wire way covered by the Hayden patent is limited to a way consisting of "two or more fine wires arranged parallel to each other," whereas McCormick employs but a single wire to form the way or track. In the Hayden patent the first claim is stated in the following language:

"In a store-service apparatus, the combination, with the way or ways, of one or more carriers, propelling devices constructed to push the carriers and appliances, substantially as described, extending from the propelling devices to the operator's desk, whereby said propelling devices may be moved by the operator to impart initial movements to the carriers, substantially as set forth."

The second claim differs somewhat from the first in phraseology, but it embraces the same elements. These are confessedly combination claims covering the same arrangement of parts or devices, each of which is individually old; and it goes without saying that the appellees cannot be held liable for an infringement unless they use the combination as an entirety. It is admitted that the appellees only make use of a way or track consisting of a single wire; hence it is important to determine whether, upon a true construction of Hayden's specification, his first and second claims should be limited to a combination containing, as one of its integral elements, a track composed of two small wires placed side by side. It may be conceded that the claims of the patent do not state that the track is composed of two wires, but the language employed is as appropriate to describe a track consisting of two wires as a track consisting of one wire. Indeed, if the claims are read in connection with the specification, a very natural view would be that the phrase "a way of ways" was intended to show that the track referred to was composed of two wires, and for that reason might be appropriately spoken of either as a "way or ways." The specification in this instance is the most reliable guide in determining what the patentee intended to claim and is entitled to hold. We find in this specification two significant passages, which leave little room for doubt that he regarded

the use of two small wires in forming the track as one of the essential features of his invention. In his general description of the invention the patentee says:

"My invention consists in certain improvements in store-service apparatus, fully described hereinafter, whereby to propel the carriers, facilitate their manipulation, and secure a better way than is afforded by the single wire ways heretofore used."

In a subsequent paragraph of the specification he points out the objections to a track consisting of one wire, and the advantage of using two wires, in the following manner:

"Where wire ways are used as heretofore constructed, each of a single wire, the carriers are apt to have an objectionable oscillating motion, and a breaking of a wire results in a fall of the carrier, and injury to persons or showcases, necessitating the use, for safety, of wires that are objectionably heavy. To avoid this I make the way of two or more fine wires, t, t, arranged parallel to each other, and each of the same length."

The drawings attached to the specification, except those which were not intended to show the precise formation of the track, also clearly indicate the use of two wires, and there is not a line in the specification which will warrant the inference that the inventor ever contemplated the use of a track consisting of a single wire, which he had declared to be objectionable for the reasons above stated.

In arriving at a construction of these claims, the state of the art, as well as the specification, is also entitled to much consideration; for, if Hayden was a pioneer inventor, the claims of his patent are entitled to a more liberal interpretation than should be accorded to them if he followed closely in the footsteps of others, and merely made an improvement, not involving a high order of invention, in a device that had already come into use. *Machine Co. v. Lancaster*, 129 U. S. 263, 273, 9 Sup. Ct. 299; *McCormick v. Talcott*, 20 How. 402, 405; *Railway Co. v. Sayles*, 97 U. S. 554, 556.

The record shows that at least four or five patents had been granted for store-service apparatus, commonly called "cash carriers," before the date of Hayden's application for the patent in suit. In one of these patents the device shown consists of an endless wire moving over stationary pulleys or wheels located at the respective stations, by means of which the carrier is transported, either by turning one of the wheels by hand, or by pulling a cord wrapped round the axle. In another device the carrier employed appears to be a hollow ball, made in two sections, which is first raised by an elevator to an inclined track, and thence rolled to its destination by force of gravity. Two other patented devices, which antedate the Hayden invention, consist of a level wire track along which the carrier runs on wheels, as in the Hayden and McCormick patents, but motion is communicated to the carrier by releasing a coiled or compressed spring, against which the carrier is placed. The foregoing brief description of these several devices will suffice to show that a very considerable advance had been made in the art of constructing cash carriers before Hayden turned his attention in that direction. He was not the first to

conceive the idea of transporting cash or small parcels from one point to another in a store by means of a carrier running on a taut wire; he simply aided in perfecting the details of the mechanism by which that object is now accomplished. He may have been, and doubtless was, the first to devise a convenient means of imparting an initial velocity to the carrier, proportioned to the distance it has to traverse. The mechanism contrived for that purpose, consisting of the propeller and depending cord so arranged as to give the carrier any desired initial velocity, was evidently an improvement on the spring, which imparted a uniform velocity. But the improvement in this respect does not appear to us to have required a high degree of ingenuity or mechanical skill, in view of the then state of the art, and we think, therefore, that Hayden is not entitled to a broad construction of his claims, but that he should be limited to a combination consisting of such parts or elements as he has explicitly described in his specification. As we have above shown, the specification and drawings clearly contemplate the use of a track consisting of two small wires placed side by side, and this limitation enters into the claims by necessary implication. *Roller-Mill Co. v. Walker*, 138 U. S. 124, 133, 11 Sup. Ct. 292; *Caster Co. v. Spiegel*, 133 U. S. 360, 369, 10 Sup. Ct. 409; *Bragg v. Fitch*, 121 U. S. 478, 483, 7 Sup. Ct. 978; *Keystone Bridge Co. v. Phoenix Iron Co.*, 95 U. S. 274; *Sharp v. Riessner*, 119 U. S. 631, 7 Sup. Ct. 417. It was suggested on the argument that the construction of claims 1 and 2, last indicated, ought not to be adopted, because of the language employed in the fifth claim. This claim is as follows: "(5) The combination of the way consisting of two parallel wires or cables on the same plane, and a duplex tightening device, substantially as specified." The argument seems to be that, because a way consisting of two wires is expressly described in the fifth claim, a different species of way was intended by the language employed in the first and second claims. It will be observed, however, that the combination covered by the fifth claim is one consisting of only two elements, namely, the way and duplex tightening device. This claim is not rendered meaningless or inoperative by the limitation which we are disposed to place on the word "way," as used in the first and second claims. We think, therefore, that no inference arises, from the language employed in the fifth claim, that the patentee intended that the word "way," as used in the first and second claims, should have a broader signification than he had himself given to it in the fifth claim. At all events, the argument based on this ground is not of sufficient weight to overcome the limitation of claims 1 and 2, which seems to be rendered necessary by the language of the specification. The result is that we have been constrained to hold that the proof fails to disclose an infringement of the Hayden patent, inasmuch as the appellees use a track consisting of a single wire; wherefore, without considering the other questions that have been suggested and discussed, the decree of the circuit court must be affirmed.

CORSER v. BRATTLEBORO OVERALL CO.

(Circuit Court, D. Vermont. October 13, 1893.)

1. PATENTS FOR INVENTIONS—INFRINGEMENT—PRELIMINARY INJUNCTION.

Where, in a suit for the infringement of a patent, it appears that the improvement is novel and useful, that the patent has been generally acquiesced in, and that the person who took the device to defendant, and uses it for him, used it formerly in the employ of the plaintiff, there is a sufficient presumption of validity to warrant the granting of a preliminary injunction.

2. SAME—PRIOR USE OR KNOWLEDGE—HOW SHOWN.

The affidavit of a third person, stating merely that he showed the plaintiff how to make the improvement upon which his patent is based, does not show such prior knowledge or use as will defeat the patent, and hence it does not raise such a doubt as to defeat the motion for a preliminary injunction.

3. SAME.

No. 372,062, for combined buckle and buttonhole of metal, having an offset forward to rest upon the upper edge of the button to prevent unbuttoning, presumed valid upon application for a preliminary injunction.

In Equity. On motion for preliminary injunction. Suit by Brackett G. Corser against the Brattleboro Overall Company for the infringement of plaintiff's patent. Motion granted.

E. L. Waterman, for orator.

Kittredge Haskins, for defendant.

WHEELER, District Judge. This suit is brought upon patent No. 372,062, dated October 25, 1887, and granted to the orator, for a combined buckle and buttonhole of metal, having an offset forward to rest upon the upper edge of the button to prevent unbuttoning, and has been heard upon a motion for a preliminary injunction. This improvement, although small, seems to be sufficiently novel and useful to support a patent. The defendant admits making use of the same thing. The patent alone would not warrant a preliminary injunction for this infringement; but the patent appears to have been acquiesced in generally, and to have been operated under, with the orator, by the person who took it to, and makes use of it for, the defendant. This adds sufficiently to the presumption of validity to warrant a preliminary injunction without any express adjudication of validity. The answer sets up prior knowledge and use of one Churchill, whose affidavit is produced, stating that he showed the orator "how to make an offset in the loop by bending the wires composing the loop," and that the offset of the patented articles "is the identical change suggested" by him. An answering affidavit of the orator states that Churchill's suggestion was of an inward bend of the wires, and not of this offset. This contradiction might raise sufficient doubt to defeat this motion if what Churchill says he did would defeat the patent. The conception of an invention is not making it; the embodiment of it is. The orator produced this invention; Churchill did not. According to his statement, as understood, he merely made a suggestion which, perhaps, forwarded it. This

idea would not be such prior knowledge or use as, within the statutes, would defeat a patent. *Gayler v. Wilder*, 10 How. 477; *Coffin v. Ogden*, 18 Wall. 120. Upon the undisputed facts of this case as it now stands, the orator seems to be entitled to the preventive relief of a preliminary injunction against the use of this offset in the metallic buttonhole of this patent. Motion granted.

HENEY v. THE JOSIE et al.

(District Court, D. Rhode Island. February 9, 1894.)

ADMIRALTY—LIBEL—JOINDER OF CAUSES—IN REM AND IN PERSONAM.

A libel against a vessel alleged that she was owned "by J. and other persons to the libelants unknown;" and it was sought therein to recover money furnished for repairs "on the credit of the owner and said J.," and also money advanced upon a cargo consigned by J. alone. *Held*, that these claims could not be joined, for the transactions out of which they severally arose were unrelated, and the judgments in rem and in personam upon them, respectively, would not affect the same persons.

In Admiralty. On exceptions to libel. Libel by Archibald T. Heney against the schooner Josie and others for advances. Exceptions sustained.

This is a libel against the schooner Josie for money furnished to her master by the libelant for repairs and supplies, and also against John Jones and William Jones, copartners as Jones Bros., and part owners of the schooner, to recover a sum of money advanced by the libelant on a consignment of piling over and above the sum for which the piling was sold. John Duffy claims the schooner as master and part owner, and excepts to the libel—First, because "in said libel a cause of action in rem is joined with a cause of action in personam in the same suit;" and, secondly, because "in said libel a cause of action, against the said schooner Josie for repairs and supplies is joined with a cause of action for debt against Jones Bros. relating to a cargo of piling, and to pay for the same."

W. G. Roelker, for libelant.

First. Two claims in personam may be joined together. Second. If one of the claims in personam be also a claim in rem against the vessel and master, the vessel and all are liable for the debt, and they may be joined in the same libel, so far as the claim against them is concerned. The court has entire control of its process, and will mold its decree in rem against the vessel so as to apply only to so much of the claim as is good against the vessel in rem. That, where the shipmaster and owners are all liable for the debt, they may, on principle, be joined in the action, see *Ben. Adm.* §§ 393, 397; *Betts, Adm.* pp. 89, 99; *Hen. Adm.* pp. 330-332; *The Enterprise*, 2 *Curt.* 317; *The Monte A.*, 12 *Fed.* 331; *The Clatsop Chief*, 8 *Fed.* 163; *The J. F. Warner*, 22 *Fed.* 342; 630 *Quarter Casks of Sherry Wine*, 14 *Blatchf.* 517; *The Zenobia*, 1 *Abb. Adm.* 48.

E. P. Carver, for claimant.

CARPENTER, District Judge. The general principle is that several issues may be tried in one action, when that course will promote the cause of justice, and conduce to the convenience of parties and of the court, and when no considerable inconvenience will arise therefrom. On this principle actions are sustained

against a defendant for several independent but analogous claims, and also against several defendants for claims arising out of the same transaction, where the claims themselves are analogous. On general principles there is no reason why a libel both in rem and in personam should not be retained in cases where the matter comes within the above definition, and where this practice is not forbidden by the rules of the supreme court. The present case raises a different question. The allegations of the libel are not entirely clear. The libel is entitled against Jones Bros. "and also against all persons lawfully intervening for their interest in the said schooner;" and it sets out that the schooner is owned by persons "who are to the libelant unknown," and speaks of Jones Bros. as "owners of said schooner," and refers to supplies furnished to the schooner on the credit of "Jones Bros. and her other owners," and on the credit of "her owners and said Jones Bros." Reading these allegations together, it appears that the schooner is owned by Jones Bros. and other persons who are to the libelant unknown. There is therefore in this case neither a unity of parties, nor a unity of cause of action, which would justify a joinder of action. The two claims arise from two unrelated transactions; and the only other ground on which the action ought to be maintained would be that the judgment in rem would affect the same persons against whom the judgment in personam would go, so that the persons interested in contesting the two claims would be the same in each case. But here Jones Bros. alone are entitled to be heard on one claim, while they, with perhaps many others, holding, perhaps, nearly the whole interest, must be heard to contest the other claim. It is therefore a case of two wholly unrelated suits combined in one action. An order will be made that the libel be dismissed, with costs, unless the libelant shall within 10 days discontinue as to one action, or so amend the libel as to strike out one of the claims.

HIGBEE v. NINETY-SIX HUNDRED CASES TOMATOES.

(District Court, D. Rhode Island. February 3, 1894.)

ADMIRALTY—PRACTICE—PAYMENT INTO COURT—RIGHTS OF LIBELANT.

On libel for freight, where the claimant pleads a tender, and pays the amount tendered into the registry of the court, the libelant is entitled to an order for the payment of that amount to him before there is any trial of the issue. *Mayor, etc., v. Patten*, 1 Cranch, C. C. 294, disapproved.

In Admiralty. On motion for the payment of money paid into court. Libel by Harry E. Higbee against 9,600 cases of tomatoes for freight. Motion granted.

W. G. Roelker, for libelant.

S. O. Edwards, for claimant.

CARPENTER, District Judge. This is a libel for freight money, and the claimant, in his answer, alleges a tender, and, in support of

this allegation, has paid into the registry of the court the sum of \$470.70, being the amount of the alleged tender. The libellant now moves for an order for the payment to him of this sum. The claimant resists the motion, and cites *Mayor, etc., v. Patten*, 1 Cranch, C. C. 294. The whole report of that case is as follows:

"Plea of tender, etc. Before trial of the issue, Mr. Swann, for the plaintiff, moved the court for leave to take out the money, and go on for the balance of his claim. *Esp. N. P. 161*. The court thought the plaintiff could not take the money out, and then proceed for more."

The case is certainly in point, but it does not appear to have been decided on argument, and is therefore not strictly an authority; and I can perceive no reason on which it is based. The tender implies a consent on the part of the claimant that the money in court is the property of the libellant, and it therefore must be paid to him in any event, and there seems no reason why the payment should not now be made. If it be found that there was, in fact, a tender, and that the tender was for the full amount due, the claimant will recover costs, which, as in all other cases of suits on claims ascertained to be unfounded, is taken to be full compensation. The principles laid down in *Espinasse* and the cases there cited seem to point to this conclusion, with which they are in no respect in conflict. There will be an order that the fund be paid to the libellant, after deducting the fee chargeable by the clerk.

THE JAMES ROY.

HYLAND v. THE JAMES ROY.

(District Court, S. D. New York. February 13, 1894.)

ADMIRALTY — PROPERTY IN POSSESSION OF ASSIGNEE OR RECEIVER — ATTACHMENT BY MARSHAL.

Property in the hands of an assignee for the benefit of creditors, unlike property in the possession of a receiver, is not in *custodia legis*; and one who has a maritime lien against it is not obliged to obtain the consent of a state court before arresting the property in the admiralty.

In Admiralty. On motion to set aside arrest of vessel by the marshal under process. Denied.

Charles M. Stafford, for petitioner.

Hyland & Zabriskie, for libellant.

Root & Clark, for the marshal.

BROWN, District Judge. The above libel was filed on the 2d of February, 1894, to recover damages to the libellant's scow, through the alleged negligence of the tug James Roy while having the scow in tow on the 23d day of November, 1893. Upon process in rem the marshal, on the 2d of February, arrested the tug and took her into his custody. The petition avers that the owner of the tug on the 16th day of December, 1893, made a general assignment for the benefit of his creditors, without preference; that the assignment was

duly recorded, an approved bond given by the assignee, and an inventory filed—all in accordance with the New York statute of 1877, and the amendments thereto; and that possession of the tug was taken by the assignee, who held the same at the time she was taken from him by the marshal. The petitioner prays that the tug be discharged from arrest, on the ground that she was virtually in custodia legis, and therefore not liable to arrest by the marshal under process of this court. *Taylor v. Carryl*, 20 How. 596.

Under the laws of this state, the county courts, and the supreme court, have concurrent summary jurisdiction upon petition to supervise the conduct of assignees, to enforce the provisions of voluntary assignments for creditors, and to settle and adjust the assignee's accounts. This liability of the assignee to regulation, direction, and control, does not in any sense make such a voluntary assignee, ipso facto, an officer of the court, like a receiver, a sheriff, or a marshal. The very fact that under the laws of New York there are two independent courts that may exercise this same supervisory power over assignees, is conclusive that the assignee's possession of the assigned property is not of itself the possession of either court; since the same property cannot be in the possession of both courts at the same time, and the possession of either would exclude the other.

There is, in truth, no foundation for the contention that the assignee's possession is that of either court, until after some definite proceeding in the one court or the other has been taken to give the court possession of the property, as in other regular suits; and none such has been taken in this case. Under the state law the assignment is in no sense a judicial proceeding, or any part of any judicial proceeding in insolvency, like an assignment in bankruptcy. The state court of appeals, in construing the state act, has repeatedly held that it has made no difference in the essential nature of the assignee's possession; and that the assignee "is merely the representative of the debtor." *In re Lewis*, 81 N. Y. 421, 424; *In re Holbrook*, 99 N. Y. 539, 546, 2 N. E. 887; *Roberts & Co. v. Vietor*, 130 N. Y. 585, 598, 29 N. E. 1025.

A receiver, on the other hand, is the representative of the court that appoints him; his hand and his possession are those of the court. The supreme court of this state has held that the county court, notwithstanding the general language of the act of 1877, has no authority to entertain summary jurisdiction of claims upon the property hostile to the assignee; but only of proceedings in aid of the trust; and that opposing claims must be enforced by regular action against the assignee. *Potter v. Durfee*, 44 Hun, 197; *In re Witmer*, 40 Hun, 64. The ordinary practice, moreover, to make such voluntary assignees parties defendant in foreclosure suits, without any application for leave to sue, is conclusive that the petitioner's contention has no recognition even in the state courts.

In the federal courts this question has been repeatedly adjudicated adversely to the claim now made. The statutes of Michigan, v.59f.no.7—50

which are more favorable to the petitioner's contention than the statutes of New York, have been held, on full consideration and discussion of the subject by the present Mr. Justice Brown, in the case of *Lehman v. Rosengarten*, 23 Fed. 642, to present no obstacle to suits in replevin against the assignee in the federal courts. Various other cases are there cited to the same effect.

The present case is one of a maritime lien. The federal courts alone have jurisdiction to enforce such liens. "This jurisdiction," says Mr. Justice Brown, "cannot be ousted or impaired by any provisions of the state law requiring creditors to appear before a state court and present their claims. *Suydam v. Broadnax*, 14 Pet. 67; *Hyde v. Stone*, 20 How. 170; *Bank v. Jolly's Adm'rs*, 18 How. 503; *Payne v. Hook*, 7 Wall. 429; *Chewett v. Moran*, 17 Fed. 820, 822." While a receiver, appointed by a state court, or its sheriff, is in possession of the property subject to the lien, the marshal of this court will not interfere with that possession by an arrest of the property for the enforcement of the maritime lien, without the assent of the state court whose officer is in possession; because such a course would lead to irreconcilable conflicts between different courts in the exercise of their lawful jurisdictions. *Taylor v. Carryl*, supra. But the state court in such a case has no authority to adjudicate the maritime lien, or the maritime claim, without the creditor's assent. It cannot compel the maritime creditor to come before it; nor can it sell the property freed from the maritime lien. As the sale of any property by the state court while the property is subject to an undefined, unadjudicated maritime lien, is highly disadvantageous and prejudicial to the interest of the assigned estate, leave to sue in a court competent to make a binding adjudication as regards such liens is usually given; though sometimes leave is refused, apparently through misapprehension as to the lack of constitutional authority in the state court to sell and convey the property free from the maritime lien, or to abridge the creditor's constitutional right to enforce his lien in the federal court. When such leave is refused, the creditor, if he wishes to rely on his lien, must wait until the state court has disposed of the property, and the creditor can then pursue his constitutional remedy in rem against the property, without regard to the proceedings in the state court.

As respects the validity of an arrest of property, as between different courts, the question is one of priority of possession. In this case, the tug when seized was not in the custody of the state court, or of any officer of that court. As I have before said, the assignee does not stand in the situation of a receiver. He takes the property from the assignor, cum onere; and he holds it simply as the representative of the debtor, and upon the private trust expressed in the assignment. Executors and administrators are subject to equal, if not greater, supervision and direction by the probate court; but, so far as I am aware, it has never been supposed that a maritime lien could not be enforced against a vessel after the owner's death, and while the vessel was in the possession of an administrator or executor.

It is further urged that in another cause an application to the supreme court by another libellant for leave to sue in this court was denied; and that the present libellant prepared a similar application, but withdrew it after that decision. The refusal to give leave in the case referred to was well enough; since, if the case was one of a maritime lien, the application to the state court was itself an impertinence. For neither the supreme court, nor the county court, has any jurisdiction of the subject-matter of such an application, the assignee not being a receiver or an officer of the court; and in such cases, the state courts have no jurisdiction to make orders permitting or enjoining suits to enforce maritime liens, which, under the constitution and the judiciary act, fall within the exclusive jurisdiction of the federal courts.

Motion denied.

THE AMERICA.

BEACH et al. v. THE AMERICA.

(District Court, S. D. New York. February 15, 1894.)

SHIPPING—NONDELIVERY OF CARGO—BREAKAGE—PRODUCTION OF REMAINS OF PACKAGE—PERILS OF THE SEA—BILL OF LADING—EXCEPTIONS.

Though the ship does not produce the remains of casks alleged to have been broken by perils of the sea, the fact that the casks were actually received on board is a matter of proof, and the absence of such remains is not necessarily conclusive of bad faith on the part of the ship; and when the testimony is explicit that the casks were well stored, and that the ship encountered heavy weather, resulting in the destruction of a number of casks, a decree will be given for the ship under the exceptions of a bill of lading against insufficiency of package, breakage, leakage, and perils of the seas.

In Admiralty. Libel for nondelivery of cargo. Dismissed.

Goodrich, Deady & Goodrich, for libellants.

John Chetwood, for respondent.

BROWN, District Judge. The above libel was filed to recover for the nondelivery of two drums of vinegar, which, according to the bill of lading, were shipped on board the America at London in April, 1893, marked "B & S," and deliverable to libellants at this port. The ship arrived in this port on the 27th of April. She met heavy weather, and some 30 casks of various descriptions, partly containing dyestuffs, were found, on opening the cargo, to be more or less smashed, and the contents gone. No vinegar was found, and no staves or heads were produced by the respondent bearing the mark "B & S," as stated in the bill of lading. Two bundles of staves and one head were presented by the respondents to the libellants as being their casks. One of the libellants testified that they had been long accustomed to import similar casks, and that the bundles of staves shown them were not of the usual size and had no smell of vinegar. Two of the defendant's witnesses testified that they had some smell of vinegar. It appeared also that

some staves had been thrown overboard. The bill of lading contained exceptions for "insufficiency of package, breakage, leakage, and perils of the seas."

I think the evidence of heavy weather, the testimony as to good stowage, and the breakage of a considerable number of casks, would be sufficient to exempt the defendants from liability under the above exceptions in the bill of lading, as caused through perils of the seas, and the breakage and leakage incident thereto, if it sufficiently appeared that the nondelivery of the vinegar was from those causes. The libelants, however, contend that the nonproduction of any staves of the length of the usual drum, or of any staves bearing the marks recited in the bill of lading, should prevent the respondents from claiming this defense, as the casks might not have been actually shipped, or might have been removed.

It is undoubtedly the practice, in case of the loss of contents of packages by accident, to preserve the remains of the bags, cases or barrels, etc., and to produce them to the consignee as evidence of the carrier's good faith in the performance of his duty. This is, however, a matter of evidence; and the absence of such remains is not necessarily conclusive of bad faith. In proportion as the packages are valuable and easily purloined, the absence of all traces of their identity is the more suspicious; and the defendants should consequently be held to a more rigid account. In the present case, the drums of vinegar were certainly not of that character. There is not the smallest probability that such drums, if put on board, were purloined; and the evidence of the mate is explicit that he saw these drums put on board and stowed in the vicinity of the barrels of dye stuffs, which were also broken. There is nothing to contradict this, except the absence of any staves marked as recited in the bill of lading. Though some of the staves produced were stained by the dye stuff, yet the marks on the vinegar drums were usually branded in; and if so, they were not likely to be obscured. The staves thrown away might also have included the ones marked.

The testimony on the part of the libelants, both as respects the length of the staves, and the branding of the marks, was inferential only, viz., from the character and branding of the casks which the libelants had been previously accustomed to receive from the shippers on similar orders. The libelants' inferences on both these points are, therefore, not at all certain, but liable to mistake, and do not amount to any positive evidence. As the reasonable result of the evidence, I must, therefore, find that the vinegar was shipped on board, and was lost on the passage through the breakage of the casks, caused by perils of the seas.

The libel is, therefore, dismissed; but as the staves were not all preserved as they should have been for the proper satisfaction of consignees as to the identity of their casks, the dismissal must be without costs.

BAETJER v. LA COMPAGNIE GENERALE TRANSATLANTIQUE.

(District Court, S. D. New York. February 15, 1894.)

SHIPPING—BILL OF LADING—FOREIGN LAW—EXCEPTION OF NEGLIGENCE—LAW OF JURISDICTION WHERE INJURY OCCURRED.

The peculiarity of a patch put upon a cask of brandy brought from Cognac to New York, via Havre, indicated that it must have been put on at Havre. The bill of lading excepted the carrier from the results of negligence of the servants or agents, which exception is valid by the law of France. *Held* that, if the injury occurred during land transit from Cognac to Havre under a contract other than the bill of lading, this court would have no jurisdiction; if it arose under the bill of lading, but wholly within foreign territory, the law of that jurisdiction would prevail; and in either event the ship was not liable.

In Admiralty. Libel for damage to cargo. Dismissed.

D. McMahon, for libellant.

Jones & Govin, for respondent.

BROWN, District Judge. The peculiarities about the lead patch over the hole in the cask of brandy, leave no doubt that the patch was made in Havre, and consequently that the breakage of the stave, which caused the loss of the contents, occurred either in Havre, or before its arrival there, during its passage from Cognac to Havre. The bill of lading was stamped, dated at Cognac, which is about 300 miles from Havre. It recites the cask as received in good order upon the steamer La Champagne, or upon the next following steamer; and it is doubtful from what point the stipulations of the bill of lading should be deemed applicable. If the injury arose during transit by land from Cognac to the steamer at Havre, upon a contract outside of the bill of lading, then the negligence and the damage were not maritime, and this court would have no jurisdiction. If, on the other hand, the bill of lading is held to cover the whole transportation by land and sea from Cognac to New York, as an entire contract, then the exceptions in the bill of lading must also apply to the whole carriage; and these exempt the carrier from negligence of its agents or servants. These exemptions are valid by the law of France, which has been pleaded in the amended answer, and proved upon the final hearing. To acts of negligence and consequent damage occurring, not on the high seas, but within foreign territory, the law of that jurisdiction must, I think, prevail; and as no cause of action arises according to the law of the jurisdiction within which the injury occurred, none, I think, can be recognized here. Such was the view expressed in the case of *The Trinacria*, 42 Fed. 863.

If the damage occurred, however, after the brandy was delivered to the ship's representatives in Havre, inasmuch as the breakage, if negligence at all, was through negligence before the ship sailed, the negligence and the damage were still wholly within the French jurisdiction, and therefore subject to the same valid exception.

The libel must, therefore, be dismissed.

THE SACHEM.

HILL v. THE SACHEM.

(District Court, S. D. New York. February 15, 1894.)

SEAMEN'S WAGES—DISCHARGE ABROAD—IRREGULAR HEARING BEFORE CONSUL.

Where, on the question of the competency of a seaman, there has been a hearing before a consul, and a proper record preserved of his decision and judgment, it is ordinarily entitled to full credence; but, where there has been no hearing, no judgment, and no record, a forced discharge abroad is illegal, and it is no defense that it was abetted by irregular action of the consular office.

In Admiralty. Libel for seamen's wages. Decree for libellant.

R. J. Moses, for libellant.

Wing, Shoudy & Putnam and Mr. Burlingham, for respondents.

BROWN, District Judge. The evidence of incompetency of the libellant as cook, is not, to my mind, satisfactory. It is certain that after the arrival of the ship at Hong Kong, the captain was determined to get rid of the libellant as cook; and it is equally certain that the consul, before whom both went, endeavored to favor the captain's wishes, while he at the same time refused to afford the libellant any opportunity to prove his capacity or fitness for the place. The captain made no charges against him in the log until after the seaman had been sent ashore. The alternative was forced upon him, either to go back on board the ship and be disgraced, or else to be discharged at Hong Kong; and that, without any hearing on the merits. This was an injustice to the libellant, and apparently an abuse by the consul of his position and influence.

Where a hearing has been had on the merits, on the demand of the master, or the seaman, and a proper record preserved of the consul's decision and judgment, discharging the seaman, it is ordinarily entitled to full credence, notwithstanding the contradictions made by the seaman afterwards, such as I have not unfrequently had in previous cases. In the present case, there was no hearing, no judgment, and no record, so far as the testimony shows. The libellant was paid \$200, his wages up to the moment of discharge, which he received under protest. Such a forced discharge, with no hearing on the merits, at a distant place, and with no pay beyond the day of discharge, is inhumane and opposed to the policy and the statutes of this country, (Rev. St. § 4580;) and it is no defense that it was abetted, so far as appears, by the irregular action of the consular office. The libellant was unable to obtain employment to return from Hong Kong, and took passage for San Francisco at an expense of \$196, and thence to New York, at an expense of \$91.50. To this I add one month's wages, \$40, all of which, with interest, amounts to \$347.15, for which a decree may be entered, with costs.

THE CHAUNCEY M. DEPEW. THE GEORGE W. PRATT. THE LILA M. HARDY. THE ALFRED. CHAPMAN DERRICK & WRECKING CO. v. THREE TUGS. CORNELL STEAMBOAT CO. v. THE ALFRED.¹

(District Court, S. D. New York. January 23, 1894.)

1. COLLISION—VESSELS AT ANCHOR—CROWDED CHANNEL—DREDGE LAWFULLY MOORED.

It is obligatory on their owners to raise, when practicable, vessels sunk in collision. Hence, a derrick anchored in the channel of the East river under a permit from the secretary of the treasury, occupied in raising a sunken vessel, and, though a partial obstruction to navigation, not such a complete obstruction as to constitute a nuisance, was *held* not unlawfully anchored, though off the regular anchorage grounds, and not in fault for damage suffered by a vessel which collided with her.

2. SAME—DREDGE ANCHORED IN NARROW CHANNEL WAY—LIABILITY OF COLLIDING VESSELS.

A derrick anchored in the crowded channel way of the East river, engaged in raising a sunken vessel, although not unlawfully in such position, was *held* not entitled to all the immunities of vessels anchored on anchorage grounds; and certain tugs, which collided with her in spite of skill and diligence exercised by their pilots, were *held* not responsible for the damage to the derrick.

3. SAME—ANCHORAGE GROUNDS—ACT AUTHORIZING SECRETARY OF TREASURY TO ESTABLISH—APPLICATION TO VESSELS ENGAGED IN RAISING WRECKS.

Whether the anchoring of a derrick for the purpose of raising a wreck falls within the purview of the act of May 16, 1888, or the authority of the secretary of the treasury thereunder "to define and establish an anchorage ground," etc., quære.

In Admiralty. Libels and cross libels for collision. Dismissed.

Wing, Shoudy & Putnam and Mr. Burlingham, for Chapman, etc., Co. and the Alfred.

Carpenter & Mosher, for the Chauncey M. Depew.

Benedict & Benedict, for the George W. Pratt and the Lila M. Hardy.

BROWN, District Judge. The first three libels above named were filed by the owners of the derrick Alfred to recover damages sustained by the derrick from three separate collisions with the steam tugs above named, all happening in the course of about two hours, between half past 7 and half past 9 A. M., on May 17, 1893, while the derrick was at anchor a little way above the Brooklyn bridge, and off pier 40, in the East river, over the sunken wreck Emma, which it was there engaged in raising.

The width of the East river in that locality is about 1,350 feet from pier to pier. It is the narrowest part of the river. At times the concourse of vessels there is large, and in passing in opposite directions, great care and skill are needed at such times to avoid collisions, even when there are no fixed obstructions. The derrick was anchored about 500 feet off from the New York pier, and was

¹ Reported by E. G. Benedict, Esq., of the New York bar.

fastened by two anchors at her bow and two at her stern. She had also lines and chains running to the wreck beneath her, which lay on the bottom, in 75 feet of water. The tide was strong flood. Each of the tugs above named was going up river with a tow; the first two with a float, or scows, alongside; the Hardy had two scows astern, on a hawser. The testimony in behalf of each shows that at the time when she passed under the bridge, the river on the Brooklyn side was much incumbered by other vessels. Each claimed that in consequence of these incumbrances, and by reason of the cross set of the tide, she was forced towards the westerly side of the river, so as to come in contact with the derrick, notwithstanding the exercise of all reasonable care and skill to avoid it.

The first collision was between the Depew's car float and the derrick; it was comparatively slight, rubbing along the eastwardly side of the derrick; but, as claimed by the libelants, cutting two lines that ran to the wreck beneath, and doing some other slight damage. The collision of the Pratt was with the starboard stern corner of the derrick, which was struck by the Pratt's bow, and swung outwards, so as to point nearly across the river towards the Brooklyn shore; considerable damage was thereby done to the derrick, and also to the Pratt, and for the latter damage the cross libel was filed by the Cornell Steamboat Company. The third collision was with one of the Hardy's scows, which was astern of her, on a hawser. In this collision, the port stern corner of the derrick was struck and damaged.

The cases having so much testimony in common, they were, for convenience, tried together. For the tugs it is contended that the derrick was an unlawful obstruction, having no right to be at anchor where she was, except at the risk of all the damages which she might suffer, or might inflict on others. The libelants, in their justification, produce a permit from the secretary of the treasury, dated January 9, 1893, in the following words:

"Referring to your letter of the 6th instant, you are informed that the department has no objection to the mooring of two of your derricks over the barge Emma which was recently sunk with about five hundred tons of coal in the East river off pier 39 provided it does not interfere with navigation, is at your risk, and that the proper lights are exhibited."

In a subsequent letter, dated May 3, 1893, in answer to further inquiries of the libelants, the department gave its construction of the meaning of the above permit, as follows:

"Referring to your letter of the 1st instant, in relation to mooring your derricks over the sunken barge Emma, and other permits granted in similar cases; you are informed that the department intended by its letter of January 9th last to authorize you to moor your derricks over said vessels for the purpose of raising and removing the same.

"The proviso that it should not interfere with navigation, is understood to mean that you should not completely block up the channel nor seriously interfere with the passage of vessels.

"The risk that you assume in such cases, is for such damage as the courts might award in case of collision between your barges and other vessels.

"The department intended by its letter dated November 17, 1892, to au-

thorize you to commence work on a wreck as it might occur, without waiting for the permit, but expected that you would apply immediately for such permission."

It does not appear what was the supposed value of the wreck Emma; but the libelants admit a contract to receive \$700 for raising her. The wreck lay so deep that she was no obstruction to navigation. The state act on the subject of removing wrecks has, therefore, no application.

Considerable discussion has been had with reference to the permit issued by the secretary of the treasury. I have considerable doubt, however, whether the anchoring of a derrick for the purpose of raising a wreck falls within the purview of the act of May 16, 1888, (1 Supp. Rev. St. 586,) or the authority of the secretary of the treasury thereunder "to define and establish an anchorage ground for vessels * * * in the Hudson and East rivers, and to adopt suitable regulations in relation thereto;" or whether the act applies at all where the anchorage is not of vessels engaged in navigation, but is in the business, and for the purpose of raising wrecks; any more than it would apply to vessels throwing out an anchor in extremity or in distress. In practice, however, it seems to have been customary, when raising wrecks, to obtain a permit to anchor from the secretary of the treasury; and for revenue cutters to visit vessels found at anchor off the prescribed "anchorage ground," to see if such permits have been secured. It is not necessary, however, to consider this point further; for I am satisfied that upon the proper construction of the permit itself, the liability of the ship is neither enlarged nor diminished from that which would exist independently of the statute concerning anchorage. If this anchoring of the derrick fell under the provisions of the act of 1888, the permit was sufficient to absolve the libelants from the penalty prescribed by it; and the conditions of the permit, under the explanations of the letter of May 3d were, I think, simply designed to leave the rights and liabilities of the libelants, and of others, to be determined by the courts, unaffected by the anchorage act.

There can be no doubt from the evidence in this case, as well as from daily observation and common knowledge, that the anchorage of a vessel in the narrow, and often crowded, passage where this derrick was anchored must of necessity, for the time being, be a serious embarrassment to the navigation of the East river, whenever there is a concourse of vessels or tows meeting or passing in that vicinity. Under certain conditions of tide and weather, such a concourse is very frequent, and almost of daily occurrence. Under such circumstances, and on the flood tide, this derrick was, therefore, a very serious embarrassment, and a partial obstruction to the free and easy navigation of the East river.

The question, however, is not whether the derrick was a partial obstruction to navigation, but whether it was an unlawful obstruction. Sailing vessels in that locality are often an obstruction to

steamers; tows, an obstruction to both; and slow boats, an obstruction to faster ones. But none of these are unlawful; and none are liable, except for negligence. Dredges in a channel way are partial obstructions, but lawful ones.

Some of the witnesses considered that this derrick was more of an obstruction, and would present greater difficulties, to vessels undertaking to pass her, than a sail vessel in motion at the same spot; because, in case of danger, some help in avoiding collision might be expected from the sail vessel; other witnesses thought that a stationary object presents less difficulty, because her position is more certain, and therefore the more accurately to be counted on in maneuvers to avoid it.

The Emma was evidently supposed to be worth raising, or the libelant would not have been employed to undertake that work. The obligation of the owners of vessels that have been sunk by collision to raise their vessels when practicable, has been repeatedly recognized in litigations on the question of damages, as a duty towards the faulty party. *Towboat Co. v. Pettie*, 1 U. S. App. 62, 1 C. C. A. 314, 49 Fed. 464; *The Havilah*, 1 U. S. App. 138, 1 C. C. A. 519, 50 Fed. 333, and cases there cited.

The raising of sunken vessels, even when not necessary for the benefit of the public, and the use of the river for raising vessels, are, therefore, legitimate and lawful; and, so far as I can perceive, as much so as is the navigation of the river by other vessels for other purposes.

There may be extreme cases, in which the anchoring of one vessel for the purpose of raising another in a very narrow passage, may so completely obstruct navigation as to amount to a nuisance, which could not be lawfully maintained, even for the rescue of one's own property. But this case is far from being the case of a public nuisance. Reasonable room still remained for ordinary navigation; much more than is often left in cases of dredging, (*The Virginia Ehrman*, 97 U. S. 309,) and under the permit, which removes any question upon the statute, I cannot regard the mere anchoring of the derrick in the place where she was anchored for the raising of the wreck, as unlawful. The derrick remained there no longer than was necessary for that purpose; and no negligence is shown in the manner of anchoring, or handling the derrick. The cases of *The Scioto*, 2 Ware, 367; *The Clara*, 23 Wall. 1; and *Strout v. Foster*, 1 How. 89,—are therefore inapplicable; and no decree should be given against the derrick.

As regards the claims made against the tugs, it is to be observed that the derrick, on the other hand, not lying upon any authorized anchorage ground, was not entitled to all the immunities of vessels so anchored and lying out of the usual channel way. Her position, on the contrary, was in the channel way, and though lawful, was in the midst of a busy traffic, where her presence at times added greatly to the difficulties of navigation by other vessels. Those vessels were, doubtless, required to use skill and diligence to avoid

the derrick and each other; but they were not otherwise answerable for the results. And in determining whether skill and diligence have been exercised, the mere fact of collision with the derrick in a place like this, is no such *prima facie* evidence of negligence as in the ordinary case of a collision with a wharf, or with a vessel moored at a wharf, or upon ground out of the channel way and set apart for anchorage.

Considering all the circumstances, and the obstructions by other vessels that are so fully detailed by the witnesses for each tug, I am of the opinion that neither of the tugs was lacking in reasonable diligence and skill, from the time when the danger of collision became appreciable; and that no specific fault is established against either. It was no fault in the tugs to shape their courses originally for the wide channel way on the right, where the rule of the road, the state statute, and custom required them to go; instead of trying the narrower channel way to the left.

There is no doubt that during the two hours in which these collisions happened, there was an unusually large concourse of vessels coming and going past the derrick. They were going at different speeds, and not far apart; the tugs were incumbered and slow; the tide was strong, setting crosswise, and changing in strength and direction; the derrick was anchored in an unusual place, and in the midst of the cross tide; the pilots were wholly unaccustomed and untrained to avoid an anchored vessel in that location; and no previous experience was likely to be perfectly adequate to suggest at once all that was possible, or all that was needed, to avoid the derrick with certainty. Since the event, no doubt, modes can now be pointed out by which the collisions might have been avoided. But at the time it could not be foreseen just what movements the other vessels would make. The circumstances were extraordinary; and the fact that these three pilots all got into collision so nearly at the same time, though they had previously avoided the derrick when hauling other tows, tends to corroborate their testimony to the extraordinary difficulties of this occasion, and to absolve them from the charge of negligence.

The result is, that all the libels should be dismissed. with costs.

THE VANDAL.¹**THE W. A. LEVERING.****MILLIKEN et al. v. THE VANDAL.****STANTON v. THE W. A. LEVERING.****(District Court, S. D. New York. January 18, 1894.)****COLLISION—STEAM TUG AND SAIL—CLOSE APPROACH—CAUTION.**

A steam tug which attempts a close approach to a sailing vessel for the purpose of collecting her towage bill is bound to approach with care and skill, and with due regard to the motion of the sailing vessel; and a tug which, under such circumstances, failed to approach a yacht parallel with the latter's course, and delayed reducing her speed, by reason of which collision ensued, was held liable for the damage.

In Admiralty. Cross libels for collision. Decree for libellant, and dismissing cross libel.

Wilcox, Adams & Green, for The Vandal.

Edwin G. Davis, for The Levering.

BROWN, District Judge. At about 7 P. M. on May 30, 1892, the tug Levering, having towed the steam yacht Vandal from City Island to the junction of the East and North rivers, while endeavoring to collect her towage bill, by approaching the yacht near enough to receive payment in a package from the end of a pole, came in collision with the port side of the yacht, which was struck by the tug's bow, and each vessel sustained some damage, for which the above libel, and cross libel, were filed.

Some comments have been made in regard to the efforts at a settlement without trial. These efforts, I am entirely satisfied, were made in good faith on each side. They call for no other observations than the commendation of the court, and the assurance that such efforts can always be made without the least prejudice in this court to either side upon the merits, should such endeavors prove unsuccessful.

The mode of collecting payment at the end of the towage service, adopted in this case, is a very common one, though attended with some risk, through the near approach of the boats. Both, however, evidently concurred in this method; and the case, therefore, is not to be judged by the ordinary rules of navigation. The tug was bound, in approaching within a pole's length of the tow, to approach with care and skill, so as to avoid any injurious contacts. Upon her first approach, the tug missed, by keeping too far away; whereupon she dropped astern a second time. In coming up again on the port side of the yacht, her stem came in contact with the yacht amidships.

For the tug it is contended, that the yacht, at the moment of her approach, took a sheer to port, thereby causing her port side to come across the tug's bow. The wind was light, and the yacht moved very slowly through the water. A couple of the yacht's

¹ Reported by E. G. Benedict, Esq., of the New York bar.

planks were broken, and the stem of the tug was split. This indicates a blow of some severity; something more, at least, than a slight contact. As it is very difficult, if not impossible, to keep a light boat on a straight course with an aft wind, more especially if there are no head sails drawing, it is almost certain that there was some yawing of the yacht. But this was to be looked for to some extent, and guarded against.

Upon the whole evidence, I am satisfied, that considering the slow motion of the yacht, such yawing could not account for the damage done to either, had the tug approached in the ordinary way, that is, nearly parallel with the yacht, and reduced her speed properly before coming close to the yacht. I am persuaded that the accident arose from too much delay in reducing the tug's speed, and too large an angle of approach; and not from any luff by the yacht through the handling of her rudder. The luff to the southward, spoken of by the witnesses, was doubtless just after the collision.

Decree for the libelant, in the first suit, and dismissal of the cross libel, with an order of reference to compute the libelant's damages, if not agreed upon.

THE PREMIER.

THE WILLAMETTE

NELSON v. THE PREMIER and THE WILLAMETTE, (REESE et al.,
Intervenors.)

(District Court, D. Washington, N. D. February 5, 1894.)

1. COLLISION—INJURIES TO PASSENGERS—LIABILITY.

A steamer guilty of culpable negligence contributing to a collision is liable for resulting injuries to passengers on the other vessel, although it, also, may be guilty of fault contributing to the disaster.

2. SAME—FOG—EXCESSIVE SPEED.

A steamer which deviates from her proper course and continues at full speed in a fog, notwithstanding the known proximity of another vessel, as indicated by her fog horn, is guilty of fault when collision ensues.

3. SAME—DEATH OF PASSENGERS—SUIT BY PERSONAL REPRESENTATIVES — ADMIRALTY JURISDICTION.

The personal representatives of passengers killed in a collision can maintain a suit in admiralty in a federal court against the vessel in fault, when the local law gives them a right of action, and makes the damages a lien on the vessel, as in Washington by 1 Hill's Code, § 1678, and 2 Hill's Code, §§ 138, 148.

In Admiralty. Suit in rem to recover damages for personal injuries to passengers, resulting from a collision of the steam collier Willamette with the passenger steamer Premier. Findings and decree for libelants.

John H. Elder and A. R. Titlow, for libelant.

A. H. Garretson, John H. Elder, A. R. Titlow, Crowley & Sullivan, Stratton, Lewis & Gilman, and Ben Sheeks, for intervening libelants.

A. F. Burleigh, for claimant.

HANFORD, District Judge. This is a suit in rem by passengers who were injured, and personal representatives and heirs of passengers who were killed, by a collision between the passenger steamer Premier and the steam collier Willamette on Admiralty inlet, about midway between Marrowstone point and Bush point. The Premier is a steel propeller, and was, at the time of the collision, plying as a regular passenger steamer on the route from Tacoma to Whatcom, via Seattle, Port Townsend, and Anacortes. The Willamette is an iron propeller, built for the coal trade, and was, at the time of the collision, bound from Seattle to San Francisco with a cargo of about 2,700 tons of coal.

The collision occurred at 2:05 P. M., October 8, 1892. Admiralty inlet is wide. No other vessels or obstructions impeded either of the colliding vessels. The sea was smooth. The machinery of each vessel worked well, and both were in all respects properly equipped and easily controlled. And, although fog hung over the place and enveloped both vessels at the time of the occurrence, the collision could not possibly have happened if due care, and the rules prescribed by law for the prevention of collisions, had been observed by the commanders of both vessels. The Premier has not been arrested or brought within the jurisdiction of the court. I shall therefore, in this decision, refrain from expressing any opinion upon the question as to whether she was in fault. If the collision was caused by culpable negligence on the part of Willamette, she is liable for resulting injuries to passengers of the Premier, notwithstanding any fault on the part of the latter which may have been a contributing cause of the same injuries. The Atlas, 93 U. S. 302.

From the testimony of the Willamette's officers, I find that she left Seattle at 10:50 A. M. in a thick fog. When off West point she was overtaken and passed by the passenger steamer City of Kingston, bound from Seattle to Port Townsend. She passed Point-no-Point at 1:10 P. M., and from that time until the moment of the collision her engines were working full speed, or nearly so. I do not accept as true the statements of her officers as to the course of the Willamette from Point-no-Point to the place of the collision. I find, according to the preponderance of all the evidence, that the Willamette took a course from Point-no-Point which brought her very near to Bush point, on the east side of the inlet. A few minutes before the collision she was actually seen by persons residing there. The Premier was then around Marrowstone point, and had passed the Kingston, and was heading S. E. $\frac{3}{4}$ E., which was her proper course. Being in the fog, she was sounding one blast of her whistle at frequent intervals, and said signals were heard on board of the Willamette, and also by people on Bush point. The Willamette, instead of pursuing her proper course, keeping on the east side of the inlet, deviated to the westward, and took a course aimed with fatal accuracy toward the approaching Premier. The master of the Willamette, in his testimony, swears that when he heard the Premier's whistle he

mistook her for the City of Kingston, and it is altogether probable that he changed the course of the Willamette with the intention of following in the Kingston's wake, and that, on account of his stupidity or perversity he failed to discover that the vessel whose notes of warning were constantly sounding was approaching, instead of being overtaken. It is proven by the testimony of the assistant engineer in charge of the Willamette's engine room at the time of the occurrence that the first and only order occasioned by the meeting was, "Astern full speed," and this he has recorded as being given at 2:05,—the very moment of the collision. The Willamette rammed the Premier at an angle of about 45 degrees on her port side, just abaft the foremast, with such force as to cut into her hull nearly or quite to the latter's keel; the Willamette's bow being so firmly wedged into the structure of the Premier as to render her unable, by her own efforts, to pull away. After towing the Premier across the inlet to the beach near Bush point, and making her fast to the shore, her repeated efforts to back away and separate from the Premier resulted in parting a hawser, and still the two vessels remained united, until, with the assistance of a tug, the Willamette was finally liberated, and the Premier sunk. The Willamette was in fault for deviating from her proper course, and for continuing at a dangerous rate of speed, when the near proximity of another vessel was in fact known to her officers, instead of stopping until the position and course of the other vessel had been made out, and proper signals for passing had been given and understood by both vessels, as the law prescribes.

As the direct result of this casualty, John E. Moe, who is represented in this suit by Philip L. Reese, as administrator of the estate of said Moe; Frank C. Wynkoop; W. N. Richardson, who is represented in this suit by his widow, Ida F. Richardson; and Joseph Rankin,—were killed, and Jacob Nelson, Emma B. Miller, D. J. Wynkoop, E. W. Vest, and Thomas Foran suffered personal injuries; all of said deceased and injured persons being passengers on board the Premier.

The statutes of this state provide as follows:

"When the death of a person is caused by the wrongful act or neglect of another, his heirs, or personal representatives may maintain an action for damages against the persons causing the death. * * * 2 Hill's Code, § 138.

"A father, or in case of his death or desertion of his family the mother, may maintain an action as plaintiff for the injury or death of a child, and a guardian for the injury or death of his ward." Id. § 139.

"No action for a personal injury to any person occasioning his death shall abate, nor shall such right of action determine by reason of such death if he have a wife or child living, but such action may be prosecuted, or commenced and prosecuted, in favor of such wife, or in favor of the wife and children, or if no wife, in favor of such child or children." Id. § 148.

"All steamers, vessels, and boats, their tackle, apparel, and furniture, are liable: * * * 6. For injuries committed by them to persons or property within this state, or while transporting such persons or property to or from this state. Demands for these several causes constitute liens upon all steamboats, vessels, and boats, and their tackle, apparel, and furniture, and have

priority in their order herein enumerated, and have preference over all other demands; but such liens only continue in force for the period of three years from the time the cause of action accrued." 1 Hill's Code, § 1678.

Upon the authority of the decision of Judge Deady, in the case of *The Oregon*, 45 Fed. 62, and the apparent approval thereof by the supreme court of the United States in the case of *The Corsair*, 145 U. S. 335, 12 Sup. Ct. 949, I hold that the rights conferred by these statutes are available to the representatives of the deceased passengers above named in this suit. The injuries to the passengers who are parties to this suit are all of a serious character, but the evidence does not convince me that the disabilities existing at the time of taking the proofs are certain to be permanent. I believe that all will, as soon as their claims for damages are settled, regain health so far as to be able to pursue their former avocations. Therefore, in awarding them damages, I have not allowed for permanent disabilities. I award damages to the libelant and the several interveners, as follows: To the libelant, Jacob Nelson, for personal injuries sustained by himself, \$2,500; to the intervener Philip L. Reese, for the death of John E. Moe, \$5,000; to the intervener Emma B. Miller, for the injuries sustained by herself, \$2,500; to the interveners D. J. Wynkoop and Ella E. Wynkoop, for the death of their son, Frank C. Wynkoop, \$3,500; for the injuries sustained by D. J. Wynkoop, \$2,500; for the injuries sustained by Ella E. Wynkoop, \$1,000; for loss and injury to baggage and property, \$300; to the intervener E. W. Vest, for the injuries sustained by him, \$700; to the intervener Thomas Foran, for the injuries sustained by him, \$3,500; to the intervener John Rankin, for the death of his son Joseph Rankin, \$3,500; and to the intervener Ida F. Richardson, for the death of her husband, W. N. Richardson, \$5,000.

PERKINS et al. v. FISHER et al.*

(Circuit Court of Appeals, Fourth Circuit. February 7, 1894.)

No. 55.

WILLS—DEVISES—ALTERNATIVE CONTINGENCIES—PERPETUITIES.

A devise to trustees for the purpose of division among the children of testator's son, (a person in being,) if he should have any, and in case he should die "without lawful issue," then to other persons mentioned, is a devise upon an alternative contingency; and even if the first devise is void, as creating a perpetuity, the second will take effect if the son dies without having had any lawful issue.

Appeal from the Circuit Court of the United States for the District of West Virginia.

This was a bill filed by Elma Perkins and others against Maria P. Fisher and others, to review a former decree of the circuit court. Certain defendants demurred to the bill generally. The circuit court sustained the demurrer and dismissed the bill. Complainants appealed.

Henry J. Fisher, a prominent lawyer of West Virginia, departed this life on — day of January, 1883, leaving a last will and testament, with codicils, the last whereof is dated 25th January, 1883. The will, with its codicils, was presented and admitted to probate in the manner required by law, and Charles E. Hogg and L. F. Campbell, the executors named therein, duly qualified as such. The following is a copy of said will. The only codicil bearing on this case is the second. In it he revokes the bequests to the children of John Heisner, and his sister, Mrs. Choen, contained in the third clause of the will.

"Point Pleasant, Mason County, West Va.,

"Monday, January the 20th, 1879.

"I, Henry J. Fisher, of the town, county, state aforesaid, being of sound mind and disposing memory, do make and declare this to be my last will and testament, hereby revoking all former wills and codicils by me at any time made. I hereby devise and bequeath my whole estate, real, personal, and mixed, wherever situated, to Charles E. Hogg and L. F. Campbell, of the town, county, and state aforesaid, in trust for the uses and purposes hereinafter mentioned, namely:

"First. For the support of my son, Henry J. Fisher, Jr., in the manner and as hereinafter directed. This I do on account of my said son's conduct,—he having been all his life neglectful of my true interests, and also extravagant and wasteful,—and for the further reason that I cannot bear to see my estate wasted, which I have only been able to accumulate by the most rigid economy, diligence, and industry, practiced during my whole life; and, although I know it is nonsense to provide for those whom I have never seen, and forsooth may never see, still I cannot bear to see my property wasted through the drunkenness, contrariness, and sloth of my said son.

"And, in order that my said son may not be able to sell any reversionary interest in my said estate, I hereby direct my said trustees not to allow him an annual stipend, but to dole out to him a bare subsistence, and if he does not choose to eke it out by professional exertions or otherwise, let him live hard.

"I am now old and infirm, and this my last will and testament is made in accordance with a long-cherished purpose, and in some degree correspondent with a former will and codicils, which I have preserved to show my intention to preserve my property against my said son's habits of waste and extravagance.

* Rehearing denied, February 16, 1894.

"My son's wife is furnished, at my expense, with a house and lot in Point Pleasant, and all that he needs to do is to make a little to eat, drink, and wear; and I mention this in order that my son may be restricted in his allowance by my said trustees.

"Second. The accumulations of my estate shall be invested in good interest-bearing securities, and the accumulations thereof shall themselves be invested in like good interest-bearing securities; and if my said son should have any lawful children, my property shall be equally divided among them, giving to the girls at marriage, and to the boys at twenty-four years of age, and when one gets his share there shall be no other further division as to that matter, nor shall a death disturb the arrangement, but the interest of the one deceased shall go to augment the shares of those who have not then received their shares.

"Third. And in case my said son shall die without lawful issue, I desire that his widow be comfortably supported out of my estate during her widowhood, and the residue of my estate that is not required for a comfortable support of my son's widow during her widowhood, as aforesaid, I desire to be disposed of as follows: One-fourth thereof to Mrs. Henrietta Fowler, my natural daughter; one-fourth thereof to the lawful children of Nicholas Perkins by his present wife; one-fourth thereof to the children of John Heisner, deceased, of Gallipolis, Ohio; and the remaining one-fourth to the children of my sister, Sophia Choen.

"These devises and bequests are made in subordination to my wife's right of dower.

"And whereas, Nicholas Perkins and family are now occupying a part of my farm adjoining Long's farm, down to Crooked creek bridge, and near the town of Point Pleasant, and has made some improvements thereon, I desire my said trustees to allow him to live on and farm such part of said land until, in their judgment and discretion, he is fully and liberally paid for his said labor and improvements.

"And whereas, I have invested a part of my earnings in Virginia bonds, for which I have paid from ninety-five cents to one hundred cents on the dollar previously to the war, and have exchanged some coupons since for bonds which were scaled one-third, upon the promise that they should be punctually paid,—upon which bonds, though due, not one cent has ever been paid, and very little of the interest thereon,—I hereby require my said trustees to petition the general assembly of Virginia, at every session thereof, to pay the said trustees of my estate what is justly due me from that state, reminding said general assembly that I lost my negroes by the war, as well as they, my estate being subjected to rapine and plunder, and my person to privation, hardships, and distress; and I request them, my said trustees, to expend twenty dollars of my estate, if necessary, in getting such petitions printed and presented.

"I desire my said trustees to have a fair and reasonable compensation for their care and labor in managing and caring for my estate, and desire that they act as my executors; also, that no bond be required of them.

"This will I have drawn in duplicate, the original of which I have delivered to Charles E. Hogg, one of my said trustees and executors, and the duplicate I have kept myself.

"Witness my hand and seal this the day and year first above written.

"Henry J. Fisher. [Seal.]"

On 24th April, 1884, Henry J. Fisher, the son of the testator, filed his bill in the circuit court of the United States for the district of West Virginia, seeking to set aside the said will, and to have the same declared void and of no effect, on the following grounds: "That prior to the death of the testator he had married his present wife, and he had at the time of the death of the testator no children born of his marriage, nor has he now any children born of his marriage; that the devises and bequests to his unborn children, respectively, to wit, the boys at the age of 24 years and the girls at marriage, create perpetuities inhibited by law, and are void for remoteness; that the devise to Mrs. Henrietta Fowler, who has since intermarried with George Blackburn, now dead, being dependent on the same contingent

dies mentioned in the devises and bequests to the unborn children of your orator, are also void; that the devises and bequests to the children of Nicholas Perkins by his present wife, being dependent upon the same contingencies mentioned in the devises and bequests to the unborn children of your orator, are also void; that the testator died intestate as to one moiety of his estate."

To this bill Charles E. Hogg and L. F. Campbell, executors and trustees, were made defendants, as well as Henrietta Blackburn, Nicholas Perkins, and Susan, his wife, and their children, Elma Perkins, Shelly Perkins, Lila Perkins, Mary Perkins, and Eugene Perkins. All of these children were then under the age of 21 years. The defendant trustees and executors demurred to the bill, in which the other defendants joined. The demurrer was overruled. Whereupon the executors filed an answer, and default was taken against the other defendants. Upon hearing, the court, on 21st January, 1885, held "that the devises and bequests in the will contained of the testator's whole estate, real, personal, and mixed, wherever situated, to Charles E. Hogg and L. F. Campbell, as trustees, as therein mentioned and described, operate as a resulting trust for the complainant, Henry J. Fisher, as testator's sole heir at law, and that the latter is entitled to a conveyance from said trustees of all the real estate of the testator, and to the immediate possession and enjoyment of the whole of the testator's estate, real, personal, and mixed, wherever situate, subject, however, to the testator's widow's right of dower, and to her distributive share in the personal estate."

The order to the executors and trustees to convey and deliver the whole estate to the son was then made, and they were enjoined from any further intermeddling with the estate. Henry J. Fisher, the younger, took possession of all the estate of his father, the testator, and departed this life in June, 1887, leaving his wife, mentioned in said will, surviving him, and never having had any children by his marriage.

On 6th June, 1890, the bill of review in question was filed by Elma Perkins and Shelly Perkins, who are of full age,—the latter attaining age in October, 1890,—and Lila Perkins, Mary Perkins, and Eugene Perkins, who are under age, and who sue by *prochein ami*, their father. To this bill of review are made defendants the widow of Henry J. Fisher, the testator, the trustees and executors named in his will, Henrietta Blackburn, Nicholas Perkins, Maria P. Fisher, widow and executrix of Henry J. Fisher, the son, certain alienees of the said Henry J. Fisher, the son, of property after the date of the former decree, and certain heirs at law of Henry J. Fisher, the father,—all of them having been served. The bill seeks a review of the decree of 21st January, 1885, for the following alleged errors of law, apparent on the face of the decree:

"First. Overruling the objection and demurrer to said bill, because Maria P. Fisher, a beneficiary under said will, was not made a party to said original cause.

"Second. In overruling the demurrer to said bill for want of equity therein.

"Third. In holding that the devises and bequests in the second clause of the said will and testament contained, dated 20th January, 1879, to the lawful children of Henry J. Fisher, the son, were void, as creating perpetuities and being too remote. The said clause was and is valid, because it does not create a perpetuity; the proper construction of the will being that, as soon as the children of the complainant, Fisher, were born, the property of the said testator at once vested in said children, the possession and control thereof being postponed only until the events named therein should occur.

"Fourth. In holding the contingent devise to those plaintiffs who are the lawful children of the said Nicholas Perkins by his then present wife void, as said contingency simply depended upon the death of a person then in being without lawful issue.

"Fifth. In holding the first clause of the first codicil to the said will void, as it creates an interest inuring to the benefit of these complainants immediately upon the death of said testator."

Mrs. Maria P. Fisher, widow of Henry J. Fisher, appearing, filed a petition in the cause, which, however, does not bear upon the present aspect

of the case. The defendants claiming under deeds made by Henry J. Fisher, the son, demur to the bill generally. The heirs at law of the testator permit the bill to go by default. The court below sustained the demurrer and dismissed the bill of review, because, upon consideration thereof, the court is of opinion that the second clause of the said will of Henry J. Fisher, deceased, is in violation of the rule against perpetuities, and is therefore null and void. The assignment of errors sets this up as error, and also that, even if this second clause be void for remoteness, the third clause, which is a separate and independent one, not controlled by the second, provides that, in case the son die without lawful issue, one-fourth of the estate shall go to the complainants in the bill of review, and this contingency has happened and is not too remote.

The statute of West Virginia provides that "every limitation in any deed or will, contingent upon the dying of any person without heirs, or heirs of his body, or issue, or issue of the body, or children, or offspring, or descendant, or other relation shall be construed a limitation to take effect when such person shall die not having such heir or issue or child or offspring or descendant or other relation, as the case may be, living at the time of his death or born to him within ten months thereafter, unless the intention of such limitation be otherwise plainly declared on the face of the deed or will creating it." See, also, *Schultz v. Schultz*, 10 Grat. 358.

Okey Johnson, for appellants.

V. B. Archer, for appellees.

Before GOFF, Circuit Judge, and SEYMOUR and SIMONTON, District Judges.

SIMONTON, District Judge, (after stating the facts as above.) The learned judge who heard this case in the circuit court was of the opinion that the second clause of this will created a perpetuity. On this ground he held that the will was void, and directed the executors to surrender the whole estate to the heir at law. Assuming that this is the legitimate construction of the second clause, let us examine the correctness of the conclusion drawn therefrom. We confine ourselves to the terms of the will proper. The effect of the codicils will be noticed hereafter.

Where a previous disposition of property in a will is void by law, or becomes impossible, it does not follow that a subsequent disposition of it in the same will will fail, although it be expressly made to follow the void or impossible disposition. In *Robison v. Orphan Asylum*, 123 U. S. 703, 8 Sup. Ct. 327, the testator gave the income of his estate to his wife for her life. He then gave said income to his two sisters, or that one of them who should be living at the death of himself and of his wife, and he directed that at their death the income of the whole estate be divided into three equal parts, and be given to three several charitable societies. The two sisters died before the testator. The wife survived him, and claimed the whole estate, insisting that inasmuch as the provision for the sisters lapsed, the devise to the societies dependent on it failed also. The supreme court sustained the gift to the three societies.

In *Avelyn v. Ward*, 1 Ves. Sr. 420, testator devised his real estate to his brother and his heirs on the express condition that he should, within three months after testator's death, execute a release of all demands on his estate, but if the brother should neg-

lect to give such release, the devise should be null and void, and in such case testator devised the estate to W., his heirs and assigns, forever. The brother died in testator's lifetime. Lord Hardwicke held that the gift over took effect. In delivering his opinion he says that he knew of no case of a remainder or a conditional limitation over of a real estate, whether by way of a particular estate, so as to leave a proper remainder, or to defeat an absolute fee before by a conditional limitation, but, if the precedent limitation by what means soever is out of the case, the subsequent limitation takes effect.

In the case of *Warren v. Rudall*, 4 Kay & J. 603, a devise to a charity, which is void by law, with a gift over in the event that the inhabitants are not willing to carry out the scheme, Wood, V. Ch., sustained the devise over, notwithstanding that the devise to the charity was void by law. "I cannot," said he, "see any substantial distinction between the case of a devise to a nonentity, if the nonentity should die under 21, or, again, of a devise over after the death of a deceased person, if the deceased person should fail to do a certain act, and the case before me of a devise to a charity which cannot take, followed by a devise over in the event of that charity omitting to perform a certain act."

This case went into the house of lords, and is reported as *Hall v. Warren*, 9 H. L. Cas. 420. Lord Campbell, then chancellor, and Lords Cransworth, Wensleydale, and Kingsdown all concur in sustaining the devise over, notwithstanding that the first devise was void by law.

In *Cambridge v. Rous*, 25 Beav. 414, (Sir John Romilly, master of the rolls,) there was a gift of property to trustees to invest and pay the yearly dividends to the sister of testatrix during her life, and at her death to divide the said property equally among her sister's children when they should severally and respectively attain the age of 27 years. If the sister died not leaving any child or children at the time of her death, or in case of the death of all the children under 27, the will gave the whole property to certain relations of testatrix. Held, notwithstanding that the provision for the children was too remote, the devise over was good, the sister having died without children.

In *Monypenny v. Dering*, 2 De Gex, M. & G. 145, before St. Leonards, Ld. Ch., (devise in trust for A. for life, and after his decease in trust for his first son for life, and after the death of such first son in trust for the first son of the body of such first son and the heirs male of his body, and in default of such issue in trust for all and every other son and sons of the body of A., severally and successively, according to seniority, for like interests and limitations as hereinbefore directed respecting the first son and his issue, and in default of issue of the body of A., or in case of his not leaving any at his decease, in trust for B.,) the learned chancellor held that the limitation to the unborn son of an unborn son of A. was void, but that the devise to B. was good in the alternative event, which happened, of A. not leaving any issue at his death. In the fifth edition of *Jarman on Wills*, by

Bigelow, (volume 1, p. 285,) the doctrine is stated, and the English cases set out in the text.

The supreme court of Massachusetts, in *Jackson v. Phillips*, 14 Allen, 572, lay down the same rule. The court says:

"The general rule is that if any estate, legal or equitable, is given by deed or will to any person in the first instance, and then over to another person, or even to a public charity, upon the happening of a contingency which may by possibility not take place within a life or lives in being and twenty-one years afterwards, the gift is void, as tending to create a perpetuity. * * * If, therefore, the gift be limited upon a single event, which may or may not happen within the prescribed period, it is void, and cannot be made good by the actual happening of the event within that period; but if the testator distinctly makes his gift over to depend upon what is sometimes called an alternative contingency, or upon either of two contingencies, one of which may be too remote and the other cannot be, its validity depends on the event. Or, in other words, if he gives his estate over on one contingency, which must happen, if at all, within the limit of the rule, and that contingency does happen, the validity of the distinct gift over will not be affected by the consideration that, upon a different contingency, which might or might not happen within the lawful limit, he makes a disposition of his estate which would be void for remoteness. The authorities on this point are conclusive."

The case of *Armstrong v. Armstrong*, 14 B. Mon. 333, sustains the same position.

Jarman states the principle and draws the distinction. "Where the gift over is to arise on an alternative event, one branch of which is within, and the other is not within, the prescribed limits, so that the gift over will be valid or not according to the event," (1 Bigelow, *Jarm. Wills*, [5th Ed.] p. 285;) or, as it is put in the Massachusetts case above cited, if the gift over be upon an alternative contingency, if one of the alternatives be not too remote, and the event transpires, so as to make the gift over available if deemed valid, such gift will be supported, notwithstanding the fact that the other alternative is too remote," (*Jackson v. Phillips*, supra.)

If we examine the language of this will we will find that the testator disposes of his estate upon an alternative contingency. Grievd by the unfilial conduct of his son, the testator gives him by the will proper no interest in his property which would be subject to his disposition. He creates in him no particular estate with a limitation over; consequently, if that limitation be too remote, no absolute estate can vest in him as the first taker. He leaves him subject to the discretion of, and at the mercy of, his executors and trustees. Turning from him, he gives the fee in his realty and the absolute estate in his personalty to these trustees, so that the whole property may be kept together and preserved until his ultimate wishes regarding it shall have been accomplished. The burden of the trusts remains on them, and their heirs and representatives, until the happening of one or the other of two events. He selects as the objects of his bounty: First. The children of his son, should such children come into being. "If my said son should have any lawful children, my property shall be equally divided" between them, etc. Second. "In case my said son shall die without lawful issue," he provides for

those named in the third clause, which next succeeds. The language of this clause does not impinge upon the rule as to perpetuities. The statute of West Virginia limits the generality of the expression. And it would seem that, even without this statute, the limitation over would be good. The words, "in case my said son shall die without lawful issue," immediately follow a clause making a gift to the lawful children of the son, should he have any. "It is well settled," says Mr. Jarman, "that words importing failure of issue, following a devise to children in fee simple or fee tail, refer to the objects of that prior devise, and not to issue at large." 3 Rand. Jarm. Wills, (5th Ed.) p. 256. In *Treharne v. Layton*, in Ex. Ch. chamber, L. R. 10 Q. B. 459, testatrix gave her estate, real and personal, to M. for her sole use during her life, and after her death to her children in equal parts, and in case M. die leaving no issue, the whole property to go to the next of kin; held, affirming the queen's bench, that the words "leaving no issue" must be construed as "having had no issue." See, also, *Maitland v. Chalie*, 6 Madd. 250. And the same construction is put on the words "without leaving." They are held to be the same as "without having" by Jessel, M. R., in *Re Jackson's Will*, L. R. 13 Ch. Div. 194. Between these two classes, the testator had a marked preference in favor of his son's children. If they came into existence, the other class could not take anything. And he postponed any ultimate disposition of his estate to the last moment of the possibility of their coming into existence,—the death of his son. Only upon this alternative, the death of his son without lawful issue, or, we may say, never having had lawful issue, could this postponed class take. So intent was he that his whole estate and its usufruct should be preserved for the possibility of children of his son, the testator made no provision for the wife of his son, notwithstanding his evident regard for her, until she should become the widow of his son. Here there is clearly an alternative: If my son has lawful children, the whole of my property to them: in case my son should die without lawful issue,—without having had lawful issue,—this selfsame property, charged with a proper support of his son's widow, goes to the postponed class. Whatever may be the construction of the second clause, be it valid or not, yet, under the terms of the third clause, so long as any descendant of the testator existed, the class mentioned in this third clause could take nothing. This case, therefore, comes within the distinction made by Lord St. Leonards, Chancellor, in *Mony-penny v. Dering*, 2 De Gex, M. & G. 182:

"If the gift in question can be read as a gift in the alternative, that in case there is no issue living at the death of the brother, the estate is to go over, then effect may be given to it, consistently with *Beard v. Westcott*, 5 Taunt. 393, *Turn. & R.* 25, and every other authority, because the estate over would not be carried under the limitation at the expense of any person whom the testator intended to take, and no objection on this ground could consistently be raised."

We are of the opinion that the decree of 21st January, 1885, was premature because, at that time, the son being alive, non constat

whether or not he would die without lawful issue. The case at that time came within *Jackson v. Phillips*, 14 Allen, 573. In that case the court says:

"Neither James Jackson nor Mrs. Palmer is entitled to a present equitable estate in fee. But as James, though now unmarried, may marry and have children who survive him, and as Mrs. Palmer's children may survive her,—in either of which cases half of the income of the share would, by the will, go to such children during their lives, and the bequest over to the charity be too remote,—the validity and effect of that bequest cannot now be determined. If the contingency upon which it is valid should hereafter occur,—namely, the death of testator's son and daughter, respectively, leaving no children,—the whole remainder of the share will then go to the charity."

This course should have been followed here. We are also of the opinion that the decree sustaining the demurrer to the bill of review is erroneous, in that the third clause of the will presents an alternative event, and can go into operation even if the second clause be void; and that the testator did not die wholly intestate.

The testator, in Codicil No. 2 of his will, revoked the provision, made in the third paragraph of his will, of one-fourth of the residue to the children of Sophia Choen, and of another fourth to the children of John Heisner. These are fourths of the residue of his estate, after a comfortable support for the widow of his son during her widowhood is secured. Subject to this charge, these two-fourths have been undisposed of by the testator, and to that extent went to the son as heir at law.

The decree is reversed, and the case is remanded for such other proceedings as may be proper and consistent with this opinion.

RECTOR v. FITZGERALD.

(Circuit Court of Appeals, Eighth Circuit. January 29, 1894.)

No. 287.

LIS PENDENS—BILL OF REVIEW—TIME OF FILING.

A final decree dismissing a bill of complaint filed by R. was entered on May 2, 1881, and an appeal from such decree was dismissed for failure to prosecute it on December 6, 1881. On February 29, 1884, F. took a mortgage on lands affected by the litigation, from the grantee of the defendant who had prevailed in said suit. On April 29, 1884, R. filed a bill of review against F. and his grantor to reverse the decree dismissing the bill of complaint for error appearing on the record. *Held*: (1) That as F. was a purchaser in good faith after the lapse of the term at which a final decree in favor of his grantor had been rendered, his title could not be affected by a decree rendered on a bill of review subsequently filed; (2) that a bill of review will not be regarded as a continuation of the original suit so as to affect with notice a person purchasing the property in controversy in good faith from the successful party, after a final decree, and without notice that a bill of review is intended to be filed; (3) that, unless special reasons exist to excuse delay, a bill of review must be filed within the time limited by law for taking an appeal, and, as the bill of review filed by R. was not exhibited until after the time allowed by section 1008, Rev. St., for taking an appeal, it could in no event be entertained in the present case as against F.

Appeal from the Circuit Court of the United States for the Eastern District of Arkansas. Affirmed.

U. M. Rose, W. E. Hemingway, and G. B. Rose, for appellant.
Sam. W. Williams, for appellee.

Before SANBORN, Circuit Judge, and THAYER, District Judge.

THAYER, District Judge. This case comes before us on appeal from the decree of the circuit court of the United States for the eastern district of Arkansas dismissing a bill of review, so termed. The chief question to be considered is one of lis pendens, and the controlling facts on which the decision depends are as follows: Prior to December 16, 1880, there were pending in the United States circuit court for the eastern district of Arkansas, on the chancery docket, nine distinct and independent suits by Henry M. Rector, the present appellant, against several different defendants, in which suits Rector sought to enforce an alleged equitable title to certain lands situated in the city of Hot Springs, Ark., which were at the time held and occupied in severalty by the last-mentioned defendants. One of these suits was entitled Henry M. Rector v. E. Q. Gibbon et al.; another was entitled Henry M. Rector v. Thaddeus Taylor and William Gray. On December 16, 1880, the following stipulation, signed by counsel for the respective parties, was filed and spread of record in each of said cases.

"It is hereby stipulated and agreed that the answer shall be withdrawn in the case of H. M. Rector v. E. Q. Gibbon et al., and a demurrer shall be interposed, raising the question of the sufficiency of the bill upon the ground of jurisdiction, and to the finality of the decision of the Hot Springs commissioners, which shall be argued at the next April term with like effect as though filed and argued on the proper rule day, and affidavit and certificate to the demurrer is waived. And it is further agreed that the cases of Rector v. West Steele et al., Rector v. Henry P. Smith et al., Rector v. Henry Smith, Rector v. Lipscomb, Rector v. J. W. Parker et al., Rector v. Elihu Smith, Rector v. T. W. Beattie, and Rector v. Thad. Taylor, and other cases pending in this court involving the same question, shall await and abide the decision on the said demurrer; and if said demurrer is sustained, the same entry shall be made in each of said causes, and demurrer to be formally entered after such decision; and if said demurrer shall be overruled, the parties shall have time to take depositions with like effect as though their answers had been filed and depositions taken under regular rules."

At the April term, 1881, the demurrer which had been filed, pursuant to the above stipulation, in the case of E. Q. Gibbon et al., was sustained by the circuit court, and a final decree was entered dismissing the bill, from which decree an appeal was prosecuted to the supreme court of the United States. The decision on that appeal, reversing the decree of the circuit court, was rendered on March 19, 1884. Vide 111 U. S. 276, 4 Sup. Ct. 605. At the April term of the circuit court, and on May 2, 1881, the circuit court also entered an order sustaining a demurrer to the bill in the suit of Rector v. Taylor and Gray, and at the same time granted a decree dismissing the bill in that case. Afterwards Rector filed a motion to vacate the last-mentioned decree, on the ground that it had been entered prematurely, in violation of the foregoing stipulation, but the court denied the motion on October 22, 1881. From the last-mentioned decree, dismissing the bill of complaint

against Taylor et al., an appeal appears to have been allowed to the supreme court of the United States; but the same was not prosecuted diligently, and the appeal was dismissed by the supreme court on December 6, 1881. The land to which the litigation related was conveyed by Taylor and wife to Orlando A. Hobson on August 9, 1881, and on February 29, 1884, Hobson and wife executed a trust deed in the nature of a mortgage on the same property, to secure a loan of \$5,000 made to Hobson by Edward Fitzgerald, the present appellee. At a foreclosure sale under said deed of trust or mortgage, Fitzgerald became the purchaser of the premises on March 4, 1887, and received a deed for the premises in due form. After the announcement of the decision of the supreme court in the case of Rector v. Gibbon, 111 U. S. 276, 4 Sup. Ct. 605, and on April 29, 1884, a bill, which on its face professed to be an "original bill in the nature of a bill of review," was filed by Rector against Taylor, Gray, and Hobson. This was followed by a bill of revivor, filed on January 20, 1887, to bring in the heirs of Hobson, who had died in the mean time. On March 6, 1888, a supplemental bill was filed by Rector to make Fitzgerald a party to the litigation. The bill of review and supplemental bill, last referred to, contained substantially the same allegations that are found in the original bill of complaint against Taylor and Gray, and the same prayer for relief. They also contained a brief statement of the terms of the stipulation that had been spread of record in the case on December 16, 1880; but the so-called bill of review did not refer to the decree that had been entered on May 2, 1881, dismissing the original bill of complaint, neither did it nor the supplemental bill contain any prayer that that decree might be reviewed and reversed.

In his answer to the several pleadings above mentioned, Fitzgerald, the appellee, based his defense to the relief sought on the ground that the alleged bill of review was not filed within the time limited by law and the rules of procedure in equity for filing such a bill; also on the ground that, at the inception of his title, on February 29, 1884, there was no pending suit which could affect him with constructive notice of Rector's alleged equity, and that, in any event, he was a purchaser for value in good faith under circumstances which would have satisfied any prudent person that the litigation affecting the property in question had been finally terminated. It is a familiar rule of law that a stranger who purchases property at a judicial sale under a judgment or decree that is erroneous or voidable, but not absolutely void, will be protected in his purchase, even if the judgment or decree is subsequently reversed on appeal or writ of error. *Gray v. Brignardello*, 1 Wall. 627, 634; *Voorhees v. Bank*, 10 Pet. 449, 469; *Gilman v. Hamilton*, 16 Ill. 225, 232, and citations; *Clarey v. Marshall's Heirs*, 4 Dana, 96, 99. But the same protection which is afforded to a stranger to the record, who purchases property at a judicial sale under an erroneous judgment or decree, will not be extended under all circumstances to a person who purchases property that is in litigation from a party to the litigation, even though he purchases after a

final judgment or decree has been rendered at nisi prius in favor of the vendor. If the purchase is made after the rendition of a judgment in favor of the vendor, but within the time limited by law for an appeal or writ of error, it seems to be a debatable question how far the purchaser is affected by subsequent proceedings in the case, if an appeal or writ of error is prosecuted with effect by the losing party. In some, and in perhaps the majority, of the states it is held that one who thus purchases after a final judgment or decree at nisi prius, before a writ of error has been served, and without notice that such a writ of error has been or will be sued out, will not be affected by a subsequent reversal of the judgment or decree on writ of error. *Taylor v. Boyd*, 3 Ohio, 337, 352; *Eldridge v. Walker*, 80 Ill. 270; *Macklin v. Allenberg*, 100 Mo. 337, 13 S. W. 350; *Pierce v. Stinde*, 11 Mo. App. 364; *McCormick v. McClure*, 6 Blackf. 466. But in some other states the authorities indicate, if they do not expressly hold, that a voluntary purchaser from a party to a suit, during the period allowed after final judgment or decree to take an appeal or to sue out a writ of error, would be there regarded as a purchaser pendente lite, and would hold the property subject to the outcome of the litigation. *Debell v. Foxworthy's Heirs*, 9 B. Mon. 228; *Harle v. Langdon's Heirs*, 60 Tex. 555, 562, and citations; *Marks v. Cowles*, 61 Ala. 299.

There is also some conflict of opinion as to whether a person who purchases property from a party to a suit after final decree therein, and within the time limited by law for filing a bill of review, is a purchaser pendente lite, and is bound by a decree of reversal on a bill of review subsequently filed. This question was answered in the affirmative in *Earle v. Couch*, 3 Metc. (Ky.) 450, and in *Clarey v. Marshall's Heirs*, 4 Dana, 95, 96. The decision in these cases is based upon the ground that a purchaser under such circumstances is presumed to know that the decree may be reversed on a bill of review, or, in other words, that he buys with the knowledge that the litigation is not at an end until the period has expired for filing a bill of review or taking an appeal. On the other hand, a different conclusion was reached in a very well considered case in the state of Ohio. *Ludlow v. Kidd*, 3 Ohio, 541. In the last case the facts were that certain infants filed a bill to obtain the legal title to certain real estate. The bill was dismissed on final hearing; whereupon the defendants, who were in possession of the land, and had an apparent legal title, sold the same to third parties who were strangers to the suit. A statute of Ohio allowed infants five years after obtaining their majority to bring a bill of review in such cases. The complainants having availed themselves of this statutory right after becoming of full age, and having procured a reversal of the original decree on a bill of review, it was held, after a careful scrutiny of the authorities, that the intermediate purchasers were not affected by the decree of reversal. The decision in *Lee Co. v. Rogers*, 7 Wall. 181, also has a direct bearing on the question at issue, and is in harmony with the case last cited. A suit was brought to enjoin the county from issuing certain bonds on the ground that it had no authority to issue such securities.

This bill was dismissed on final hearing, whereupon the bonds were issued and sold. Subsequently a bill of review was filed, which resulted in a decree declaring that the county had no power to issue such bonds, and in a reversal of the original decree. In a suit against the county upon the bonds, it was urged that they had been issued and sold during the pendency of a suit to test their validity, and that the purchasers were affected with notice of the litigation, and were bound by the decree on the bill of review. It was held, however, that they were "distinct and independent suits, and that the doctrine of *lis pendens* had no application to the case." In *Cole v. Miller*, 32 Miss. 89, 101, it was also expressly ruled that, while a bill of review has reference to the original suit, yet it is "an independent proceeding, and not a part of the original case." We are of the opinion, both on principle and authority, that a bill of review ought not to be regarded as a continuation of the original suit, merely for the purpose of affecting a purchaser in good faith, after a final decree, with notice. In our judgment, one who thus purchases after the lapse of the term at which a final decree on the merits is rendered, without notice that a bill of review is in contemplation, or will be exhibited, should be protected from the effect of a decree on such a bill if it is subsequently filed. After a final decree the losing party, by proper diligence, can always guard against the risk of losing the fruits of the litigation by a sale to an intermediate purchaser; and, on grounds of public policy, it is better to exact of him such diligence in the prosecution of his claim, than to suffer the title of valuable property to be clouded for an indefinite period by the possibility that the litigation may be renewed by a bill of review.

But, even if the conclusion last stated is not warranted by the authorities, we entertain no doubt that, on the state of facts disclosed by this record, the doctrine of *lis pendens*, which the appellant invokes, is inapplicable. The decree dismissing the bill was entered on May 2, 1881. Thereafter, by the motion to vacate the decree, the court's attention was directed to the stipulation of December 16, 1880, and, in a proper manner, it was called upon to construe that stipulation. It held, in substance, that the agreement "to await and abide the decision on the demurrer" in the *Gibbon Case*, meant the decision of the circuit court on such demurrer, rather than such final decision as might be rendered on appeal; and, whether that view was right or wrong, it was conclusive, as between the parties to the suit wherein such ruling was made, until it was reversed on appeal or by a bill of review. An appeal was in fact allowed, which was dismissed on December 6, 1881; and the present bill of review, so termed, was not filed for more than two years and four months thereafter. No sufficient excuse has been shown for not prosecuting that appeal to a final hearing upon the merits, nor can we entertain any doubt that, if it had been diligently followed, the appellant might have obtained a review of the decision of the circuit court touching the proper construction of the stipulation, which decision we are now asked to review and to reverse. It is a well-settled rule of procedure that, unless some special reasons exist to excuse the delay,

which have not been shown in the present case, a bill of review must be exhibited within the same time allowed for taking an appeal, which by the federal statute at the time of these occurrences was limited to two years after the entry of a final decree. Rev. St. § 1008; *Thomas v. Harvie's Heirs*, 10 Wheat. 146; *Clark v. Killain*, 103 U. S. 766; *Ensminger v. Powers*, 108 U. S. 292, 2 Sup. Ct. 643; *Daniell*, Ch. Pl. & Pr. 1580, 1581, and citations; *Story*, Eq. Pl. & Pr. 410. We are of the opinion, therefore, that as the appellee's title to the premises was acquired under a mortgage which was executed on February 29, 1884, more than two years after the appeal from the final decree dismissing the original bill had been itself dismissed in the supreme court, such title as he then acquired could not be prejudiced, or in any manner affected, by a decree rendered on the alleged bill of review which was thereafter filed.

In view of what has already been said, it becomes unnecessary to consider whether the final decree of May 2, 1881, was entered prematurely, in violation of the stipulation of December 16, 1880, and no opinion will be expressed on that point. If the circuit court erred in its interpretation of the stipulation, it was like any other error that might have been committed during the progress of the case, and the alleged error did not render the decree dismissing the original bill any the less final. It is evident, we think, that when the appellee acquired an interest in the property there was not only no pending suit which could affect him with notice, but the time had then expired within which the litigation could be renewed by a bill of review. Finding no error in the record, the decree of the circuit court is in all things affirmed.

UNION PAC. RY. CO. et al. v. UNITED STATES.

(Circuit Court of Appeals, Eighth Circuit. January 29, 1894.)

No. 221.

1. RAILWAY AND TELEGRAPH COMPANIES—GOVERNMENTAL AID—PACIFIC RAILROADS.

There was nothing in the acts of July 1, 1862, and July 2, 1864, which would prevent the Union Pacific Railroad Company, in the discharge of its obligation to maintain a telegraph line for railroad and commercial purposes, from contracting with a telegraph company for the joint maintenance of a line of poles on the railroad right of way, upon which each party was to string its wires; the railroad company to maintain its own telegraphic offices and operators, adequate to the transmission of commercial, as well as railroad, messages. 50 Fed. 28, reversed.

2. SAME.

Such a contract was not rendered unlawful, on grounds of public policy, by a provision therein binding the railroad company to assure to the telegraph company the exclusive right of way along the railroad "as far as it could legally do so," and to refuse assistance and facilities for the construction of rival lines, in so far as "it could lawfully withhold" the same. 50 Fed. 28, reversed.

3. SAME.

The authority given to the Pacific Railroad Companies by the fourth section of the act of July 2, 1864, known as the "Idaho Act," to discharge their obligation in respect to telegraph lines by entering into

an arrangement with the United States Telegraph Company whereby its lines should be constructed upon their right of way, was not a privilege confined merely to the United States Company, but it extended to that company and "its associates," to whom the right of constructing lines was given in the first section of the act, and the railroad companies had authority to make such an "arrangement" with a company in which the United States Company became merged by a lawful consolidation. 50 Fed. 28, reversed.

4. SAME—ENFORCING RIGHTS OF GOVERNMENT—LEGAL AND EQUITABLE PROCEDURE.

The court will not presume, in the absence of express provisions to that effect, that, by directing the attorney general to take "proper proceedings" to ascertain and enforce the rights of the United States in the telegraphic property and franchises connected with the Pacific Railroads. (Act Aug. 7, 1888, § 4,) congress intended to authorize the joinder of legal and equitable matters in one proceeding; and it will not, therefore, under a bill in equity, attempt to enforce upon the Union Pacific Railroad Company the duty, imposed by the first section of said act, of operating its telegraph lines "by itself alone through its own corporate officer," which is a matter properly appertaining to the writ of mandamus. 50 Fed. 28, reversed.

5. SAME—INTERSTATE COMMERCE COMMISSION.

The duty of affording equal facilities to all connecting lines of telegraph without discrimination against any, which is enjoined upon the Pacific Railroad Companies by the second section of the act of 1888, is a duty to be enforced, not by a bill in equity, but in the manner prescribed in section 3, namely, by application to the interstate commerce commission under the rules prescribed by that body.

Appeal from the Circuit Court of the United States for the District of Nebraska.

In Equity. Bill by the United States against the Union Pacific Railway Company and the Western Union Telegraph Company to cancel a contract whereby the telegraphic franchises of the railroad company were transferred to the telegraph company, and to compel the railroad company to exercise such franchises directly through its own officers and employees. Complainant obtained a decree from the circuit court for the district of Nebraska, (50 Fed. 28,) but upon appeal the case was reversed, and the cause remanded with directions to set aside the former decree, and in lieu thereof to make and enter a modified decree.

This was a bill exhibited by the attorney general in behalf of the United States under the provisions of an act of congress approved August 7, 1888, (25 Stat. 382,) which by its title is declared to be supplementary to the Pacific Railroad acts of July 1, 1862, and July 2, 1864. Vide 12 Stat. 489, and 13 Stat. 356. The material portions of the act of August 7, 1888, are as follows:

"Be it enacted by the senate and house of representatives of the United States of America in congress assembled, that all railroad and telegraph companies to which the United States has granted any subsidy in lands or bonds or loan of credit for the construction of either railroad or telegraph lines, which, by the acts incorporating them, or by any act amendatory or supplementary thereto, are required to construct, maintain, or operate telegraph lines, and all companies engaged in operating said railroad or telegraph lines shall forthwith and henceforward, by and through their own respective corporate officers and employees, maintain and operate for railroad, governmental, commercial and all other purposes, telegraph lines, and exercise by themselves alone all the telegraph franchises conferred upon them and obligations assumed by them under the acts making the grants as aforesaid.

"Sec. 2. That whenever any telegraph company which shall have accepted the provisions of title sixty-five of the Revised Statutes shall extend its line to any station or office of a telegraph line belonging to any one of said railroad or telegraph companies, referred to in the first section of this act, said telegraph company so extending its line shall have the right and said railroad or telegraph company shall allow the line of said telegraph company so extending its line to connect with the telegraph line of said railroad or telegraph company to which it is extended at the place where their lines may meet, for the prompt and convenient interchange of telegraph business between said companies; and such railroad and telegraph companies, referred to in the first section of this act, shall so operate their respective telegraph lines as to afford equal facilities to all, without discrimination in favor of or against any person, company or corporation whatever, and shall receive, deliver and exchange business with connecting telegraph lines on equal terms, and affording equal facilities, and without discrimination for or against any one of such connecting lines; and such exchange of business shall be on terms just and equitable.

"Sec. 3. That if any such railroad or telegraph company referred to in the first section of this act, or company operating such railroad or telegraph line shall refuse or fail, in whole or in part, to maintain and operate a telegraph line as provided in this act and acts to which this is supplementary, for the use of the government or the public, for commercial and other purposes, without discrimination, or shall refuse or fail to make or continue such arrangements for the interchange of business with any connecting telegraph company, then any person, company, corporation, or connecting telegraph company may apply for relief to the interstate commerce commission, whose duty it shall thereupon be, under such rules and regulations as said commission may prescribe, to ascertain the facts, and determine and order what arrangement is proper to be made in the particular case, and the railroad or telegraph company concerned shall abide by and perform such order; and it shall be the duty of the interstate commerce commission, when such determination and order are made, to notify the parties concerned; and, if necessary, enforce the same by writ of mandamus in the courts of the United States, in the name of the United States, at the relation of either of said interstate commerce commissioners: provided, that the said commissioners may institute any inquiry, upon their own motion, in the same manner and to the same effect as though complaint had been made.

"Sec. 4. That in order to secure and preserve to the United States the full value and benefit of its liens upon all the telegraph lines required to be constructed by and lawfully belonging to said railroad and telegraph companies referred to in the first section of this act, and to have the same possessed, used and operated in conformity with the provisions of this act and of the several acts to which this act is supplementary, it is hereby made the duty of the attorney general of the United States, by proper proceedings, to prevent any unlawful interference with the rights and equities of the United States under this act, and under the acts hereinbefore mentioned, and under all acts of congress relating to such railroads and telegraph lines, and to have legally ascertained and firmly adjudicated all alleged rights of all persons and corporations whatever claiming in any manner any control or interest of any kind in any telegraph lines or property, or exclusive rights of way upon the lands of said railroad companies, or any of them, and to have all contracts and provisions of contracts set aside and annulled which have been unlawfully and beyond their powers entered into by said railroad or telegraph companies, or any of them, with any other person, company or corporation."

The Union Pacific Railway Company, which is named as one of the defendants in the bill, was formed in January, 1880, pursuant to section 16 of the act of July 1, 1862, by the consolidation of three pre-existing railroad corporations, to wit, the old Union Pacific Railroad Company, the Kansas Pacific Railway Company, and the Denver Pacific Railway & Telegraph Company. The consolidated company now operates a line of railroad from Council Bluffs, Iowa, to Ogden, Utah, known as the main line; also, a line

from Kansas City, Mo., to Denver, Colo., and a line from Denver north to a junction with the main line at Cheyenne. Prior to the consolidation in January, 1880, the Union Pacific Railroad had built the main line from Council Bluffs to Ogden, together with a line of telegraph along its right of way; the Kansas Pacific Railway Company (which was first called the Leavenworth, Pawnee & Western Railroad, subsequently the Union Pacific Railroad, Eastern Division, and lastly the Kansas Pacific Railway Company) had built the line of railroad from Kansas City to Denver, and under a contract with the Western Union Telegraph Company of date October 1, 1866, had caused a line of telegraph to be erected on its right of way. Prior to the consolidation the Denver Pacific Railway & Telegraph Company had built a line of railroad and telegraph from Denver to Cheyenne, acting in that behalf under a contract with the Kansas Pacific Railway Company, whereby the former company acquired so much of the Kansas Pacific Company's subsidy as pertained to that part of its line between Denver and Cheyenne. The contract between the two companies, last mentioned, was authorized by an act of congress approved on March 3, 1869, (15 Stat. 324.) The Leavenworth, Pawnee & Western Railroad Company (afterwards termed the Kansas Pacific Railway Company) accepted the provisions of the ninth section of the Pacific Railroad acts of July 1, 1862, and July 2, 1864, which acceptance entitled it to receive, and it did in fact receive, a large subsidy from the government for constructing the line of railroad from Kansas City to Cheyenne via Denver, and the Union Pacific Railroad Company received a like subsidy for building the main line from Council Bluffs to Ogden.

The foregoing facts were stated substantially in the bill of complaint. It further charged, in substance, as follows: That by the act of July 1, 1862, the Union Pacific Railroad Company became and was bound to build and maintain, and to operate by its own servants and agents, a line of telegraph for commercial and governmental purposes between Omaha and Ogden, but that on September 1, 1869, and on December 20, 1871, said railroad company had unlawfully leased to the Atlantic & Pacific Telegraph Company "all its telegraph lines, wires, poles, instruments, and offices, and all of its property pertaining to the business of telegraphy," for the full period of its corporate existence; and that the consolidated company had thereafter, on July 1, 1881, entered into a contract with the Western Union Telegraph Company (which had, in the mean time, become the successor of the Atlantic & Pacific Telegraph Company) whereby it had "surrendered its franchise and alienated its powers under its charter" to said Western Union Telegraph Company, and that under said contract the Western Union Telegraph Company had entered into possession and control of the lines of telegraph between Omaha and Ogden. The bill also charged that under the provisions of the Pacific Railroad acts of July 1, 1862, and July 2, 1864, the United States had a lien upon the railway and telegraph lines aforesaid, and the earnings of each, with all appurtenances, to reimburse it for aid extended in constructing the same, but that the Union Pacific Railway Company, by the contract of July 1, 1881, with the Western Union Telegraph Company, had "attempted to relieve itself from the duty of maintaining and operating telegraph lines for railroad, governmental, commercial, and all other purposes, and had refused to exercise the obligations assumed by it under the aforesaid acts;" that the United States "had been deprived by said contract of its security and indemnity fund;" that the earnings from said telegraph business had been appropriated by the Western Union Telegraph Company, which had taken possession, for its own use, of the right of way and materials donated by the United States; that the Union Pacific Railway Company "had surrendered its telegraphic franchises to the telegraph company;" that it "had avoided and refused to perform its duties; that it had refused to connect with other lines, or to afford any facilities for the exchange of telegraph business except with the Western Union Telegraph Company; that it had refused to do any telegraph business for the United States or for the general public, and had thereby granted a monopoly of the telegraph business along its lines to the Western Union Telegraph Company, and had deprived the people of the United States of the benefits of free competition, contrary to the Pacific Railroad acts aforesaid and the

supplementary act of August 7, 1888. The bill further averred that since the passage of the act of August 7, 1888, the Union Pacific Railway Company had continued to act in accordance with the provisions of the contract of July 1, 1881, and that it had done so, subsequent to the passage of that act, under pretense of complying with an injunction which the Western Union Telegraph Company had obtained on February 14, 1889, in the United States circuit court for the district of Nebraska, restraining the Union Pacific Railway Company "from doing any act or thing contrary to the provisions of that contract." The bill of complaint disclosed the various proceedings that had been taken in said injunction suit, (which is characterized as a collusive suit,) and among other things averred, in substance, that it was therein claimed by the Western Union Telegraph Company that prior to October 1, 1866, the United States Telegraph Company had moved its telegraph line in the state of Kansas upon the right of way of the Kansas Pacific Railway Company under an arrangement with the Kansas Pacific Railway Company which was authorized by an act of congress approved July 2, 1864, (13 Stat. 373;) that the Western Union Telegraph Company had succeeded to all the rights of the United States Telegraph Company, and on October 1, 1866, had entered into a contract with the Kansas Pacific Railway Company, in pursuance of which it had completed the line of telegraph along the Kansas Pacific Railway to Denver, and that the line so constructed was duly accepted by the United States as a fulfillment of the obligation of the Kansas Pacific Railway Company to erect a line of telegraph. With respect to this claim on the part of the Western Union Telegraph Company, the bill filed by the United States charged, in substance, that the United States Telegraph Company did not remove its constructed line, under the aforesaid arrangement, upon the right of way of the Kansas Pacific Railway Company; that the Western Union Telegraph Company did not complete a line of telegraph along that road to Denver, as claimed; and that the United States had neither accepted such line of telegraph from the Western Union Telegraph Company, nor dealt with nor recognized either it or the United States Telegraph Company as the builder of said line. The bill finally charged that all of the aforesaid contracts with the Western Union Telegraph Company were beyond the power of the railway company to make, and against public policy, and in violation of the Pacific Railroad acts and the act of August 7, 1888.

The prayer of the bill was in accordance with the fourth section of the act of August 7, 1888: "That the court ascertain and finally adjudge the rights of all persons and corporations in any manner claiming any contract or interest of any kind in said telegraph lines or property, or exclusive rights of way upon the lands of said railway company, or any of them, and that upon the hearing an order or final decree be entered, canceling and annulling said contract and all provisions of contracts relating to the alienation of said telegraph lines or the control and management thereof," and that said railway company "be decreed and compelled to maintain and operate said telegraph lines according to law." Answers were filed by the railway company and the telegraph company, which admitted the execution of the several contracts referred to in the bill, but denied that the contracts of July 1, 1881, and October 1, 1866, were invalid. The defendants further denied, in substance, that the railway company had transferred or surrendered its telegraphic franchise to the telegraph company, or that it had divested itself of the power to perform its charter obligations to the government or to the public with respect to maintaining a telegraph line, or that it had at any time failed or refused to discharge its obligations in that behalf. On the final hearing the circuit court entered a decree canceling and annulling all of the contracts with the Western Union Telegraph Company and the Atlantic and Pacific Telegraph Company that have been heretofore referred to. It further decreed that the Union Pacific Railway Company "put an end to all relations with the Western Union Telegraph Company not equally allowed to other persons and corporations operating * * * telegraphs, that it at once resume possession of its offices, poles, wires, instruments, and all of its other property belonging to the business of telegraphy, along such of its main and branch lines as were aided by the government under

the act of July 1, 1862, * * * and henceforth, by and through its own corporate officers and employes, maintain and operate for railroad, governmental, commercial, and other purposes such telegraph lines and instruments, and * * * exercise, by itself alone, all the telegraphic franchises conferred upon it under the several acts granting to it subsidies." The decree further required the railway company to afford equal facilities to all telegraph companies without discrimination, and to receive, deliver, and exchange business with connecting telegraph companies on equal terms, and to afford equal facilities to all, without discrimination for or against any. It further commanded the railway company to construct and provide such lines of telegraph and instrumentalities as would be adequate to enable it to carry out the provisions of the decree aforesaid, and also commanded the Western Union Telegraph Company to forthwith vacate all offices of the railway company without removing therefrom, until further order. any property which had theretofore been jointly used by the two defendants.

The opinion of the circuit court is reported in 50 Fed. 28, 41.

John F. Dillon and John M. Thurston, (W. R. Kelly, on the brief,) for appellant Union Pac. Ry. Co.

Rush Taggart, for appellant Western Union Tel. Co.

Sol. Gen. Maxwell, for the United States.

Before CALDWELL, Circuit Judge, and THAYER, District Judge.

THAYER, District Judge, after stating the case as above, delivered the opinion of the court.

The chief question to be considered on this appeal is whether the United States is entitled to have the contract of July 1, 1881, between the Union Pacific Railway Company and the Western Union Telegraph Company, canceled and annulled, either because it was originally illegal and beyond the power of the Union Pacific Railway Company, or because its provisions are now repugnant to the act of August 7, 1888, (25 Stat. 382.) Subordinate to this general inquiry are the questions whether the contract of October 1, 1866, between the Western Union Telegraph Company and the Kansas Pacific Railway Company, is invalid, and some questions pertaining to the scope, purpose, and effect of the act of August 7, 1888. It is claimed by the government, and is not denied by the appellants, that the Pacific Railroad acts of July 1, 1862, and July 2, 1864, imposed on the various constituent railroad companies who now compose the Union Pacific Railway Company the duty, among others, of constructing and maintaining on their several rights of way a line of telegraph for governmental, commercial, and other purposes. It was held both by Mr. Justice Brewer in this case, and by Mr. Justice Miller and Judge McCrary in other cases where the same question was involved, that the obligation thus imposed on the several railroad companies to construct and maintain telegraph lines could not be lawfully avoided by leasing their lines of telegraph, after their construction, to some other corporation, to be by it maintained and operated. Vide 50 Fed. 32; W. U. Tel. Co. v. Union Pac. Ry. Co., 3 Fed. 423, 721, 725; Atlantic & P. Tel. Co. v. Union Pac. Ry. Co., 1 Fed. 745, 749. This latter proposition does not seem to be controverted by the appellants, or either of them; therefore, it must be taken as conceded that the lease granted by the Union Pacific Railroad Company to the Atlantic & Pacific Tele-

graph Company on September 1, 1869, and the supplementary agreement of December 20, 1871, between the same companies, which are referred to in the bill of complaint, were each beyond the power of the railroad company to execute, and for that reason were and are of no binding force or efficacy. The nineteenth section of the Pacific Railroad act of July 1, 1862, (12 Stat. 489,) and the fourth section of the act of July 2, 1864, (13 Stat. 373,) provided a means by which the old Union Pacific Railroad Company and the Kansas Pacific Railway Company might respectively relieve themselves of the obligation to construct and maintain a telegraph line along their respective rights of way. When the act of July 1, 1862, was passed, the Pacific Telegraph Company, the Overland Telegraph Company, and the California State Telegraph Company were operating a line of telegraph across the plains, from the Missouri river to San Francisco, about on the proposed route of the main line of the Union Pacific Railway Company, under a contract with the government which had been entered into pursuant to an act of congress approved June 16, 1860, (12 Stat. 41,) entitled "An act to facilitate communication between the Atlantic and Pacific states by electric telegraph." The nineteenth section of the act of July 1, 1862, provided, in substance, that an arrangement might be made with said last-named telegraph companies, by the railway companies mentioned in said act, to move their line of telegraph upon the railroad right of way, and that, if such an arrangement was entered into, it should be considered a fulfillment of the obligation of the railroad company to construct and maintain a line of telegraph; and, even in the absence of such an arrangement, it authorized the aforesaid telegraph companies to move their line upon the railroad right of way. In like manner the fourth section of the act of July 2, 1864, which latter act empowered the United States Telegraph Company to construct a telegraph line between the Missouri river and San Francisco, authorized the United States Telegraph Company to enter into an arrangement with either of the railway companies mentioned in the Pacific Railroad act of July 1, 1862, whereby its telegraph line might be erected on the railroad right of way, and, if so erected, should be held and considered a fulfillment of the railroad company's obligation to construct and maintain a telegraph line. This latter act, though general in its terms, evidently had in view an arrangement between the United States Telegraph Company and the Kansas Pacific Railway Company, whereby the latter should be relieved of its telegraphic obligation, as the line of the United States Telegraph Company was projected to run through Kansas. With respect to the opportunity thus afforded to the several railway companies to fulfill their telegraphic obligations to the United States otherwise than by actually constructing and maintaining a telegraph line for governmental and commercial purposes, it is sufficient to say, that it does not appear to be claimed by the appellants, or either of them, that the old Union Pacific Railroad Company ever availed itself of the opportunity thus afforded it, so far as the main line between Omaha and Ogden is concerned. On the contrary, it built a telegraph line of its own, on the

north side of its right of way, between the points aforesaid, and the three telegraph companies heretofore named (the Pacific, the Overland, and the California State) moved their line upon the south side of the right of way, in accordance with the statute aforesaid, but not under any such "arrangement" or agreement with the railway company as would suffice to relieve the latter of its obligation to maintain a telegraph. The case is different, however, with respect to the Kansas Pacific Railway Company. It is argued with much force that the latter company entered into an arrangement with the United States Telegraph Company, which arrangement was subsequently embodied in the contract of October 1, 1866, with the Western Union Telegraph Company, the successor of the United States Telegraph Company, whereby, under the fourth section of the act of July 2, 1864, *supra*, it fulfilled its obligation to maintain a telegraph line at least between Kansas City and Denver. We shall discuss the merits of this contention further on, but at present, with the foregoing summary of the points conceded, and in the light of such concessions, we turn to consider whether the contract of July 1, 1881, which superseded all other contracts, was a valid agreement.

Before stating the provisions of that contract it will be well to describe the situation as it existed when the same was entered into. At that time the Western Union Telegraph Company, as the successor of the Overland, the Pacific, and the California State Telegraph Companies, was lawfully in possession of, and was the owner of a line of telegraph upon the railroad right of way between Omaha and Ogden. The Western Union Telegraph Company had in fact furnished the means to build, and had built, that line of telegraph across the plains, and had caused it to be moved upon the railroad right of way, through the agency of the three telegraph companies last named. On July 1, 1881, the Western Union Telegraph Company had also succeeded to all the rights of the Atlantic & Pacific Telegraph Company, which was the lessee of the Union Pacific's telegraph line under the lease of September 1, 1869. In a suit which had theretofore arisen between the Atlantic & Pacific Telegraph Company and the Union Pacific Railway Company it had been decided that the last-mentioned lease was invalid; but, as it appeared in the course of the suit that the railway company had received for such lease 17,800 shares of the telegraph company's stock, from which it had realized from four to six hundred thousand dollars, the court had enjoined the railway company from taking possession of the telegraph line then in the possession of the Atlantic & Pacific Telegraph Company under the invalid lease until there had been an accounting, and until the consideration for the lease had been restored. *Vide* 1 Fed. 745, 752. This injunction was in full force on July 1, 1881. The railway company did not have possession of the telegraph line between Council Bluffs and Ogden, and could not acquire possession of that line except on the condition last indicated. Prior to July 1, 1881, litigation had also arisen with respect to the telegraph line on the right of way of the Kansas Pacific Railway Company. The Union Pacific Railway Company, after the con-

solidation, had threatened to take possession of that line, which had been erected and was being operated by the Western Union Telegraph Company under the contract of October 1, 1866, with the Kansas Pacific Railway Company, heretofore mentioned. The Western Union Telegraph Company had applied for and obtained an injunction against the railway company to restrain its threatened action. With reference to that litigation it is sufficient to say, at present, that on July 1, 1881, the injunction was in full force, but under conditions which permitted the railway company to have the exclusive use of one wire between Kansas City and Denver for railroad and commercial business. Vide 3 Fed. 417, 423, 721, 736.

In this posture of affairs the contract of July 1, 1881, was executed. As the contract is lengthy, we shall only undertake to state its material provisions, and according to their legal effect, rather than in the language of the parties. It recites, in the first instance, that it is entered into "for the purpose of providing telegraphic facilities for the parties thereto, and maintaining and operating the lines of telegraph along the Union Pacific Railway in the most economical manner, in the interest of both parties, and for the purpose of fulfilling the obligations of the railway company to * * * the United States and the public in respect to the telegraphic service required by the act of congress of July 1, 1862, and the amendments thereto." The parties then agreed, in substance, as follows: That all existing suits (being those heretofore mentioned) should be dismissed, and that the contract should operate as a release and discharge of all claims, debts, and liabilities arising and accruing under pre-existing contracts between the parties, which were then in litigation; that the railway company should assure to the telegraph company, as far as it legally could do so, the exclusive right of way along its railroad, and any extensions and branches thereof, for the construction and maintenance of lines of telegraph, and that the railway company would not transport men and material for the construction of a line or lines of telegraph to be operated in competition with the Western Union Telegraph Company, except at its regular local rates, nor furnish such competing lines facilities for construction that it could lawfully withhold, nor stop its trains or distribute material at other than regular stations; that no employe of the railway company should be employed by, or have any connection with, any other telegraph company than the Western Union Company; and that the latter company should have the exclusive right, as against any other telegraph company, to occupy and connect with the railway company's depots or station houses for commercial telegraph purposes. Concerning the mode of keeping up, maintaining, and renewing the existing lines of telegraph then on the railroad right of way, the contract contained the following stipulations: That the railway company should, at its own expense, furnish all the labor in that behalf required, except a foreman; that the telegraph company should provide a foreman, skilled in the work of construction and repair, to direct and supervise such work; and that each party should pay one-half the cost of poles, wire, insulators, tools, and other materials used for the

maintenance, renewal, or repair of telegraph lines along all of the railway company's roads, branches, and extensions, until three wires for the exclusive use of each party had been provided between Council Bluffs and Ogden,—two for the exclusive use of each party between Kansas City and Denver, and one for the exclusive use of each party on all other portions of the railway company's road. The contract in this respect further provided that the railway company should transport free of charge, and distribute along the line of its railroad, all poles and other materials that were required in the work of maintenance, renewal, and reconstruction, also all employes and laborers who were engaged in such work, and that the telegraph company, on its part, should supply telegraph instruments and local batteries to work the line, and blanks and stationery for commercial telegraph business. With respect to the mode of operating the telegraph lines aforesaid, the contract contained the following provisions: That at all telegraph stations of the railway company its operators should receive and transmit such commercial or public messages as were offered, and should account for the tolls paid thereon to the telegraph company, but that at the end of each month the telegraph company should return to the railway company one-half of such receipts at its offices, excepting only tolls paid on ocean cable messages and tolls paid for the transmission of messages over other lines of telegraph than Western Union lines; that the telegraph company should also furnish, free of charge, one wire between Omaha and Kansas City, over which the railway company might transact its railroad business between those points and at intermediate places on the Missouri river, including Council Bluffs; that either party might maintain offices along the Union Pacific Railway where they then had offices, and might establish additional offices, but that the telegraph company should not establish independent offices at any point along said railroad within one mile of an office previously established by the railway company unless the latter company consented, and that the railway company's operators should not compete with the telegraph company at points where the latter maintained independent offices, by cutting rates, or by active efforts to divert business from the telegraph company. It was further stipulated by the parties as follows: That if any person, or officer of the government, tendered a message to a railway telegraph operator at any station between Council Bluffs and Ogden, and required its transmission over the wires of the railway company, it should be so sent, at rates fixed by the railway company. It was also stipulated, in substance, that in addition to the three wires between Council Bluffs and Ogden, and the two wires between Kansas City and Denver, and the one wire on other portions of its road, which were to be set apart, or were to be strung and maintained, for the exclusive use of the railway company, the railway company might string such other wires for its exclusive use, and at its own cost, as it saw fit; and the like privilege was accorded to the telegraph company. It was also stipulated that a competent superintendent of the telegraph lines aforesaid should be appointed by the railway and telegraph companies, and that both should contribute to pay

for his services. The foregoing contract was to continue in force for 25 years, and was to supersede all previous contracts relating to said telegraph lines, including the contract of October 1, 1866, between the Western Union Telegraph Company and the Kansas Pacific Railway Company, but it was agreed that if the contract of July 1, 1881, was not kept in good faith by the railway company, then the superseded contracts should be revived and considered in force. Since the foregoing agreement was entered into, and in accordance with its provisions, the lines of telegraph formerly erected on the railway company's right of way between Omaha and Ogden have been entirely reconstructed in a very substantial manner, and at great cost to the parties. In the process of reconstruction, all of the wires have been strung on a new line of poles erected on the north side of the right of way, a portion of which wires are exclusively used by the railway company and the remainder by the telegraph company. Some of the telegraph company's wires connect with the depots and station houses of the railway company, but many of its wires run into independent offices of the telegraph company, and are not so connected.

It is claimed by the United States (and this contention seems to have prevailed in the circuit court) that this contract was originally beyond the power of the Union Pacific Railway Company, and therefore invalid, because the railway company thereby transferred or surrendered its telegraphic franchise to the Western Union Telegraph Company, and disabled itself to discharge its obligations to the government and the public; secondly, that the contract is in restraint of trade and against public policy, and for that reason is illegal and void.

With reference to this contention it should be remarked, at the outset, that when the contract of 1881 was executed, and long prior thereto, the Western Union Telegraph Company was lawfully in possession of a line of telegraph on the railroad right of way, and was operating the same for commercial and other purposes. It was there with the express sanction of congress under the nineteenth section of the act of July 1, 1862, and neither acquired nor claims to have acquired its right to operate its existing wires under the said contract. Looking at the provisions of the agreement, it is also noteworthy that it imposes no limitations or restrictions upon the right of the railway company to operate a telegraph for commercial, governmental, and other purposes. It has wires which are devoted to its exclusive use, telegraphic offices at convenient points along its road, operators to work its wires, who are expressly required to send over the same all such messages of a governmental or commercial character as are directed by the senders to be so sent, and the right to string such additional wires as may at any time be deemed essential or convenient to meet the demands made upon it for telegraphic service. It surely cannot be maintained that in addition to the foregoing facilities the railway company must maintain a separate line of poles on its right of way and at its own expense, for when congress authorized other telegraph companies to go upon this right of way, as it did by the act of July 1, 1862, and

again by the act of July 24, 1866, (14 Stat. 221,) it must have foreseen that it would be convenient, economical, and often necessary for such companies and the railway company to string their wires on the same poles, and we will not impute to congress an intention to ignore all considerations of convenience and economy, especially in view of the magnitude and importance of the enterprise which it aimed to foster. We may well take judicial notice of the fact that there is no inherent difficulty in stringing several independent lines of telegraph on the same poles. That method of construction in no wise interferes with the efficiency of lines that are so built, while it is often a convenient, and always an economical, arrangement. We think, therefore, that the Pacific Railroad acts did not impose on the railway company the duty of maintaining a separate line of poles upon which to string its wires, and that its failure to do so cannot be regarded as any evidence of an abandonment of its public duties.

Perhaps the strongest evidence of an intent on the part of the Union Pacific Railway Company to part with its telegraphic franchise is to be found in those provisions of the contract whereby the telegraph company gained access to the railway company's station houses with some of its wires, and the right to avail itself of the services of employees of the railway company; but on a careful scrutiny it will be seen that the most that can be alleged against these provisions is that they afforded to the telegraph company some facilities for competing with the railway company in the matter of transacting a commercial business, which it would not have enjoyed if it had been compelled to maintain independent offices at all of such points, and to man them with its own operators. These provisions cannot be said to have amounted to a transfer or surrender of the telegraphic franchise, because, notwithstanding these provisions, the railway company still retained its right and capacity to do a commercial business. Moreover, it does not occur to us that there are any provisions in the Pacific Railroad acts which made it the duty of the railway company to withhold from any telegraph company that was authorized to occupy its right of way any facility for the convenient and economical operation of its line, merely because it would enable such company to compete more successfully with the railway company in the transaction of a telegraph business. Congress had offered to relieve the railway company of the entire burden of constructing and maintaining a telegraph line, if it would arrange with one of these telegraph companies to move its line upon the railroad right of way. When those acts were passed, congress was desirous, above all things, to have a telegraph line constructed across the plains that would be able to render cheap, prompt, and efficient service both to the government and the public. This purpose is manifest throughout all of the legislation of congress, which antedates the contract of 1881, and for that reason we cannot hold the provisions of the contract now in question to be unlawful merely because they gave the telegraph company better opportunities for successful competition. We think it obvious that they

enabled both the railway company and the telegraph company to operate their lines more economically, and to render the public better service, without impairing the franchise of either.

Much stress, however, is laid on the fact that under the operation of the contract the great bulk of the commercial telegraph business over the lines in question is done by the Western Union Company. Attention is also directed to the circumstance that the wires devoted to the use of the railway company are about sufficient to do its ordinary railroad business, and are wholly insufficient to do a considerable portion of the commercial business. With reference to the last of these suggestions it is sufficient to say that the record does not disclose that the railway company has ever failed or refused to transmit over its own wires a single governmental or commercial message which was tendered it to be so sent. The wires which it operates seem to be adequate for its patronage, and under no possible construction of its charter can it be held bound to furnish more wires than are needed to meet the demands made upon it for telegraphic service. But it is said that its loss of patronage is due to the contract with the telegraph company, and that what has actually occurred under the operation of that contract is persuasive evidence of what was intended to happen, and that it should control in determining the purpose of the parties thereto and the true interpretation of the agreement. We entertain no doubt that the bulk of the commercial business, as claimed, is in the hands of the Western Union Telegraph Company; that fact is abundantly shown by the record, and is practically admitted by the appellants. But we are unable to concede that the fact last mentioned is mainly due to the operation of the contract of 1881, or that it should be accepted as a safe test by which to determine the legal effect of that agreement. It is not a necessary inference that the failure of the railway company to secure a fair share of the commercial telegraph business is due to the existence of the contract; much less does it follow that, because the Western Union Telegraph Company now transacts the great bulk of the commercial telegraph business, the railway company has therefore parted with its telegraphic franchise, and disabled itself from fulfilling its public duties. The telegraph company is engaged exclusively in operating lines of telegraph for commercial and other purposes. Its wires ramify throughout the United States, and reach every important city and hamlet, while the railway company is limited to the lines erected on its right of way, and must depend upon connecting lines for the transmission of all dispatches that are not purely local. In view of this fact it becomes highly probable that, under the operation of natural laws of trade, the same disparity in the business of the two companies would in any event exist, because of the superior facilities of the telegraph company for reaching distant points, and forwarding messages intrusted to it with promptness and accuracy. At all events, we cannot regard the existing disparity in the amount of commercial business done by the respective companies as of much importance in deciding whether the contract was be-

yond the power of the railway company. That issue must be determined by ascertaining what power to transact a commercial telegraph business the railway company still retains, and what functions it has abdicated; in other words, the question must be decided with reference to the provisions of the contract, rather than with reference to a business condition that now exists, which may be, and probably is, due to natural causes. *Midland Ry. Co. v. Great Western Ry. Co.*, 8 Ch. App. 841, 854.

The result of our deliberations on this branch of the case has been that we are unable to declare the contract of 1881 to be beyond the power of the railway company because it divests the company of its telegraphic franchise, or because it renders it powerless to discharge its public duties. In our judgment, the Union Pacific Railway Company has now the same absolute power to operate a telegraph line for commercial and other purposes that it ever had. Under the contract in question it secured at once the absolute control of several lines of wire, with authority to use them for all purposes, and the right to string any number of additional wires, and to use them as it saw fit. By the provisions of the agreement it also avoided a litigation of vast proportions and great intricacy in which it was then involved, touching its right to the lines of telegraph on its right of way, and at the same time it was relieved of its liability to account for large sums of money which it had received from the Atlantic & Pacific Telegraph Company under the invalid lease of September 1, 1869. From the standpoint of the railway company it was confessedly a beneficial business arrangement, by means of which it has realized great advantages in which the government has participated; and the record before this court fails to disclose that the general public have been prejudiced by the manner in which the lines of telegraph in question have been maintained and operated under the provisions of the agreement. We would not be understood as intimating that the considerations last mentioned should have any weight if the contract was in fact contrary to law; but they furnish an adequate reason why it should not be set aside and canceled, unless it appears that it was clearly beyond the power of the railway company to enter into such an arrangement.

The other objection to the contract of 1881, which has been heretofore mentioned, is based on those provisions of the agreement whereby the Western Union Telegraph Company attempted to obtain certain exclusive rights and privileges from the Union Pacific Railway Company, and to prevent other telegraph companies from coming upon the railroad right of way. These stipulations are said to have rendered the contract voidable on grounds of public policy. When the contract was executed, the railway company appears to have entertained doubts of its power "to assure to the telegraph company the exclusive right of way along and upon its line of road," hence it agreed to grant such exclusive right only to the extent that it might legally do so. The further provision in the contract relative to withholding facilities for the construction of competing

lines of telegraph was also accompanied with the reservation that it should only be required to refuse to afford such assistance and facilities as it might lawfully withhold. It may be admitted that these provisions of the contract would have been unlawful, as the law is now understood, if the railway company had bound itself absolutely to exclude other telegraph companies from its right of way, or to withhold all facilities for the construction of competing lines. *W. U. Tel. Co. v. American Union Tel. Co.*, 65 Ga. 160. But, as these stipulations were actually drawn, they neither bound the railway company to do anything that was unlawful or contrary to its duty. The most that can be alleged against them is that they placed the railway company in a position in which it might be compelled to determine, at its peril, whether, by extending certain facilities and assistance to competing lines, it would thereby violate its contract with the telegraph company; but this is an attitude in which the parties to contracts are frequently placed. The only exclusive privileges that the telegraph company acquired by this contract, so far as we are able to see, was the right to connect its wires with the railway company's station houses and to maintain offices therein; also, the right to have the wires thus connected with such stations operated by employes of the railway company, and the right, under the ninth clause, to have poles and telegraph materials transported and distributed free of charge along the Union Pacific Railway. For all of these privileges the railway company undoubtedly received what it deemed an adequate consideration in the way of advantages derived from other provisions of the contract, and the privileges in question do not appear to us to be of such nature that the railway company was bound, either under then existing acts of congress or on general principles of law, to confer them equally upon all other telegraph companies. *Express Cases*, 117 U. S. 1, 6 Sup. Ct. 542, 628; *Pullman's Palace-Car Co. v. Missouri Pac. Ry. Co.*, 115 U. S. 587, 6 Sup. Ct. 194. Under the second section of the act of congress of August 7, 1888, enjoining upon the railway company the duty of affording equal facilities to all without discrimination, the privileges aforesaid may most likely be claimed by all telegraph companies who comply with the provisions of the last-mentioned act, and they can no longer be regarded as exclusive; but we think it must be conceded that, when the contract was executed, the railway company had some power to enter into arrangements with other telegraph companies with a view of making a profitable use of its telegraphic franchise, and that within this power was the right to select some telegraph company, and to confer upon it special privileges, like those above mentioned, in exchange for benefits and advantages which it could by such means secure. We will not impute to congress the folly of having granted to the railway company a telegraphic franchise, and of having so limited the power to exercise it or deal with it as to render it a burden rather than a benefit. In the nature of things, some power must be conceded to the railway company to enter into arrangements with other telegraph companies to assure the economical maintenance and profitable working of its lines, and we think that the grant of the

exclusive privileges above referred to was not an unreasonable nor an unlawful exercise of that power.

Passing, now, to the contract of October 1, 1866, between the Kansas Pacific Railway Company and the Western Union Telegraph Company, it should be observed, that the necessity of noticing that contract, which has been superseded, for the time being, by the contract of 1881, grows out of the fact that it was annulled by the decree of the circuit court, whereas the appellants claim that it was lawfully entered into under the fourth section of the act of July 2, 1864, and operated to relieve the railway company of its obligation to maintain a telegraph line along the railroad right of way between Kansas City and Denver. Hence, it becomes an important inquiry whether that contract was rightfully annulled. The act of July 2, 1864, last referred to, is entitled "An act for increased facilities of telegraphic communication between the Atlantic and Pacific states and the territory of Idaho." 13 Stat. 373. Its first section declared "that the United States Telegraph Company and their associates, are hereby authorized to erect a line or lines of magnetic telegraph between the Missouri river and the city of San Francisco, * * * on such route as they may select, to connect with the lines of the said United States Telegraph Company now constructed and being constructed through the states of the Union." By the same section the company was given the right to use unoccupied land of the United States for right of way, materials, station houses, etc. The second section granted said company the right to erect a line of telegraph from Ft. Hall to Portland, Or., via San Francisco, and from Ft. Hall to Bannock and Virginia City. The third section granted to the company the right to send dispatches over any line then or thereafter built by authority of congress, to connect with any lines erected by the Russian or English governments. The fourth and last section was as follows:

"Sec. 4. The several railroad companies authorized by act of congress, July one, eighteen hundred and sixty-two, are authorized to enter into arrangements with the United States Telegraph Company so that the line of telegraph between the Missouri river and San Francisco may be made upon and along the line of said railroad and branches as fast as said roads and branches are built, and if said arrangements be entered into, and the transfer of said telegraph line be made in accordance therewith to the line of said railroad and branches, such transfer shall, for all purposes of the act referred to, be held and considered a fulfillment on the part of said railroad companies of the provision of the act in regard to the construction of a telegraph line; and, in case of disagreement, said telegraph company are authorized to remove their line of telegraph along and upon the line of railroad therein contemplated, without prejudice to the rights of said railroad companies."

Now, the contract of October 1, 1866, provided, in substance, for the erection of a line of telegraph on the railroad right of way from Lawrence, Kan., to Denver, Colo., at the joint expense of the telegraph company and the railway company, and for their joint use, but the railway company was denied the right to transact a commercial telegraph business over that line. Before this contract was entered into, a small portion of the line between Lawrence and Denver had been wholly or partially constructed by the United States

Telegraph Company, under an arrangement with the railway company for its joint use, and it seems evident that the agreement of October 1, 1866, was entered into with the Western Union Telegraph Company because, by consolidation proceedings, it had then become the successor of the United States Telegraph Company. It seems most probable, we think, that the contract of October 1, 1866, was intended to give expression, in a more detailed form, to an oral understanding or agreement which had previously existed between the Kansas Pacific Railway Company and the United States Telegraph Company, and it admits of no doubt that, in accordance with the terms of that contract, a line of telegraph was completed through to Denver. After a very full consideration of the question it was held by Mr. Justice Miller, as far back as 1880, in the case of *W. U. Tel. Co. v. Union Pac. Ry. Co.*, 3 Fed. 721, 727, 728, that the contract of October 1, 1866, embodies such an "arrangement" as was contemplated and authorized by the fourth section of the act of July 2, 1864, above quoted, and such an "arrangement" as, if carried out, would absolve the railway company with which it was made from the obligation to construct and operate an independent line of telegraph. The court said in that case that "it was manifestly the design of the act of 1864 to enable the United States Telegraph Company to become substituted, by a proper arrangement with the Pacific Railroad Company and its branches, to the right to build a telegraph line along the * * * right of way of those railroad companies, and thereby to relieve those companies from the obligation to build and operate such a line." It furthermore said, in substance, that the contract of 1866 satisfied all the requirements of the act of July 2, 1864, notwithstanding the fact that it prohibited the railway company from transmitting commercial messages. In that case, however, the evidence then before the court did not disclose whether the Western Union Telegraph Company was in fact the legal successor of the United States Telegraph Company, and that point was left undetermined, with the statement, however, that the contract of 1866 was clearly valid if such successorship was thereafter established.

On the trial of the present case Mr. Justice Brewer held, in effect, that the testimony showed that the United States Telegraph Company and the Western Union Telegraph Company had become lawfully consolidated under the laws of New York, prior to October 1, 1866, and that the latter company was the legal successor of the former. He was of the opinion, however, that the privilege conferred upon the United States Telegraph Company by the fourth section of the act of July 2, 1864, *supra*, was so strictly personal that it was lost by the consolidation proceedings, and did not pass to the consolidated company. In all other respects the circuit court appears to have fully concurred in the points ruled by Mr. Justice Miller, and in similar rulings made by Judge McCrary in the same case. *Vide* 3 Fed. 423, 425. The question that we have to decide, therefore, with respect to the contract of 1866, (and, in view of former decisions, the only question that we deem it necessary to consider,) is whether the privilege granted to the

United States Telegraph Company by the act of July 2, 1864, was purely personal, and was lost by its merger with the Western Union Telegraph Company. With reference to that question it may be conceded to be a well-settled rule, resting upon sound reasons, that, when a franchise has been granted to a quasi public corporation in consideration of public benefits that may result from its exercise, such franchise cannot be bodily assigned by the grantee company unless the power of assignment is conferred in express terms or by fair implication. Such franchises are properly said to be personal in their nature, and not assignable. But when a corporation is endowed with a privilege or power like the one now in question, and the corporation is one which, under the law of its creation, has the right to consolidate with other corporations engaged in a like business, it may well be doubted whether the rule above conceded has any application. In such cases it must be presumed that the privilege was conferred with full knowledge of all the charter powers of the grantee, and it is a reasonable inference, unless some restrictive words are employed, that the legislature intended that the privilege conferred should pass to, and become vested in, the consolidated company, if one was subsequently formed. In the present case, however, it is not necessary for the Western Union Telegraph Company to rest its right to enter into the aforesaid arrangement with the Kansas Pacific Railway Company upon the ground last stated, however tenable that ground may appear to be, for the act of July 2, 1864, bears upon its face indubitable evidence that congress did not intend that the right to enter into such an arrangement should be exercised solely by the United States Telegraph Company. The first section of that act granted the right to construct a line of telegraph between the Missouri river and San Francisco to "the United States Telegraph Company and their associates." That was the important franchise which the act conferred, and other privileges mentioned in succeeding sections were incidental and supplementary; in other words, they were conferred to furnish an inducement to the telegraph company and its associates, and to enable them, to accomplish the work authorized by the first section, which the government was desirous of fostering. In view of the language employed in the first paragraph of the act, which clearly authorized and encouraged other corporations to become associated with the United States Telegraph Company, and to embark their means in what was then considered a great and hazardous enterprise, it cannot be consistently maintained that congress intended that the privilege of entering into the arrangement mentioned in the fourth section of the act should be confined solely to the United States Telegraph Company, and that it should not inure to the benefit of its associates. We think it is far more reasonable to suppose that congress intended that the privilege in question should be shared by any corporation which became lawfully associated with the United States Telegraph Company in the work of constructing a transcontinental line, and more especially that the privilege should inhere in a corporation with which the

United States Telegraph Company became lawfully united by the process of consolidation.

In opposition to the views last expressed, it is urged by the government that when the act of July 2, 1864, was passed, congress knew that a line of telegraph had already been constructed across the plains, by other telegraph companies, about on the proposed route of the main line of the Union Pacific Railroad; that by the last-named act it intended to aid in the construction of an independent and competing line of telegraph; and that this purpose will be defeated unless it is held that the privilege granted to the United States Telegraph Company to enter into an arrangement with the Kansas Pacific Railway Company was strictly a personal privilege accorded to the former company. It is to be observed, however, that the act now under consideration says nothing about competing lines of telegraph, but is entitled "An act for increased facilities of telegraphic communication between the Atlantic and Pacific States. * * *" Such additional facilities would be obtained by the construction of a new line on a new route, and congress undoubtedly contemplated that such a line would be built, and such a line was in fact constructed. We fail to see, therefore, how the purpose which congress saw fit to express in the title of the act will be defeated by conceding that the privilege mentioned in the fourth section of the act was not strictly personal, but was a grant to the United States Telegraph Company "and its associates." It might happen, of course, that by a process of consolidation the two companies would fall under one management; but even in that event the two lines of telegraph, if erected, would afford increased facilities for communication. Moreover, if the idea of exciting competition by the construction of a second line of telegraph across the continent was at that time entertained by congress, (which we very much doubt,) it was evidently well known to congress that a practical identity of interest and control could be effectually secured by other means than by a consolidation of property and franchises, and it took no precautions to prevent such a merger. We must conclude, therefore, that the considerations last mentioned are entitled to little weight in determining whether the privilege in question became vested in the Western Union Telegraph Company. An attempt is also made, in behalf of the government, to deduce evidence, from certain reports made by the Kansas Pacific Railway Company to the United States, that the line of telegraph along that railway, from the Missouri river to Denver, was in fact built by the railway company at its own expense, in fulfillment of its charter obligations; but an obvious answer to this suggestion is that no statement made by the officers of the railway company can prejudice the rights of the telegraph company. For other reasons, however, the suggestion is without merit. We have no doubt, under the testimony, that the line of telegraph along the Kansas Pacific Railway was built substantially in accordance with the arrangement embodied in the contract of October 1, 1866. To enable the railway company to obtain its subsidy it was no doubt required

to prove, to the satisfaction of the officers of the government, that a telegraph line, as well as a railroad, had been constructed. The United States was entitled to insist upon such proof because the obligation of the railway company to construct a telegraph would not be fulfilled merely by entering into an "arrangement" with some telegraph company to construct such a line. It was bound to see that the arrangement was carried out, and that a line was erected along its right of way, either by the telegraph company alone, or by itself and the telegraph company, under some satisfactory agreement as to dividing the expense, which telegraph line would be fairly adequate for governmental and commercial purposes; but it certainly was not necessary for the railway company to set forth in its reports to the government the precise terms of its arrangement with the telegraph company, or the precise sum which it had itself contributed towards the construction of the line. For these reasons we cannot attach much importance to such reports,—certainly not enough to decide that the line was not built under an arrangement with the telegraph company. The result is that with respect to this feature of the case we feel constrained to concur in the view entertained by Mr. Justice Miller,—that the contract of October 1, 1866, was a valid agreement, and that it was within the purview of the act of July 2, 1864.

This opinion has necessarily been extended to such length in the discussion of the foregoing questions that we have felt compelled to dispose of the remaining questions as briefly as possible, although we have considered them attentively, and with a due appreciation of their importance. The fourth section of the act of August 7, 1888, under which this bill purports to have been filed, provides, in effect, "that in order to secure and preserve to the United States the full value and benefit of its liens upon all the telegraph lines * * * constructed by and lawfully belonging to said railroad and telegraph companies referred to in the first section of this act [being those mentioned in the Pacific Railroad acts] and to have the same possessed, used and operated, in conformity with the provisions of this act and of the several acts to which this act is supplementary—it is * * * made the duty of the attorney general * * * by proper proceedings, to prevent any unlawful interference with the rights and equities of the United States * * * to have legally ascertained and * * * adjudicated all alleged rights of all persons and corporations * * * claiming * * * any control or interest * * * in any telegraph lines or property, or exclusive rights of way upon the lands of said railroad companies, * * * and to have all contracts and provisions of contracts set aside, * * * which have been unlawfully and beyond their powers entered into by said railroad or telegraph companies. * * *" We must presume in this case, as in all others, that, when congress authorizes the attorney general to take any legal proceedings to enforce the rights of the United States, it is intended, unless the contrary idea is clearly expressed, that rights of a purely legal nature, for the enforcement of which there is an adequate legal remedy, shall be so enforced by a proceeding at law rather

than by a suit in equity. We cannot assume, therefore, there being no clear expression of such a purpose, that congress intended by the fourth section of the act of August 7, 1888, to authorize matters of legal and equitable cognizance to be mingled indiscriminately in the same complaint, and that all the rights and duties mentioned in said act, of whatsoever nature, should be enforced in a single suit, to be instituted by the attorney general in the name of the United States. Even if congress has power to so direct, we should not feel authorized to say that it has done so, without a positive declaration of such purpose, which we do not find in the statute now in question. Some of the duties imposed by the act of August 7, 1888, which the government apparently seeks to enforce in this suit, are evidently of such a nature that they may be adequately enforced at law. Among these may be mentioned the duty enjoined upon the Union Pacific Railway Company, by the first section of the act, of operating "by itself alone, through its own corporate officers, its telegraph lines." We know of no reason why this precise duty may not, and should not, be enforced by mandamus, if it has in fact been violated. *U. S. v. Union Pac. R. Co.*, 98 U. S. 569, 609; *Attorney General v. Utica Ins. Co.*, 2 Johns. Ch. 371. Acting in accordance with the views last stated, we have not considered it our duty in this case to inquire, and we do not determine, whether the railway company's present method of operating its line of telegraph is in violation of the first section of the act of August 7, 1888. It is shown by the record that since the passage of that act the parties to the contract of 1881 have by mutual consent rescinded the twelfth clause of the agreement, which provided for the employment of a joint superintendent of the telegraph line. Whether the existing method of operating the line should be altered in any other respect to keep within the requirements of the late statute in the respect last stated we leave to be determined in an appropriate proceeding brought for that purpose. In this connection we may also add that it is the opinion of this court that the duty enjoined by the second section of the act of August 7, 1888, with reference to affording equal facilities to all connecting lines of telegraph, without discrimination against any, is a duty which should be enforced in the mode prescribed by the third section of the act, rather than by a bill in equity. The second section imposed a duty upon the railway company which was in some respects new, and provided a special remedy for its enforcement. Under these circumstances, we think that the remedy thus provided should be regarded as exclusive. But, even if the latter view is erroneous, we still think it manifest that the record does not make out a case which would authorize us to enter any order or decree based on the "equal facilities" provision of the second section of the act. The proof does not show, with any certainty, that since the passage of the act any telegraph company has placed itself in a position to demand of the railway company the same facilities which it accords to the Western Union Telegraph Company, and that its demand has been refused. No telegraph

company is complaining before us that, having accepted the provisions of title 65 of the Revised Statutes, and having extended its lines to a connection with the stations of the railway company, and having solicited the same facilities which the Western Union Telegraph Company now enjoys, it has been denied such privileges. Until such a case has been presented, both by complaint and by proof, we cannot presume that the railway company intends to disregard its duty, and it surely cannot be expected of us that we will attempt to give an additional sanction to the statute by merely repeating its mandate. In other respects, however, the case, as presented by the record, is one which entitles the complainant to a certain measure of equitable relief under the provisions of the act on which the suit is based. The bill shows that the government has a lien upon the railroad and telegraph lines to which the litigation relates, and, as such lienholder, it is undoubtedly entitled to have its rights and equities in and to the telegraph property along the right of way of the Union Pacific Railway Company judicially ascertained, and to have the rights of other persons and corporations therein also ascertained and adjudicated. Incidental to that relief is the right to have all provisions of contracts set aside and annulled that are unlawful, and that in any manner impair the security of the United States, or cloud its title or prejudice its rights. It is the appropriate function of a court of equity to administer such relief, and the act of August 7, 1888, directs the attorney general to inaugurate such a proceeding. We are of the opinion, therefore, that it was the duty of the circuit court, under the evidence laid before it, to have treated the suit as a bill filed to obtain the relief which we have generally indicated in the last paragraph, and to have decreed accordingly. In point of fact it went much further than the act of August 7, 1888, seems to us to have warranted in an equitable proceeding of this nature, and incorporated some provisions in its decree which we feel constrained to disapprove. We shall not stop, at this time, to enumerate all of the provisions of the decree of the circuit court that have thus met with our disapproval. It will suffice to say that the order canceling the contracts of July 1, 1881, and October 1, 1866, was the most important error. The government was in no position to ask that the contract of July 1, 1881, should be annulled in toto, merely because some of its provisions, though valid when made, had been rendered invalid by a subsequent statute. It was only entitled to have those provisions declared inoperative and no longer obligatory, so far as they were in conflict with the subsequent enactment. The case must accordingly be reversed, and the cause remanded, with directions to the circuit court to set aside its former decree, and, in lieu thereof, to make and enter a modified decree, consistent with this opinion, the provisions whereof we will now proceed to outline.

The decree to be entered by the circuit court pursuant to the mandate of this court should order, adjudge, and decree:

First. That the agreement named in the bill of complaint, entered into on the 1st day of October, 1866, by and between the

Union Pacific Railway Company, Eastern Division, and the Western Union Telegraph Company, was lawfully entered into by the parties thereto, and constituted a valid and binding contract. Second. That said contract of October 1, 1866, continued in full force and effect until the 1st day of July, 1881, when, by agreement of the parties thereto, its provisions were superseded by the provisions of the contract of that date, entered into by and between the Union Pacific Railway Company and the Western Union Telegraph Company. Third. That the agreements entered into on the 1st day of September, 1869, and on the 14th day of December, 1871, by and between the Atlantic & Pacific Telegraph Company and the Union Pacific Railroad Company were entered into by the Union Pacific Railroad Company unlawfully and beyond its powers, and the said contracts, and each of them, are hereby canceled, annulled, and held for naught. Fourth. That the equities arising out of the said contracts of September 1, 1869, and December 14, 1871, were adjusted and settled by all the parties interested therein in the making of the contract of July 1, 1881, by and between the Union Pacific Railway Company and the Western Union Telegraph Company. Fifth. That the contract of July 1, 1881, named in the bill of complaint, entered into by and between the Union Pacific Railway Company and the Western Union Telegraph Company, was lawfully entered into by the Union Pacific Railway Company and the Western Union Telegraph Company, and constituted, when made, a valid and binding contract by and between the parties thereto. Sixth. That the third and fourth paragraphs of the contract of July 1, 1881, in so far as they grant, or were intended to grant, exclusive rights or privileges of any character, are repugnant to the act of congress approved August 7, 1888, entitled "An act supplementary to the act of July first, eighteen hundred and sixty-two, entitled 'An act to aid in the construction of a railroad and telegraph line from the Missouri river to the Pacific ocean, and to secure to the government the use of the same for postal, military and other purposes,' and also of the act of July second, eighteen hundred and sixty-four, and other acts amendatory of said first-named act;" and said paragraphs of said contract are hereby adjudged and declared to be null and void, and are hereafter to have no force or effect, to the extent, and only to the extent, that they secure or grant to the Western Union Telegraph Company, or were intended to secure to it, any exclusive rights, privileges, or advantages whatsoever. Said third and fourth paragraphs are as follows, to wit: * * *. Seventh. That there is a single line of poles between Council Bluffs and Ogden, on the right of way of the defendant railway company, which poles were erected in accordance with the provisions of the contract of July 1, 1881, at the joint and equal expense of the defendant railway company and the defendant telegraph company, and is the property of said companies jointly; that upon said poles, between Council Bluffs and Ogden, there are two distinct lines of telegraph, the wires of one of which said lines are owned solely by the said railway company, and the wires of the other of which are owned solely by the said telegraph company; that the line of tele-

graph poles on the Kansas Pacific Railway, from Kansas City to Denver, was originally erected as provided in the contract of October 1, 1866; that said line of poles between Kansas City and Denver, since the 1st day of July, 1881, has been reconstructed under and in accordance with the provisions of said last-named contract, and said line of poles thus reconstructed bears two distinct lines of telegraph, one of which is the sole property of the defendant railway company, and the other of which is the sole property of the defendant telegraph company; that there are two distinct lines of telegraph on the line of poles between Denver and Cheyenne, one of which is the sole property of the defendant railway company, and the other of which is the sole property of the defendant telegraph company. Eighth. That all of the foregoing lines of telegraph of the defendants herein are, in accordance with the provisions of the contract of July 1, 1881, worked by batteries furnished by the defendant telegraph company, and operated by instruments the property of the defendant telegraph company. Ninth. It is further ordered, adjudged, and decreed that the defendants hereto are allowed the period of 60 days after the entry of this decree to make such arrangements, adjustments, and changes as are rendered necessary by the annulling of the aforesaid provisions of the contract of July 1, 1881, and to carry out the provisions of this decree.

STANDLEY et al. v. ROBERTS, Sheriff, et al.

ATOKA COAL & MIN. CO. v. HODGES et al.

(Circuit Court of Appeals, Eighth Circuit. January 29, 1894.)

Nos. 308 and 345.

1. APPEAL—FINAL DECREES—DISMISSAL OF INTERPLEADERS.

Orders finally dismissing interpleaders from the suit, also dismissing an auxiliary petition brought by plaintiff to enjoin them from enforcing a judgment, and vacating an injunction previously granted thereunder, embody final decisions as to such interpleaders, and are appealable, although the suit between the original parties is still pending.

2. INTERPLEADER—WHEN APPLICABLE.

A lessee who voluntarily takes an independent lease from each of two adverse claimants to real estate cannot, when sued by one of them for rent, compel the two to interplead, and litigate their conflicting titles and the validity of their respective leases.

3. SAME—WAIVER OF RIGHTS.

One who has erroneously been compelled to interplead does not waive his right to be dismissed from the action by filing an amended answer after his motion to be dismissed on the pleadings has been denied and he has excepted thereto, since the order is not appealable, and no party should be held to waive his rights by respectfully obeying the orders of the court.

4. PARTIES—WHO MAY BE MADE DEFENDANTS.

Under such circumstances the mutual rights subsisting between the lessee and each of his lessors are matters personal to themselves, in which the other lessor has no interest whatever; and hence the latter cannot be brought in as a defendant, under a statute giving power to make defend-

ants any person claiming an interest in the controversy adverse to plaintiff, or who is a necessary party to a complete determination of the questions involved. Mansf. Dig. Ark. § 4940.

5. COURTS—ENJOINING ACTIONS.

In an action on a lease, to recover royalties, where jurisdiction is acquired by personal service on defendant, the court acquires no possession or jurisdiction over the demised premises, whereby it would have authority to enjoin a third party from enforcing a decree, obtained in another court, quieting his title to the premises as against the present plaintiff.

6. JUDGMENTS—INDIAN COURTS—FAITH AND CREDIT.

The judgments of the courts of the Indian nations in the Indian Territory stand on the same footing with those of federal territorial courts, and are entitled to the same faith and credit.

Appeal from the United States Court in the Indian Territory. Affirmed.

The laws of the Choctaw Nation, in the Indian Territory, provide that: "Any citizen of this nation who may find any mine or mines or mineral waters shall have the exclusive right and privilege to work the same as long as he may choose within one mile in any direction from his works or improvement; provided, however, that he does not interfere with the rights of the former settler." In 1887 James D. Davis, a citizen of the Choctaw Nation, claimed that he had discovered a mine, in 1872, in coal claim No. 6, in Atoka county, in the Choctaw Nation; but he had in fact made no such discovery. There is evidence in the record tending to show that Oliver Hebert, a citizen of that nation, discovered a mine in that claim about 1881, and that H. W. Adams, another citizen, discovered such a mine in May or June, 1887. Hebert died about 1885. About June 1, 1887, Davis agreed with H. W. Adams, John M. Hodges, H. Y. McBride, and McKee James, who owned mining claims 7, 8, 9, and 10, in that county, that the five parties should thereafter each own one-fifth of each of claims 6, 7, 8, 9, and 10. After this agreement was made, and after Adams had discovered the mine on No. 6, and had taken possession of it for his partners and himself, Davis agreed to sell the undivided three-fourths of coal claim No. 6 to Coleman E. Nelson, Thomas J. Phillips, and James S. Standley. October 1, 1887, Davis, Nelson, Standley, and Phillips leased to the Atoka Coal & Mining Company, the defendant below, for the term of 6 years, with the privilege of a term of 20 years more, the exclusive right of mining coal on coal claim No. 6; and the lessee promised to pay to Davis \$25 a month until it commenced to mine, and thereafter to pay to the lessors one-quarter of a cent per bushel on all coal mined from the leased premises. After Davis had received \$50 under this lease, the defendant notified him that these lessors had no coal to lease to it, and demanded the repayment of this money, and Davis paid it back. January 25, 1888, Adams, Davis, James, Hodges, and McBride leased the exclusive right to mine coal on claims 6, 7, 8, 9, and 10 to the defendant for a term of 20 years, and the lessee agreed to pay them one-quarter of a cent per bushel on all coal mined on these claims, and to pay the representatives of the Choctaw Nation one-half a cent per bushel on all such coal. June 1, 1888, Standley, Phillips, and Nelson made an agreement with the administratrix of the estate of Oliver Hebert as the representative of his heirs, to the effect that from thenceforth Davis, Nelson, Standley, and Phillips should own one half, and the heirs of Hebert the other half, of coal claim No. 6, and the rents due and to become due under the lease of October 1, 1887. August 5, 1889, Standley, Phillips, and the administratrix of the Hebert estate brought an action against the coal company on this lease for \$300 rent. They joined Davis and Nelson as plaintiffs, but the latter repudiated this action, notified the court that the suit was brought without their knowledge, that they claimed nothing under that lease, and withdrew as plaintiffs. The defendant answered that it owed some one \$300 for coal mined on the leased premises; that it had taken the two leases above mentioned; that the two sets of lessors claimed title adversely to each other, substantially as above set forth; that the defendant was induced to take the first lease by misrepresentation; that it was without

consideration and void; and that if it paid under it the lessors in the second lease would sue, and compel it to pay the rent under that lease also. Thereupon, on the defendant's motion, and without notice to them, Adams, James, Hodges, McBride, Nelson, and Davis, hereafter called the "interpleaders," were ordered by the court to interplead, and to set up any claim they had to coal claim No. 6, and the royalty on the coal mined or to be mined therefrom, or to be forever barred of any interest therein. November 13, 1890, they appeared generally, and answered in the action, but by answer, and by motion for their dismissal, seasonably and repeatedly objected that they were not proper parties to the action, and that the pleadings disclosed no facts requiring them to interplead. In July, 1891, the interpleaders James, Adams, Davis, Hodges, McBride, and B. F. Smallwood and John Frinzell, recovered a judgment in the circuit court of the Choctaw Nation, against Standley, Phillips, and the administratrix of the Hebert estate, to the effect that the former were the owners of coal claim No. 6, that the latter be restrained from interfering with their title thereto and royalties therefrom, and that they pay the plaintiffs in that action \$25,000 damages. The action on which this judgment was based was commenced in July, 1891, and on appeal the judgment was affirmed by the supreme court of the Choctaw Nation. In September, 1891, the interpleaders filed a motion for their dismissal, and an amended answer, in which they pleaded that they were not parties to, and claimed nothing under, the plaintiffs' lease; that they owned mining claim No. 6; that the plaintiffs had no interest in it, and that the Choctaw court had so adjudged,—and they prayed to be dismissed, and that, if this prayer was denied, they might recover of the defendant the rent due them under their lease. February 9, 1892, their motion for dismissal was denied, and they excepted. May 4, 1892, Standley, Phillips, and the heirs of Oliver Hebert filed in this action an application for an injunction to restrain the interpleaders and the sheriff of Atoka county from enforcing by execution the judgment of the Choctaw court, and a temporary injunction issued. In the progress of the case, it had been transferred from the law to the equity docket, the heirs of Oliver Hebert had succeeded the administratrix of his estate, and all the parties had repeatedly amended their pleadings. The plaintiffs finally abandoned the discovery by Davis, pleaded as their source of title to the mine the discovery by Hebert and the one-fifth interest in the discovery by Adams, which they claimed to derive from the sale to them by Davis, and insisted that they were entitled to the rent under their lease. The defendant finally pleaded both leases, the conflicting claims of the respective lessors; that, if it paid its rent under the plaintiffs' lease, it might be liable to pay under the lease of the interpleaders, also,—and prayed that it might be permitted to pay the rents into court, and that the rights of the plaintiffs and the interpleaders to them and to the mine might be determined in this suit. The interpleaders, after the order was made denying their motion to be dismissed, filed a pleading in which they alleged their title to the mining claim under the discovery by Adams, the judgment of the Choctaw court quieting their title, and their lease to the defendant, and prayed that they might recover the rents due them under it, that the plaintiffs' lease might be canceled, and that the plaintiffs might be enjoined from interfering with the collection of their rents. April 22, 1893, after the testimony of all parties had been taken, the court below, on motion of the interpleaders, made an order dismissing them from the suit, and vacating the original order requiring them to interplead, and another order vacating the preliminary injunction and dismissing the petition for it. From these orders the plaintiffs and the defendant appeal.

N. B. Maxey, James M. Shackelford, and C. H. Kimball, (Thomas Marcum, S. S. Fears, H. O. Shepard, W. R. Shackelford, and A. A. Osgood, on the briefs,) for appellants.

John H. Rogers and G. G. Randell, (William J. Horton and James F. Read, on the brief,) for appellees.

Before CALDWELL and SANBORN, Circuit Judges, and THAYER, District Judge.

SANBORN, Circuit Judge, after stating the facts as above, delivered the opinion of the court.

We are met at the threshold of this case by the objection that the order dismissing the interpleaders and the order dismissing the plaintiffs' auxiliary petition for an injunction and vacating the temporary injunction issued, while the action between the plaintiffs and the defendant remained pending, were not final decisions, and hence were not appealable to this court. The act creating the circuit courts of appeals provides:

"That the circuit courts of appeals established by this act shall exercise appellate jurisdiction to review by appeal or by writ of error final decision in the district court and the existing circuit courts in all cases other than those provided for in the preceding section of this act unless otherwise provided for by law." 26 Stat. c. 517, § 6; Supp. Rev. St. p. 903, § 6.

Section 7 of that act permits an appeal from an order granting or continuing an injunction, but, with this exception, no jurisdiction is given to this court to review any order, judgment, or decree made in the progress of a case, which does not embody a final decision. A case cannot be brought to this court piecemeal. An order, judgment, or decree which leaves the rights of the parties to the suit affected by it undetermined—one which does not substantially and completely determine the rights of the parties affected by it in that suit—is not reviewable here until a final decision is rendered, nor is an order retaining or dismissing parties defendant, who are charged to be jointly liable to the complainant in the suit, appealable. *U. S. v. Girault*, 11 How. 22, 32; *Hohorst v. Packet Co.*, 148 U. S. 262, 263, 13 Sup. Ct. 590. But a final decision which completely determines the rights, in the suit in which it is rendered, of some of the parties who are not claimed to be jointly liable with those against whom the suit is retained, and a final decision which completely determines a collateral matter distinct from the general subject of litigation, and finally settles that controversy, is subject to review in this court by appeal or writ of error. In *Withenbury v. U. S.*, 5 Wall. 819, several libels were filed for the condemnation, as prize of war, of large quantities of cotton and other property. These libels were consolidated, and various claims were interposed in the consolidated suit for portions of the property, and among them the claim of *Withenbury & Doyle*. An order was made dismissing this claim, with costs, while the suit remained pending and the cotton and its proceeds undisposed of. The supreme court held that this order was appealable, because it completely determined the whole matter in controversy between these claimants and the United States, and was final as to all the parties to that severable controversy. In *Williams v. Morgan*, 111 U. S. 684, 4 Sup. Ct. 638, an order fixing the amount of the compensation of receivers in a suit to foreclose a mortgage on a railroad while the main suit was still pending was held by that court to be appealable, because it was final in its nature, and was made in a matter distinct from the general subject of litigation, a matter by itself, which affected only the parties to the particular controversy, and those whom they represented. In *Hill v. Railroad Co.*, 140 U. S. 52, 11 Sup. Ct. 690, where

a suit was brought against several parties who were alleged to be interested more or less in certain contracts and transactions out of which the claim of the complainant arose, a decree dismissing the bill as to certain of the defendants, and ordering it to be retained for the purpose of determining the liability of certain other defendants for an amount of money due under a certain contract specifically named, was held to be appealable because it was final as to the defendants dismissed, and the controversy left was a severable matter, which did not concern them. In *Central Trust Co. v. Marietta & N. G. Ry. Co.*, 2 U. S. App. 1, 1 C. C. A. 116, 48 Fed. 850, the circuit court of appeals for the fifth circuit held that the decision of the court below on the petition of an intervener claiming certain locomotives and other railroad equipment then in the hands of a receiver that had been appointed in proceedings to foreclose a mortgage on a railroad was appealable, because it finally decided the rights of the parties to the controversy presented by the petition, although the main suit for the foreclosure of the mortgage still remained pending and undetermined. In *Grant v. Railroad Co.*, 2 U. S. App. 182, 1 C. C. A. 681, 50 Fed. 795, after a bill to foreclose a mortgage upon a railroad had been filed, and while the suit was pending, an auxiliary dependent bill against the complainant, the railroad company, and others, charging that certain bonds secured by the mortgage were invalid, was filed in that suit; and, upon hearing, the court entered a decree dismissing the auxiliary bill. The circuit court of appeals of the fifth circuit held that decree appealable, because it finally disposed of the severable controversy presented by that bill, although the main suit was retained and referred to a master to ascertain the priority and validity of the liens on the mortgaged property, and to marshal the conflicting claims to the bonds. See, also, *Forgay v. Conrad*, 6 How. 201, 204; *Bronson v. Railroad Co.*, 2 Black, 524, 529; *Thomson v. Dear*, 7 Wall. 342, 345; *Trustees v. Greenough*, 105 U. S. 527; *Potter v. Beal*, 5 U. S. App. 49, 2 C. C. A. 60, 50 Fed. 860.

The orders dismissing the interpleaders from this suit, vacating the preliminary injunction, and dismissing the auxiliary petition of the plaintiffs for an injunction, finally and completely disposed of all the rights of the interpleaders against either the plaintiffs or the defendant in this suit, and all the rights of the plaintiffs or the defendant against the interpleaders herein. They were therefore final decisions of the controversies between them in this suit, and properly appealable to this court. The controversy which remained related entirely to the liability of the defendant to the plaintiffs upon the written lease of October 1, 1887, and that was a severable controversy between the plaintiffs and the defendant alone, the determination of which could not affect the interpleaders.

Can a lessee who has voluntarily taken an independent lease from each of two adverse claimants to the title of the same real estate, by establishing these facts, and bringing the amount due on one of the leases into court, compel his lessors to interplead, and litigate their conflicting titles and the validity of their leases, before either of them can receive his rent, and thereby exonerate himself from lia-

bility for the rent due on both the leases? This is the important question this case presents, on its merits. Other questions are presented, involving the jurisdiction of the court below over the subject-matter and the parties, and involving the regularity of its proceedings; but if that court had the power to take jurisdiction of the subject-matter in controversy, in a proper case, and if all the objections to the method it pursued in exercising that power are disregarded, the orders appealed from must still be affirmed, unless this question can be answered in the affirmative. If it cannot, the other questions become immaterial, and need not be considered. Adverse claimants of the same thing, debt, or duty from one who holds the thing or owes the debt or duty, and stands indifferent, and who has not colluded with, nor placed himself under any independent personal obligation to, any of them, may be compelled to interplead, and to obtain an adjudication of their conflicting claims, before any of them can recover the thing, or receive the proceeds of the debt or duty. Two rules regarding this subject are of universal application, where they have not been expressly abrogated by statute: First. No case for an interpleader can be made, unless the adverse claimants seek to recover the same thing, debt, or duty. Second. No case for an interpleader can be made where the holder or debtor has made an independent, personal agreement with some of the claimants regarding the subject-matter claimed, so that he is under a liability to them beyond that which arises from the title to the subject-matter. The statutes of Arkansas in force in the Indian Territory do not abrogate, but emphasize, these rules. They provide a summary method by which, where it appears "in any action upon contract or for the recovery of personal property that some third party, without collusion with him (the defendant), has or makes a claim to the subject of the action, and that he is ready to pay or dispose thereof as the court may direct," the court may order that the third party shall appear and maintain or relinquish his claim against the defendant. Mansf. Dig. Ark. § 4947. Statutes of this character are in force in England and in many of the states, and are universally held to introduce no new cause of interpleader. St. 1 & 2 Wm. IV. c. 58; *Belcher v. Smith*, 9 Bing. 82; *Pustet v. Flannelly*, 60 How. Pr. 67, 69; *Johnson v. Maxey*, 43 Ala. 521, 541. In *Belcher v. Smith*, *supra*,—a case which arose under an English statute much more comprehensive than the Arkansas statute before us,—the court declared that "our duty is to see that the party applying for the exercise of our discretion has not voluntarily put himself into the situation from which he calls on the court to extricate him."

The reason for, and the necessity of a strict enforcement of, the second rule is obvious. Parties claiming title to the thing in dispute ought not to be, and cannot properly be, compelled to litigate any rights but those in controversy between themselves. If the holder of the subject-matter in dispute has placed himself under an independent personal obligation to one or more of the claimants, by which his liability to deliver the thing or pay the debt in question may be determined without a decision of the

controversy between the claimants, it is plain that no litigation between the latter can ascertain the rights of the holder or debtor upon his personal obligation. Nor does the fact that the latter claims that his personal agreement was obtained by the fraud or misrepresentation of the obligees relieve the embarrassment, or except the case from this rule. The question presented by such a claim arises entirely between the parties to the personal obligation of the holder or debtor. It is nothing to the other claimants, nor are they interested in, or proper parties to, the litigation over it. It would be a monstrous proposition that one who makes agreements with two persons to sell and deliver the same article to each of them could bring the article into court, and compel the two purchasers to litigate the question which had the better right to the thing, before either could recover it of him, or that a tenant of an owner could take a second lease of the same premises from one claiming title to them, and then compel the real owner and the pretended owner to litigate, not only the title to the premises, but the validity of the leases the tenant himself had taken, before either lessor could recover his rent. If such a proposition could be sustained, any tenant might treat his landlord to as many lawsuits as he could obtain leases of his premises. To sustain the case for an interpleader presented by the record before us would not be less unreasonable. The lease of October 1, 1887, was signed and accepted by the defendant. On its face, it is a valid contract. The defendant is estopped to deny its landlord's title, and is liable to pay the rent reserved in it, whether the lessors were owners of the mine or not. It is true that the lease may be avoided for fraud, misrepresentation, or mistake, but the validity of this lease is a question entirely between the plaintiffs and their lessee. The interpleaders are not parties to it. The validity or invalidity of it is nothing to them, and the lessee cannot compel them to fight a battle with the plaintiffs that is exclusively its own. That the interpleader Davis was originally a party to the first lease is immaterial, because he and the defendant both repudiated it before this action was commenced, and he has never claimed anything under it. The lease of February 25, 1888, from the interpleaders, is likewise a conclusive answer to this case. The defendant signed and accepted that lease. Prima facie, it entitles the interpleaders to the rent reserved in it, whether they owned the mine or not. The lessee is in possession, and cannot dispute its landlord's title. And the court had no right to order these interpleaders, as a condition of holding and enforcing the lease, to plead and establish, not only the validity of that lease against their tenant, but also their title to the mine as against the plaintiffs, and the invalidity of the plaintiffs' lease. They were entitled to their rent regardless of the decision of the two latter questions, if their lease was valid as against the defendant. These independent personal obligations of the defendant to the adverse claimants to this mine make it impossible for it to present any case for an interpleader here. If it has fallen into a pit of its own digging, the courts cannot make the interpleaders its substitutes.

Cook v. Earl of Rosslyn, 1 Giff. 167; Crawshay v. Thornton, 2 Mylne & C. 1, 17; Marvin v. Ellwood, 11 Paige, 365, 370; Dodd v. Bellows, 29 N. J. Eq. 127; Crane v. Bruntrager, 1 Cart. (Ind.) 165, 169; Canal Co v. Comegys, 2 Cart. (Ind.) 469, 472, 473; Snodgrass v. Butler, 54 Miss. 45, 49; 2 Story, Eq. Jur. § 812.

Moreover, the plaintiffs and the interpleaders do not claim to recover the same debt from the defendant. If A. makes one promissory note for \$500, dated October 1, 1890, payable to the order of B. and C. 6 months from its date, and another, for the same amount, dated January 25, 1891, payable to the order of B. and D. 20 months from its date, and the respective payees sue the makers on their respective notes, it is absurd to say that B. and C. claim to recover of A. the same debt as do B. and D. The case here presented is yet stronger for the interpleaders. The plaintiffs claim to recover a debt which the defendant promised to pay to Davis, Standley, Phillips, and Nelson by the lease of October 1, 1887, for the term of 6 years, with a privilege of 20 years more. If the interpleaders claimed, by assignment or otherwise, to recover any part of the debt due under that lease, there would be a proper case for an interpleader. But they do not. Davis and Nelson both repudiated that lease, and expressly disclaimed any rights under or interest in it. The only claim of the interpleaders is that the defendant owes them rent due under the lease to Adams, Davis, James, Hodges, and McBride, dated January 25, 1888, for a term of 20 years from that date. Thus the plaintiffs and interpleaders respectively claim to recover of the defendant no part of the same debt, but two independent debts arising under independent leases, of different dates and different terms, payable to different lessors.

Nor can the interpleaders be held as parties defendant to this action under the Arkansas statute in force in the Indian Territory, which provides that:

"Any person may be made a defendant who has or claims an interest in the controversy adverse to the plaintiff, or who is a necessary party to a complete determination of the questions involved in the action." Mansf. Dig. Ark. § 4940.

The only controversy it is necessary to decide in order to determine the action between the plaintiffs and the defendant is that over the validity of the lease of October 1, 1887, between them. In that controversy the interpleaders neither have nor claim any interest. It can be, and in fact it must be, completely determined in an action between the plaintiffs and the defendant, because they are the only parties interested in the question. Its decision in the action between them cannot in any way determine or affect the rights of the interpleaders against the defendant, or of the defendant against the interpleaders, under the lease between them of January 25, 1888, or the rights of the plaintiffs and the interpleaders against each other to the title to the mine, and hence the latter are neither necessary nor proper parties to the plaintiffs' action on their lease.

It is insisted that the interpleaders have waived their right to be dismissed from this action on the ground that no case for an interpleader has been established against them, because they appeared, answered, moved to change the venue of the action, to transfer it to the equity calendar, and after their motion to be dismissed on the pleadings was denied, and they had excepted, they filed an amended answer, in which they prayed for affirmative relief. But this position is clearly untenable. It may be conceded that the interpleaders, by their general appearance and answer, waived all objections to the method by which they were brought into court, but the reason for their dismissal here lies deeper. It is that no case against them was ever pleaded or proved. On that ground they moved for a dismissal on the pleadings, while the first prayer of their answer was that they might be dismissed. Their motion was erroneously denied. They excepted, and then filed an amended answer, in which they asked the relief which the court had erroneously ordered them to seek in this action or to forever lose. That order was not appealable, and no litigant ought to be held to have waived any of his rights because he has quietly and respectfully obeyed such an order of the court after taking his exception. *Harkness v. Hyde*, 98 U. S. 476, 479; *Pacific Co. v. Denton*, 13 Sup. Ct. 44, 46; *Railway Co. v. Pinkney*, Id. 859. When the evidence had all been taken the interpleaders waived their claim for affirmative relief, which they had made under the protest of their exception, and moved the court to vacate the erroneous orders it had made, compelling them to interplead, and to dismiss them from the suit because no case had been either pleaded or proved against them. This motion was well grounded in law and in fact. In our opinion the interpleaders had not waived their right to urge it, and it was properly granted.

The conclusion at which we have arrived also disposes of the appeal from the order dismissing the auxiliary petition for an injunction and vacating the preliminary writ. The only ground on which the injunction was sought in that petition was that in July, 1891, while this suit was pending between the plaintiffs, the defendant, and the interpleaders, the latter and B. F. Smallwood and John Frinzell brought an action against the plaintiffs in the circuit court of the Choctaw Nation to quiet their title to coal claim No. 6, and the royalties from it, and to recover \$25,000 damages because the plaintiffs had illegally interfered with the mine, and prevented them from using it and collecting their royalties; that they had recovered the judgment they sought, and were enforcing it by levying an execution on certain cattle of some of the plaintiffs. There is no doubt that, in suits in which the court obtains jurisdiction by the seizure or control of the subject-matter of the suit, the court which first acquires jurisdiction over it may retain the property in its custody until final judgment, and in many cases until such judgment is satisfied, and that it may use its writ of injunction, or other proper process, to effect this result. *Gates v. Bucki*, 4 C. C. A. 116, 125, 53 Fed. 961, and authorities cited. It is equally well settled that the pendency of an action in one court will not bar or abate another action between the same parties, involving the same issues, in a

court of co-ordinate jurisdiction, in which that jurisdiction is exercised, not by seizure of the property, but by personal service of original process upon the defendants. *Stanton v. Embrey*, 93 U. S. 548, 554, and cases cited. The jurisdiction of the court in the Choctaw Nation was exercised solely by personal service of its process on the defendants in that suit. The parties to this action in the Choctaw court were all citizens of that nation, and there is no doubt that the Choctaw court had jurisdiction of the subject-matter and the parties to that action. The act of May 2, 1890, (26 Stat. 81, c. 182,) entitled "An act to provide a temporary government for the territory of Oklahoma, to enlarge the jurisdiction of the United States court in the Indian Territory, and for other purposes," provides, by its thirtieth section, "that the judicial tribunals of the Indian nations shall retain exclusive jurisdiction in all civil and criminal cases arising in the territory in which members of the nation by nativity or by adoption shall be the only parties;" and, this court has held that the judgments of the courts of these nations, in cases within their jurisdiction, stand on the same footing with those of the courts of the territories of the Union and are entitled to the same faith and credit. *Mehlin v. Ice*, 5 C. C. A. 403, 56 Fed. 12. See, also, *In re Mayfield*, 141 U. S. 107, 115, 11 Sup. Ct. 939.

The plaintiffs insist that under the act entitled "An act to establish a United States court in the Indian Territory, and for other purposes," (approved March 1, 1889,) which provides, in section 6, "that all laws having the effect to prevent the Cherokee, Choctaw, Creek, Chickasaw, and Seminole Nations or either of them from lawfully entering into leases or contracts for mining coal for a period not exceeding ten years are hereby repealed, and said court shall have jurisdiction over all controversies arising out of said mining leases or contracts, and of all questions of mining rights or invasions thereof where the amount involved exceeds the sum of one hundred dollars," (25 Stat. 783, c. 333, § 6,) the court below had co-ordinate jurisdiction with the Choctaw court to determine the questions presented in that court. It is unnecessary to decide that question. If we admit—and we do not decide—this proposition, and if we concede that the petition for an injunction might lawfully be retained, and the preliminary injunction sustained, as long as the court below continued erroneously to hold that a case was presented in that court which enabled it to hear and determine the issues raised in the Choctaw court, yet it was the right and the duty of that court to dissolve the injunction and dismiss the petition as soon as it became advised that no case had been or could be presented in this suit in which it could decide those questions. This it has done, and the orders appealed from are affirmed, with costs.

CHABLE v. NICARAGUA CANAL CONSTR. CO.

(Circuit Court, S. D. New York. January 31, 1894.)

1. CORPORATIONS — RECEIVERS — RIGHTS OF STOCKHOLDERS — INSPECTION OF BOOKS.

Where a stockholder of a corporation which is in the hands of a receiver seeks leave to inspect its books, it is no ground for denying him the right that his object is to obtain material to convince the other stockholders that a plan of reorganization, which has met the approval of a majority of them, should not be carried out.

2. SAME—DUTY OF RECEIVER.

While it is proper for the receiver to refuse to allow such an inspection until it is ordered by the court, it is no part of his duty to promote one plan of reorganization as against another, whether by opposing the petition to be allowed such inspection or otherwise, but he should remain absolutely neutral.

3. SAME—INTEREST SUBSEQUENT TO RECEIVERSHIP.

A motion by a stockholder for leave to inspect the books of a corporation which is in the hands of a receiver will be denied when it appears that the movant did not become a stockholder until six months after the receiver's appointment.

In Equity. On motion. Motion by Frederick H. Hatch in the suit of Louis Chable against the Nicaragua Canal Construction Company for leave to inspect the defendant's books in the hands of the receiver. Motion denied.

George Hoadley, for the motion.

Joseph H. Choate, opposed.

LACOMBE, Circuit Judge. When a corporation has suffered financial shipwreck, and its property and assets, including its books, come into the possession of the court and the custody of the court's officer, the receiver, the question whether or not an inspection of those books shall be accorded to a stockholder in the shipwrecked concern is one resting in the discretion of the court, unhampered by any decisions touching such right of inspection while the corporation was still a going concern in the hands of its officers and directors. Ordinarily it would seem that such discretion should be exercised by the court most liberally towards every individual stockholder who shows some reason other than mere idle curiosity which induces him to ask for the inspection. It is no doubt a fact that in many cases the information derived and the conclusions arrived at upon such inspection may promote differences of opinion, controversies, and animosities between members of the corporation, and to that extent be an interruption to the conduct of its affairs, but that is one of the misfortunes attendant upon financial shipwreck. The right of the individual stockholder to obtain from the court an inspection of its books in the court's custody, in order to inform himself as to past transactions and present condition, or to enable him to determine what may be most conducive to the protection of his own interests as a stockholder in the future, is one entitled to the favorable consideration of a court of equity.

The theory of a receivership such as this is that the court takes

possession of the assets of the corporation with the intention of distributing them equitably among all entitled to receive, without exposing creditors and stockholders alike to the heavy sacrifices which would be likely to occur should the property as an entirety be broken up, and sold, bit by bit, as the result of a ruinous race of diligence between creditors. Having the securities in its possession, the court retains them until they can be properly marshaled, the claims of all ascertained, the property converted into money, and the same distributed equitably according to the rights of all parties. Frequently, before this termination of the proceeding is reached, some plan of reorganization, satisfactory to nearly all interested, and abundantly protecting the full legal and equitable rights of those not entering into it, is perfected, and the receivership terminates by a sale of the property to some new corporation, or to some committee, organized under such plan. A stockholder who in good faith asks for an examination of the books in the custody of the court, in order to enable him to determine whether or not such a proposed plan of reorganization is or is not a desirable one for himself and the other stockholders to enter into, should be accorded such inspection, under proper regulations as to time and circumstance, so as not to interfere either with the transaction of the receiver's duties or with such inspection as his fellow members may be entitled to.

The application in the case at bar is opposed upon the statement that its object is to obtain material to be used in convincing other stockholders that a proposed plan of reorganization is one which should not be carried out; that it is primarily intended to interfere with the accomplishment of a plan which meets the approval of a majority of the stockholders, who have been content to accept it without such information as the petitioner asks for. This objection, however, is not a sufficient answer to the application. The fact that a majority of the persons interested are satisfied thus to accept it is no reason why a stockholder who wishes for further information, to which he is entitled, should be refused it, even though, when it is once obtained, he intends to present it to his fellow stockholders as an argument to dissuade them from accepting the plan. If the plan is one which commends itself to those interested, his arguments will probably have little weight with them.

The receiver himself appears by counsel before the court, asking that he be instructed to refuse permission, on the ground that the proposed plan is one which promises to afford means for an early liquidation of the debts of the company, and the renewal of the work of construction; that he has uniformly commended the scheme of reorganization already proposed, and that the apparent object of the petitioner and his associates is to defeat such plan. So far as he has heretofore refused to allow inspection of the books by stockholders, his course is entirely approved. In every case of doubt it is well for a receiver to refrain from action until he may obtain the instruction of the court, whose officer he is. It

is not, however, the duty of a receiver to formulate or to promote one or other proposed plan of reorganization. Whether there shall be a new organization formed of stockholders, bondholders, or creditors, with what respective interests, and upon what terms, is one that should be left for the determination of the persons interested, without interference in any way by the court or its officers. The court in these cases is a harbor of refuge, not a repair shop. It will hold the property of the corporation safe from outside attacks, and in proper cases will keep its business going, so that whatever value there may be in the business, *qua* business, may be preserved for all concerned; but it will not undertake, either itself or by its officer, to reorganize the old corporation, or to create a new one, or to solicit subscribers to some syndicate of prospective purchasers. If rival and discordant interests between the parties interested in the property produce conflicting plans upon which they cannot agree, it is the receiver's duty to stand absolutely neutral between all, giving to no one any preference or advantage over the other, and according equal facilities to every stockholder, whether he holds a single share or ten thousand. And if the persons interested cannot within a reasonable time provide a purchaser or competing purchasers of the property, the court will sell it, upon such advertisement, at such time, and upon such terms of sale, as courts usually adopt to secure competition and a fair price.

Inasmuch as it was stated on the argument that some 60 or more stockholders were asking for an inspection, it has seemed best to discuss the merits of the motion, although the application of this particular petitioner must be refused. It appears that he did not become a stockholder until January of this year, nearly six months after the appointment of the receiver. It is manifest that his situation is very different from that of one who was a stockholder of record at the time of the catastrophe which wrecked the corporation. Such a stockholder, the value of whose property has been affected by the manner in which the business of the corporation has been conducted, is entitled to a different measure of consideration from that shown to a mere speculator, who, after the property has passed to the receiver, buys an interest in what may be saved out of the wreck. Motion denied.

SCHLAWIG v. PURSLOW et al.

(Circuit Court of Appeals, Eighth Circuit. January 29, 1894.)

No. 253.

1. ADVERSE POSSESSION—WHAT CONSTITUTES—DOUBTFUL PAPER TITLE.

Taking possession under an instrument which the parties intend to operate as a complete relinquishment of title, followed by the most unequivocal acts of full ownership during the entire period of limitation, without objection by the grantors, will be held to show adverse possession, although it is doubtful whether the instrument, on its face, should be construed as a deed, or only as a mortgage.

2. LACHES—WHAT CONSTITUTES.

One who waits more than 10 years before asserting a right to redeem land, standing silently by and permitting another in possession, and claiming absolute ownership, to remove old buildings, and erect an expensive new one, will not be aided by a court of equity.

Appeal from the Circuit Court of the United States for the Northern District of Iowa.

In Equity. Suit by J. J. Schlawig against Robert Purslow, A. S. Garretson, the Sioux City Savings Bank, and the Sioux National Bank for an accounting and for the redemption of real estate. The bill was dismissed below without an opinion. Complainant appeals. Affirmed.

C. C. Cole, for appellant.

Asa F. Call, (William L. Joy and C. L. Joy, on the brief,) for appellees.

Before CALDWELL, Circuit Judge, and THAYER, District Judge.

THAYER, District Judge. This was a bill for an accounting between a mortgagor and mortgagee, and to redeem from the lien of a mortgage certain real estate situated in Sioux City, Iowa, known as the west 22 feet of lot 1, block 22, in East addition to said city. The material facts, as disclosed by the record, are as follows: On the 1st day of February, 1875, the appellant, Schlawig, mortgaged said property to Robert Purslow, one of the appellees, to secure an indebtedness of \$2,460, which sum he promised to pay one year thereafter, with semiannual interest at the rate of 10 per cent. per annum. The indebtedness not having been paid, a suit was subsequently brought by Purslow in the district court of Woodbury county, Iowa, to enforce said mortgage, and in such proceeding a decree of foreclosure was entered on October 29, 1876, for the sum of \$2,975, together with costs and attorney's fees. No sale was made in execution of said decree of foreclosure, but in lieu thereof, on December 1, 1877, Schlawig and wife executed the following instrument, which was duly acknowledged, delivered, and recorded.

"Know all men by these presents that we, John J. Schlawig and Ursula Schlawig, his wife, of Woodbury county and state of Iowa, in consideration of the sum of three thousand four hundred and twenty-one 55-100 dollars in hand paid by Robert Purslow, of Woodbury county and state of Iowa, do hereby sell and convey unto the said Robert Purslow the following described premises, situated in the county of Woodbury and state of Iowa, to wit: Commencing at the northwest corner of lot one, (1,) block twenty-two, (22,) Sioux City, East addition; thence running east twenty-two (22) feet on the north line of said lot; thence south fifty (50) feet; thence west on the south line of said lot twenty-two (22) feet; thence north to the point of beginning,—being the west (22) twenty-two feet of said lot. This deed is made under the following state of facts:

"(1) The said Purslow having obtained a decree of foreclosure against said grantors of a mortgage upon said premises, which is the sole consideration of this deed, now, therefore:

"(2) The grantors are to retain possession of said premises for one year from this date, December 1, 1877.

"(3) The same redemption that would be allowed by law to the grantors and their creditors had a sale under execution been made shall be allowed for one year from December 1, 1877.

"(4) At the expiration of said year, unless redeemed according to law, the grantors will surrender the immediate possession of said premises to the grantee. And we hereby covenant with the said Robert Purslow that we hold said premises by good and perfect title; that we have good, right, and lawful authority to sell and convey the same; that they are free and clear of all liens and incumbrances whatsoever; and we covenant to warrant and defend the said premises against the lawful claims of all persons whomsoever. It is further stipulated that, if grantors redeem said premises, they will pay taxes advanced by grantee, and \$25.00 paid by him on Joseph Reappler's judgment. And the said Ursula Schlawig hereby relinquishes her right of dower in and to the above-described premises.

"Signed this 1st day of December, A. D. 1877.

J. J. Schlawig.

"In presence of E. E. Lewis.

Ursula Schlawig."

The consideration expressed in this instrument (\$3,421.55) was not refunded within the year; whereupon, on December 1, 1878, Purslow took possession of the premises with the consent of Schlawig and wife, and the premises have ever since been in the actual possession of Purslow or of his grantees. On February 4, 1880, Purslow conveyed the premises, by warranty deed, to A. S. Garretson. On October 2, 1880, Garretson conveyed the same premises, by warranty deed, to the Sioux City Savings Bank, and on December 28, 1881, the Sioux City Savings Bank conveyed the same, by warranty deed, to the Sioux National Bank, by whom the property is now held and occupied. The purchase of the lot in controversy by Garretson appears to have been made for and in behalf of the Sioux City Savings Bank, of which he was cashier, and immediately after his purchase, during the spring and summer of 1880, the bank erected valuable improvements thereon at an expense of about \$22,000. The improvements consisted of a substantial brick building with stone trimmings, 22 feet wide, 90 feet deep, and 2 stories high, which was designed to be used for banking purposes, and has been so used since its completion. At the time Purslow took possession of the property, there was a frame building situated on the lot in controversy. This was removed by Purslow when the bank building was erected, and the new structure was extended for about 40 feet over an adjoining lot located at the rear of the premises in dispute, which adjoining lot belonged to the Sioux City Savings Bank. At the present time, and since its erection, the bank building covers the premises in controversy and the adjoining lot, the title to which is not in dispute. An expensive vault has also been constructed for the use of the bank, the foundation of which stands partly on the lot in controversy and partly on the adjoining lot. From December 1, 1878, until June 11, 1891, when the present suit was instituted, Schlawig spent a portion of his time in the Black hills, but his family resided continuously in Sioux City, and he visited his family on many occasions. It is not denied that he was fully aware, during all of that period, of the improvements that were being made on said lot, and of the several conveyances that were made by Purslow and by those claiming under him. During the past 12 or 13 years the property in question has greatly appreciated in value, and it is now regarded as one of the most eligible business sites in Sioux City.

On the argument of the case, much time was spent in discussing the question whether the instrument executed by Schlawig and wife on December 1, 1877, is in legal effect a mortgage, or a deed by which the grantor reserved the option to purchase the property from his grantee within one year from the date of the conveyance. The appellant contends, and the bill charges, that the instrument is merely a mortgage, which was executed for the purpose of further securing the original mortgage debt, and that when Purslow took possession of the premises, on December 1, 1878, he entered as a mortgagee, and not as owner of the fee. On the other hand, the appellees insist that the instrument is a deed by which the grantor reserved the right to reacquire the title from his grantee within a given period. The view that we have taken of the case does not require us to determine definitely whether the conveyance of December 1, 1877, is in fact a deed, as the appellees contend, or merely a mortgage. Whatever may be the legal effect of the language employed, we are satisfied that the parties did not intend, when the instrument was executed, that it should operate as a mortgage, and as further security for the mortgage indebtedness. The proof shows very clearly that, when it was executed, the value of the property was about equal to the amount of the incumbrance, as fixed by the decree of foreclosure. Neither party, therefore, had any special object to gain by a judicial sale under the decree of foreclosure, as the mortgagor's equity of redemption was of no value, and such sale would merely enhance the costs. We consider it therefore highly probable, as all of the oral testimony tends strongly to show, that the conveyance of December 1, 1877, was executed in pursuance of an agreement between the mortgagor and the mortgagee that the latter should take the property in satisfaction of the mortgage debt, without a judicial sale, and that the mortgagor should retain possession for one year, with the right, in the mean time, to reacquire the title if he elected to do so. It follows from this view of the case that when Schlawig and wife surrendered the premises to Purslow, about December 1, 1878, it was understood by both parties that he went into possession under a claim of title as owner of the fee, and not merely as an incumbrancer or mortgagee. All of Purslow's subsequent acts, as well as the conduct of his grantees, are consistent with this view, and wholly inconsistent with the theory that he merely took possession as mortgagee under an unsatisfied mortgage. Within a short time after entering into possession of the premises he conveyed the same, by warranty deed, to A. S. Garretson, and subsequently bought from the Sioux City Savings Bank, and removed from the mortgaged premises, the frame structure that was standing thereon when he took possession. It is hardly possible to conceive of any acts of ownership which might have been done and performed by Purslow and his grantees, that would have more clearly indicated, to any one interested in the mortgaged premises, that they had severally taken possession thereof as owners of the fee, and were holding the premises adversely to the mortgagor. Moreover, Schlawig's silence and inaction while the premises were

being conveyed by warranty deed from one grantee to another, and while the old building was being removed from the premises, and while new and extensive improvements were being erected thereon, are most persuasive evidence that he regarded Purslow and those claiming under him as the rightful owners of the property, and as authorized to deal with it as they thought proper. It is insisted, however, if the conveyance of December 1, 1877, was in fact and in legal effect a mortgage, that, by taking possession under the same, Purslow became subject to all of the liabilities and disabilities of a mortgagee in possession, and that neither he nor those claiming under him could assume a different relation with respect to the mortgaged premises. In other words, it is broadly contended that the possession taken by the grantee under the conveyance of December 1, 1877, could not ripen into a title under the statute of limitations, because, that instrument being merely a mortgage, such possession was not adverse to the mortgagor. We do not dispute the general proposition that, where one takes possession of lands under a written instrument, the nature of that possession is ordinarily determined by the character of the instrument; nor the further proposition that possession by a mortgagee of the mortgaged premises is usually not adverse, but consistent with the rights of the mortgagor. *Green v. Turner*, 38 Iowa, 112, 118; *Crawford v. Taylor*, 42 Iowa, 260, 264. It may also be conceded that, under the laws and judicial decisions of the state of Iowa, a mortgage does not vest the mortgagee with an estate in the land, but simply creates a specific lien or charge thereon to secure a debt. *Newman v. De Lorimer*, 19 Iowa, 244; *Gower v. Winchester*, 33 Iowa, 303, 306. These concessions, however, are of no benefit to the appellant on the state of facts disclosed by the present record. The distinguishing feature of this case is, that the parties did not regard the conveyance of December 1, 1877, as a mortgage, and Purslow did not enter into possession as mortgagee, but as the rightful owner of the fee, of which fact Schlawig must have been well aware. It is doubtful, to say the least, whether, from the face of that conveyance, it should be construed as a mortgage, or as a deed which secured to the grantor the right to repurchase the land at a fixed price within a specified time. That the parties did not intend it to operate as a mortgage is made manifest, we think, by the oral testimony, by the circumstances which attended its execution, and by the subsequent conduct of both of the parties thereto. Under the conveyance, Purslow took possession on December 1, 1878, and for more than 10 years thereafter he and his grantees exercised a dominion and control over the property which would have convinced any one who was not willfully unconscious of the significance of their acts that they claimed to be the rightful owners of the property, and that they were holding it discharged from the lien of the alleged mortgage. In view of these facts, we are constrained to decide that the plea of the statute of limitations was fully sustained by the proof, and that the bill was properly dismissed on that ground. In our judgment the record discloses more than 10 years' adverse possession

of the premises in controversy under an open, notorious, and continuous claim of ownership, which is sufficient, under the Iowa statute, to bar the present suit. McClain's Code Iowa, § 3734.

The doctrine of laches, as heretofore applied, both by this court and other courts, also fully warranted the decree dismissing the bill of complaint, even if we should concede that there was no other adequate ground for refusing relief. It is a fundamental rule that courts of equity will not aid a suitor who has for a long time acquiesced in the assertion of adverse rights without any excuse for so doing; and especially is this true if his conduct savors of bad faith, and the relief sought will be productive of much hardship and injustice to others. *Godden v. Kimmell*, 99 U. S. 201; *Badger v. Badger*, 2 Wall. 87; *McKnight v. Taylor*, 1 How. 161; *Naddo v. Bardon*, 2 C. C. A. 335, 51 Fed. 493; *Lemoine v. Dunklin Co.*, 2 C. C. A. 343, 51 Fed. 487. Courts of equity will also refuse to interfere, though the period of delay is comparatively short, where the complainant, being out of possession of property, has waited before bringing suit until the same has greatly enhanced in value, or has stood by and suffered the opposite party, without notice of his claim, to expend his money in making valuable improvements on the property to which the claim relates. *Landrum v. Bank*, 63 Mo. 48, 56, 57; *Moreman v. Talbott*, 55 Mo. 392; *Kinne v. Webb*, 4 C. C. A. 170, 175, 54 Fed. 34. In the case at bar the record shows, not only that the complainant below waited for an unreasonable period before asserting his right to redeem, but that he stood silently by, and permitted the defendants below to remove the old improvements on the mortgaged property, and to expend a large sum of money in erecting a substantial brick building, which extends over an adjoining lot, and cannot now be removed without inflicting a great loss on the appellees. It is evident that the relief sought by the complainant in this proceeding cannot be afforded at this late day without doing gross injustice, which would be justly attributable to the laches and bad faith of the complainant. Our conclusion is that the decree of the circuit court was undoubtedly right, for the reasons last indicated, and that the same should, in any event, be affirmed. It is so ordered.

DE HASS v. ROBERTS et al.

(Circuit Court, W. D. Pennsylvania. January 30, 1894.)

1. NEGOTIABLE INSTRUMENTS—WHAT CONSTITUTES.

A certain instrument made in the state of Kansas contained a promise to pay to K. or order, five years after date, a sum certain, with interest at 8 per cent., payable semiannually, as per annexed coupons; both principal and interest payable at K.'s bank, in Topeka. It recited that both "this note" and the coupons were to be construed by the laws of Kansas in every particular, and were secured by a mortgage on land, and provided that they should draw 12 per cent. interest after maturity; that in default of payment of any coupon the principal should become due, and the amount of such defaulted coupon should be added to the principal, and the whole bear interest at 12 per cent. *Held*, that this was a negotiable instrument.

2. SAME—ASSIGNMENT—SUBSEQUENT INDORSEMENT.

The payees of said instrument indorsed on it a transfer thus: "For value received, we hereby assign and transfer the within bond, together with all our interest in and rights under the same, without recourse," to J. D. *Held*, that this was not a commercial indorsement, but a mere assignment passing an equitable interest subject to the defenses of the makers; that the negotiability of the instrument was thereby destroyed, and the subsequent indorsement by the transferee did not make him liable for payment in the absence of any independent contract,—both transfers having been made in the state of Kansas. *Iron-Works v. Paddock*, 15 Pac. 574, 37 Kan. 510, followed.

At Law. On motion for judgment non obstante veredicto. Action by Elizabeth G. De Hass against John D. Roberts, as survivor of John Dibert and John H. Dibert, late partners as John Dibert & Co., on an obligation to pay money. Motion sustained, and judgment entered.

Shiras & Dickey, for plaintiff.

Robert S. Frazer, for defendants.

ACHESON, Circuit Judge. 1. The first reserved question of law is "whether, under the evidence, to wit, the writing sued on, the attached guaranty, and the mortgage securing said obligation,—the writing sued on dated the 15th day of June, 1867, for \$3,000, payable to the order of John D. Knox & Co.,—is a negotiable commercial instrument." By this instrument, which was signed at Topeka, Kan., the makers, R. J. and Ida McFarland, promise to pay to John D. Knox & Co., or order, five years after date, the sum of \$3,000, with interest at the rate of 8 per cent. per annum to be paid semiannually, as per annexed coupons; the principal and interest being payable at the banking-house of the payees, in Topeka, Kan.; the writing declaring that "this note" and the coupons "are made and executed under, and are to be construed by, the laws of the state of Kansas, in every particular," and are to draw 12 per cent. interest per annum after maturity, and that they are secured by a first mortgage on real estate, and providing that if any of the interest coupons shall not be paid at maturity the principal debt shall then become due, and the unpaid coupon first matured shall become a part of the principal, and the whole principal debt and first unpaid coupon shall bear interest at the rate of 12 per cent. per annum from the maturity of said coupon until paid. The "attached guaranty" is no part of the instrument, but a stipulation of a later date given by a third person upon the transfer of the note. It therefore has no bearing upon this particular question. The recited mortgage was given by the makers of the note to the payees, and is conditioned for the payment by the mortgagors as well as of the note and interest as of all taxes and assessments to be levied upon the mortgaged premises, and that the mortgagors shall keep the buildings insured and in good repair, and refrain from cutting timber or committing other waste, with a provision that in case of default in the payment of any taxes or assessments, if the holder shall so elect, the note shall immediately become due. It is a collateral security,—a contract distinct from the note, and not contravening any of its terms. As

it is the general rule that contracts are to be construed and governed by the law of the place where they are made and to be performed, the declaration contained in the paper in suit as to the controlling effect of the laws of Kansas in its construction only expresses what otherwise would have been implied. The precise question here raised was not involved in any of the decisions of the supreme court of Kansas brought to my attention. The instruments, which in *Killam v. Schoeps*, 26 Kan. 310, and *Iron-Works v. Paddock*, 37 Kan. 510, 15 Pac. 574, were held to be nonnegotiable, contained stipulations respecting the title and future disposition of the property which formed the consideration of the notes. They were not simply promises to pay money, but double contracts. We find, however, that it was decided in *Seaton v. Scovill*, 18 Kan. 433, that a stipulation to pay "reasonable attorney's fees if suit be instituted" does not destroy the negotiability of a promissory note; and in *Parker v. Plymell*, 23 Kan. 402, that a note otherwise negotiable is not rendered non-negotiable by reason of the provision, "If this note is not paid at maturity, the same shall bear twelve per cent. interest from date." In *Chicago Ry. Equipment Co. v. Merchants' Bank*, 136 U. S. 268, 10 Sup. Ct. 999, it was declared by the supreme court of the United States that under the general mercantile law the negotiability of a promissory note is not affected by the provisions therein that the title to the personal property for which it was given should remain, as security, in the vendor, the payee of the note, until all the notes of a series to which it belonged were paid, and that the note should become due and payable to the holder on the failure of the maker to pay the principal or interest of any of the notes of the series. It was likewise ruled in *Ernst v. Steckman*, 74 Pa. St. 13, that a promissory note is negotiable if payable certainly at a fixed time, although made subject to a contingency whereby it may become due sooner; and in *Bank v. Crowell*, 148 Pa. St. 284, 23 Atl. 1068, that the negotiability of a note is not destroyed by a clause therein stating that it was accompanied by a collateral security, and how the latter might be sold by the holder of the note if not paid at maturity. In the absence, then, of any decision by the courts of Kansas to the contrary, I feel justified in holding that the writing here in question is a negotiable commercial instrument.

2. The second reserved question is "whether the indorsement of John Dibert & Co. after the assignment without recourse made by John D. Knox & Co., the payees, upon the writings sued on, pro ut same in evidence, made the said John Dibert & Co. liable as indorsers of negotiable commercial paper; the transfer from John D. Knox & Co. to John Dibert & Co., and the transfer by John Dibert & Co. to F. S. De Hass, having been made in the state of Kansas." The indorsed transfer by John D. Knox & Co. to John Dibert & Co., upon the note of June 15, 1887, for \$3,000, is as follows: "For value received, we hereby assign and transfer the within bond, together with all our interest in and rights under the same, without recourse, to John Dibert & Co. John D. Knox & Co." Under this transfer is the indorsement: "Pay to the order of F. S. De Hass. John Dibert & Co." Then follows the indorsement: "Elizabeth G.

De Hass, Executrix of F. S. De Hass." Besides the note for \$3,000, this suit embraces two of the coupons, and they have similar transfers indorsed upon them. The "attached guaranty" already mentioned is executed by the John D. Knox Land & Investment Company under date of 19th September, 1889, and purports to assign and transfer the said note to F. S. De Hass, and guaranties the collection of the principal and interest upon specified conditions. It is the settled law of Kansas that a negotiable promissory note, payable to order, can be transferred by the payee, so as to convey the legal title, only by an indorsement, in the technical or mercantile sense; any other form of transfer passing an equitable interest therein, merely, and leaving the note in the hands of the transferee subject to all equities, counterclaims, and defenses which the maker could assert as against the payee. *McCrum v. Corby*, 11 Kan. 464, 470; *Hadden v. Rodkey*, 17 Kan. 429; *Briggs v. Latham*, 36 Kan. 205, 210, 13 Pac. 129; *Calvin v. Sterritt*, 41 Kan. 215, 218, 21 Pac. 103. In *Hatch v. Barrett*, 34 Kan. 223, 8 Pac. 129, a writing on the back of a negotiable promissory note, payable to the order of J. C. Rogers, in these words: "I, James C. Rogers, do hereby assign the within note to Charles B. Hatch, of Osage county, Kansas. Said assignment is made without recourse to me, either in law or equity. J. C. Rogers,"—was held not to be an indorsement, in a commercial sense, and not to cut off the defense of the maker. The court there said:

"The alleged indorsement is clearly not in the usual or common form, but substantially different therefrom. The words of the indorsement, taken together, must be treated as only an assignment of the note. An assignee stands in the place of the assignor, and takes simply an assignor's rights, but the assignment of a note will not cut off the defenses of the maker."

These decisions of the supreme court of Kansas are conclusive here, but it is to be observed that they are in harmony with the rule of the law merchant. *Story, Prom. Notes*, § 120; *Osgood v. Artt*, 17 Fed. 575; *Trust Co. v. National Bank*, 101 U. S. 68, 71.

If, then, upon such an assignment, the legal title is left in the payee, a mere equitable interest passes to the transferee, and the note remains subject to all the defenses of the maker, it seems necessarily to follow that the negotiable character of the instrument is thereby utterly destroyed, for all the peculiar and distinguishing characteristics of negotiability are gone. This was ruled in *Aniba v. Yeomans*, 39 Mich. 171. Does the subsequent indorsement by the transferee of the note which has thus become nonnegotiable, in the absence of any other or independent special contract in relation to that indorsement, render him liable? Upon principle, it seems to me, the question should be answered negatively. *Daniel, Neg. Inst.* 666; *Gray v. Donahoe*, 4 Watts, 400; *Wright v. Hart's Adm'r*, 44 Pa. St. 454; *Bank v. Piollet*, 126 Pa. St. 194, 17 Atl. 603. This is the conclusion deducible from the case of *Iron-Works v. Paddock*, 37 Kan. 510, 15 Pac. 574, which was a suit against indorsers of a promissory note payable to order, but which the court held was nonnegotiable because of its peculiar provisions. Treating of the re-

sponsibility of the indorsers of a nonnegotiable note, the supreme court of Kansas there said:

"In Iowa the court held that an indorsement of a nonnegotiable note, or any other instrument of writing except negotiable paper, without the proof, oral or written, of an undertaking to become responsible in some manner for a good consideration, means nothing, and an indorser incurs no liability. *Fear v. Dunlap*, 1 G. Greene, 334. *Daniel on Negotiable Instruments* (709) says: 'If the note be not negotiable, it is plain that such party cannot be regarded as an indorser, for the simple reason that there is no such thing as an indorsement, in its strict sense, of any other than negotiable paper.' See, also, *Graham v. Wilson*, 6 Kan. 490. We are inclined to the latter view,—that the indorsement of a name upon a nonnegotiable note simply transfers the title of a party, and does not make him liable as if said note were a negotiable instrument. *Story v. Lamb*, 52 Mich. 525, 18 N. W. 248; *Bank v. Gay*, 71 Mo. 627. Such party guaranties the note to be genuine, and that it is what it purports to be; nothing more. He does not guaranty its payment, although he might do this; but to do so would take a contract, either expressed in the indorsement, or by an independent contract between the parties."

This seems to have been understood by the parties to the transaction here under consideration, for the assignment of the note by the John D. Knox Land & Investment Company to F. S. De Hass contained an express guaranty. The views of the supreme court of Kansas above quoted seem to be decisive of the second question of law reserved, and the ruling thereon must be favorable to the defendants.

3. The third reserved question relates to interest only, and, in view of the conclusion just stated, need not be considered.

The opinion of the court being with the defendants upon the second question of law reserved, in each case judgment will be entered in favor of the defendants non obstante veredicto.

RODECKER et al. v. LITTAUER.¹

LITTAUER et al. v. RODECKER et al.

(Circuit Court of Appeals, Eighth Circuit. January 29, 1894.)

Nos. 250, 251.

1. REVIEW ON ERROR—TRIAL TO COURT—GENERAL FINDING.

When the case is tried to the court without a jury a general finding has the same effect as the verdict of a jury, and prevents all inquiry into the special facts and conclusions of law upon which the finding rests. *Walker v. Miller*, 59 Fed. 869, and *Bowden v. Burnham*, Id. 752, followed.

2. USURY AS DEFENSE—ACCOMMODATION PAPER.

An answer averring that the note sued on was made by defendants for accommodation of the payees, who discounted it with plaintiffs at an illegal rate of interest, states a good defense under the New York law, without averring that plaintiff knew it to be accommodation paper at the time of taking it.

3. SAME—BONA FIDE HOLDERS.

No one can become a bona fide holder of a note or bill which, by statute, is void for usury.

In Error to the Circuit Court of the United States for the District of Kansas.

¹ Rehearing pending.

At Law. Actions by Harriett Littauer, Oscar L. Richards, and Lucius N. Littauer, executors of Nathan Littauer, deceased, against Jacob Rodecker and Samuel Cohen, partners under the name of J. Rodecker & Co., and by Lucius N. Littauer against the same defendants, on certain promissory notes. In both cases a jury was waived, and the causes were tried together by the court, which rendered judgment for defendants in the first-named action and for plaintiff in the second. Plaintiffs in the first action and defendants in the second action appeal. The appeal in the first-named cause is numbered 250 and in the second 251. Both judgments affirmed.

J. D. McCleverty and W. R. Biddle, for Rodecker and others.
W. C. Perry, for Littauer and others.

Before CALDWELL, Circuit Judge, and THAYER, District Judge.

CALDWELL, Circuit Judge. These cases are between the same parties, and involve substantially the same issues. They were tried together in the lower court, and, by stipulation of the parties, have been submitted in this court, in the same manner. The parties filed with the clerk below a stipulation in writing, waiving a jury, as provided by section 649, Rev. St., and the cases were tried by the court, whose finding was general in both cases.

The only error assigned in case No. 251, in which the judgment below was for the plaintiff, is that, upon the facts proved, the judgment ought to have been for the defendants, and we are asked to review the evidence, and reverse the general verdict of the lower court on the facts. We have decided in two cases at the present term (*Walker v. Miller*, 59 Fed. 869, and *Bowden v. Burnham*, Id. 752,) that when a case is tried by a court without a jury a general finding of the court has the same effect as a verdict of a jury, and prevents all inquiry in this court into the special facts and conclusions of law upon which the findings rest. No exceptions were saved to the rulings of the court in the progress of the trial. The judgment in case No. 251 must therefore be affirmed.

In case No. 250 the judgment was for the defendants upon a general finding in their favor by the court. All the assignments of error in this case, with a single exception, rest on the asserted insufficiency of the evidence to support the general finding of the court below, and need not be further noticed.

The defendants filed an answer, to which the plaintiffs filed a reply. Upon this state of the pleadings the plaintiff in error at the trial objected to the introduction of any evidence, upon the ground that the answer did not state facts to constitute a defense to the petition. The objection was overruled, to which ruling exception was taken. It is said that under the Kansas practice such an objection can be made to perform the office of a general demurrer to a pleading after issue has been joined thereon. It would seem to be an untimely and unsatisfactory mode of testing the sufficiency of a pleading. Assuming that it is proper prac-

tice under the Kansas Code, we will consider the sufficiency of the answer. It avers, in substance, that the note sued on was accommodation paper made by the defendants payable to the order of Levy Bros. & Co., to be discounted by them in the city of New York, where the note was payable, solely for their accommodation and benefit, and to be paid by them at maturity, and that Levy Bros. & Co. discounted the same in the city of New York to the plaintiff at a rate of discount which made the interest reserved amount to 8 per centum per annum,—2 per centum in excess of the rate allowed by the laws of the state of New York,—and that by the laws of that state this rendered the note usurious and void. It is said the answer is defective in that it does not allege the plaintiff knew at the time he discounted the note that it was accommodation paper.

This allegation was not necessary. Upon the averments of the answer, while the note remained in the hands of Levy Bros. & Co., it was not a binding contract. They could not have maintained a suit upon it. It was only by the negotiation of the note by Levy Bros. & Co. that it could become a binding contract. Its negotiation by them was essential to give it life. It seems to be well settled by the court of appeals of that state that the discount of accommodation paper is merely a loan of money, the purchaser being the lender and the seller the borrower; and that if, in making such discount, the rate of interest reserved is in excess of the rate of interest allowed by the laws of the state, it avoids the contract. *Clafin v. Boorum*, 122 N. Y. 385, 25 N. E. 360; *Eastman v. Shaw*, 65 N. Y. 522; *Dickinson v. Edwards*, 77 N. Y. 573; *Jewell v. Wright*, 30 N. Y. 259; *Bank v. De Shon*, 41 Ark. 331; *Tilden v. Blair*, 21 Wall. 241.

The plaintiff cannot shelter himself under the plea of a bona fide purchaser for value before maturity of negotiable paper. The note, being accommodation paper, did not become a binding contract until after the negotiation; and in the very act of negotiation the plaintiff did that which rendered it void by statute, so that it never, at any time, took effect as a valid and subsisting contract.

Moreover, no one can become a bona fide holder of a note or bill which the statute declares to be void for usury. Such a note is void in its inception, and the rights of a bona fide holder for value do not attach to an instrument made void by statute. See authorities cited above, and particularly *Bank v. De Shon*, *supra*, where there is a full collection of the authorities by Battle, J., who delivered the opinion of the court.

The judgment of the circuit court is affirmed.

ATCHISON, T. & S. F. R. CO. v. McCLURG.

(Circuit Court of Appeals, Eighth Circuit. January 29, 1894.)

No. 326.

1. RAILROAD COMPANIES—ACCIDENTS AT CROSSINGS—QUESTION FOR JURY.

The question of contributory negligence is properly submitted to the jury, when there is much contradiction as to the care exercised by plaintiff in approaching the crossing, and it appears that there were obstructions to his view of the track, and that no bell was rung or whistle blown.

2. SAME—DEGREE OF CARE REQUIRED—INSTRUCTIONS.

The obligations of railroad companies and of travelers crossing their tracks are mutual and reciprocal, and an instruction is erroneous which requires "ordinary" care of the traveler, and "a high degree of care" of the company. Caldwell, Circuit Judge, dissenting, on the grounds that the alleged error was not assigned, was not prejudicial, and that the charge, by specifying the acts required of the traveler, did in fact require of him as high a degree of care as that required of the company.

3. APPEAL—HARMLESS ERROR—PRESUMPTIONS.

An error in giving instructions must lead to reversal, unless it clearly appears from the record that the error was harmless.

In Error to the United States Court in the Indian Territory.

At Law. Action by James McClurg against the Atchison, Topeka & Santa Fe Railroad Company to recover damages for personal injuries received at a crossing. Verdict and judgment for plaintiff. Defendant brings error. Reversed.

Henry E. Asp and J. W. Shartel, (Geo. R. Peck, on the brief,) for plaintiff in error.

Amos Green and W. A. Monroe, for defendant in error.

Before CALDWELL and SANBORN, Circuit Judges, and THAYER, District Judge.

THAYER, District Judge. This was a suit for personal injuries which the defendant in error sustained at a railroad crossing in the suburbs of the town of Purcell, in the Indian Territory, on March 4, 1891. The record discloses that on that day he started home from Purcell, in company with a neighbor of his by the name of Wear, who owned and was driving the team behind which they were riding. The road taken to get out of town lay for some distance along the west side of the railroad company's main and side tracks, leading north from its depot in Purcell, but at a point about 950 feet north from the depot the road turned east, at right angles, and crossed the tracks. When they reached this crossing on their way home, a switch engine approached from the south, which was pushing in advance of it three box cars and a coal car. Anticipating a collision from the proximity of the train and its rapid approach, the defendant in error leaped from the wagon when it was about on the crossing, and was run over and seriously injured. A number of exceptions that were taken on the trial have been argued in this court, but the view that we have taken of the case only renders it necessary to consider two questions. The first is whether the lower court should have declared,

as a matter of law, that the defendant in error was guilty of contributory negligence, and the second is whether the lower court properly charged the jury that it was the duty of the defendant railway company to exercise a high degree of care in propelling its engines and cars over the crossing in question. We are of the opinion that the question of contributory negligence was properly submitted to the jury. There was the usual conflict of evidence touching the conduct of the defendant in error and his companion as they approached the crossing. The testimony for the railroad company tended strongly to show that as McClurg and his neighbor drove northwardly from the depot along the railway track, and as they turned east to cross the track, they took no precautions, such as prudent men ought to have taken, to discover approaching trains; that at several places between the depot and the crossing, if they had turned their heads slightly to look in the direction of the depot, they must have seen the approaching switch engine; that other persons saw it approaching, and tried to warn them of the impending danger by loud outcries, because they seemed utterly unaware of the presence of the train, and apparently indifferent to dangers of that character. Undoubtedly, there was considerable testimony before the jury which tended to show that McClurg and Wear, who was driving the team, were both guilty of gross carelessness. On the other hand, the testimony of both of these parties tended to show (and this fact seems to be conceded) that the switch engine gave no signals, either with the bell or whistle, to warn people of its coming. They further testified that their view of the track on which the train was moving was obstructed by a long row of box cars standing on an intermediate side track, and that it was obstructed, when they turned east to cross the track, by a tool house which stood at the angle of the road, so that they were in fact unable to see down the track towards the approaching engine until they were nearly on the crossing, and the train was upon them. Both witnesses gave evidence tending to show that they made every reasonable effort, by looking and listening, to ascertain the presence of any moving train in time to avoid it. We think, therefore, (and we are all agreed on this proposition,) that it was fairly within the province of the jury to settle the question of contributory negligence.

With respect to the second question above stated, it is to be observed that the lower court charged the jury in the following language: "A railway company is held to a high degree of care in propelling its engines and cars over a public crossing in a town or city." An exception was duly taken to this instruction, and it is criticised for the following reasons: First, because it does not prescribe the degree of care that a railway company is bound to exercise, whether the crossing be in a city or town, or in the country; second, that the direction was inapplicable in the present case, because the crossing in question was outside of the corporate limits of the town of Purcell; and, lastly, because the court thereby imposed a higher degree of care on the railway company than it exacted of the defendant in error by its other instructions. We

will not stop to inquire whether the evidence showed that the crossing now in question was within or outside of the town of Purcell, for, if the direction would have been proper with respect to crossings within the town, then we have no doubt, under the testimony in the case, that it was equally proper with respect to the crossing where the accident happened. It was evidently a crossing in the suburbs of the town, which was much frequented by teams entering and leaving the place, and whether it was a hundred yards outside of the corporate limits, or an equal distance within the outboundaries of the town, cannot alter the degree of care that the railway company ought to have exercised, inasmuch as there was no local law or ordinance defining its duty in the premises. In the absence of any such law or ordinance imposing special duties upon the railway company within the corporate limits, it cannot be maintained, with any show of reason, that the obligation of the company with respect to the exercise of care was altered when it crossed an imaginary line separating the town from the country. The truth is that it was bound, in any event, to exercise a degree of watchfulness commensurate with the character of the crossing and the amount of travel over the same. It was required to take such precautions as a prudent person would have taken under like conditions and circumstances. As is well known, some crossings are comparatively safe, while others are exceedingly dangerous; and the degree of care to be exercised by a railway company, or a traveler upon the highway, should be graduated to suit the exigencies of each particular case. *Improvement Co. v. Stead*, 95 U. S. 161, 165. We are persuaded that the vice of the instruction now under consideration lies in the fact that, when read in connection with other parts of the charge, it imposed upon the railway company a higher degree of care and diligence than the plaintiff was required to exercise. The trial court instructed the jury that "a person approaching a railroad crossing is bound to look and listen, and to use ordinary care, to ascertain if there is a train approaching." In at least five other paragraphs of the charge the same thought was repeated,—that the plaintiff, on his part, was only bound to exercise ordinary care in endeavoring to discover whether any train was nearing the crossing. On the other hand, in defining the duty of the railway company by the instruction heretofore quoted, the trial court seems to have assumed that the crossing in question was within the corporate limits of the town of Purcell, and that in approaching that crossing it was the duty of the employes of the railway company to exercise a high degree of care. It is evident, we think, that the charge was erroneous, and well calculated to mislead the jury, in that it did not correctly define the relative degree of care that the respective parties were required to exercise. We should have no doubt on this point if it were a question of first impression, for a person may reasonably be expected and required to take as great precautions to avoid getting hurt as others are required to take to avoid injuring him. But, be this as it may, it has been expressly ruled that "the obligations, rights, and duties of railroads, and

travelers upon highways crossing them, are mutual and reciprocal, and that no greater degree of care is required of the one than of the other." *Improvement Co. v. Stead*, 95 U. S. 163, 164. See, also, *Railroad Co. v. Goetz*, 79 Ky. 442, and *Willoughby v. Railroad Co.*, 37 Iowa, 432. And in the case of *Railroad Co. v. Converse*, 139 U. S. 469, 473, 475, 11 Sup. Ct. 569, which is cited by counsel, with apparent confidence, in support of the proposition that under some circumstances it is the duty of a railway company at a crossing to exercise a high degree of care, the rule was fully recognized that in every case a traveler upon the highway must exercise the same degree of caution which the law in the particular case exacts of the railway company. The error thus noted was called to the attention of the lower court by an exception taken on the trial to instructions given in behalf of plaintiff, on the ground that they required of him a less degree of care than had been imposed on the railway company; and the error in question is apparent from a casual reading of the charge. It has been suggested, however, that it was not a prejudicial error, nor of sufficient importance to warrant a reversal. With respect to that suggestion, it is sufficient to say that the very reverse of this proposition seems to us to be true. In a case of this character, where the facts all lie within a narrow compass, and a jury is required to fix the responsibility for the accident by nicely balancing the actions and conduct of one party against those of the other, it is not improbable that the fact that one of the parties was required to exercise a higher degree of care than the other may have had a controlling influence. We must presume from the fact that the court used the expression "a high degree of care" with respect to the railway company, and repeatedly used the phrase "ordinary care" in defining the duty of the plaintiff, that the jury attached some importance to the distinction thus drawn. Moreover, unless it clearly appears from the face of the record that the error was harmless, we are not allowed to speculate as to its probable consequences.

The judgment of the lower court will therefore be reversed, and the cause remanded, with directions to grant a new trial.

SANBORN, Circuit Judge, concurs.

CALDWELL, Circuit Judge, (dissenting.) This case ought not to be reversed upon the grounds stated in the opinion of the majority of the court.

In the introduction of its charge, the court said to the jury: "A railway company is held to a high degree of care in propelling its engine and cars over a public crossing in a town or city." The bill of exceptions states that the defendant excepted to this instruction "because said instruction assumed a state of facts not in proof, there being no evidence in said cause as to the crossing in question being within the limits of any town or city, and because said instruction invades the province of the jury in not submitting the question as to whether the accident occurred within the limits of the town, and assuming it to have been proved, and as contrary to

law." It will be observed that this exception to the charge states specifically the ground of the objection. The first and principal one is that there was no evidence that the crossing was within a town or city. I do not understand the majority of the court to question the fact that there was abundant evidence to show that the accident occurred either in a town or in a thickly-settled suburb.

It is apparent from a reading of the testimony that the case was tried by both parties on the assumption that the accident happened at or near the town of Purcell. In examining its own witnesses the defendant assumed and proved this fact. It called one Prewitt, a switchman in its employ, who was asked and answered questions as follows:

"Q. What business are you engaged in? A. Switching. Q. Of what company are you in the employ? A. The Sante Fe. Q. What were you engaged in doing on the 4th of March, 1891? A. Switching. Q. Where? A. Purcell. Q. Did you have an accident there at that time? A. I did. Q. Where were you at the time of this accident? A. On the rear car."

Its yard master testified as follows:

"Q. What business are you engaged in? A. Railroadng. Q. In what capacity? A. Yard master. Q. Were you at Purcell on the 4th day of March, 1891? A. I was. Q. Were you yard master there at that time? A. Yes, sir."

The witness Fredericks testified as follows:

"Q. Where were you on the 4th day of March, 1891, the day this accident occurred to this plaintiff here? A. I was in Purcell, on the side of a building. Q. How far was that building from the crossing north of the depot between Lexington and Purcell? A. Well, I guess about four hundred feet, maybe."

There was other testimony to the same effect, and no testimony to the contrary. The rule is that a railroad company, in the running of its trains, is bound to use all the care and caution at grade crossings that the actual situation requires; and the rule is uniform that at crossings in towns and thickly-settled communities it must exercise a high degree of care.

In *Railroad Co. v. Converse*, 139 U. S. 469, 11 Sup. Ct. 569, the supreme court say:

"In some localities, in thickly-settled communities, greater vigilance and more safeguards are required upon the part of the railroad company than would be necessary in other localities. What would be due care in one locality might be negligence in another. A very high degree of caution and circumspection is required under some circumstances."

The "circumstances" which impose this high degree of care were present in this case. See, to same effect, *Railway Co. v. Ives*, 144 U. S. 408, 12 Sup. Ct. 679; *Beach*, Contrib. Neg. § 19 et seq.; *Id.* § 450; *Cremer v. Portland*, 36 Wis. 92.

The exception in the lower court, as we have seen, was not that the instruction excepted to did not abstractly state the law, but that it assumed a state of facts with reference to the place of accident which was not true, or that ought, at least, to have been left to the jury. But exception is taken by the majority of the court to the use of the epithet "high," not because the term in

itself, so far as it could have any meaning, imposed too high a degree of care on the defendant. The ground of objection, as stated by the majority of the court, is:

"We are persuaded that the vice of the instruction now under consideration lies in the fact that, when read in connection with other parts of the charge, it imposed upon the railway company a higher degree of care and diligence than the plaintiff was required to exercise."

The objection is not that the instruction upon which error is assigned is erroneous for the reasons assigned to the trial court, or, indeed, at all, but that another part of the charge, which was not assigned for error, is erroneous. No part of the charge relating to the degree of care the plaintiff was required to exercise is assigned for error, or even alluded to in the assignment of errors. When the plaintiff in error came to file its assignment of errors, it abandoned the exception it had taken to this part of the charge, and did not assign error upon it. Rule 11 of this court reads:

"When the error alleged is to the charge of the court, the assignment of errors shall set out the part referred to *totidem verbis*, whether it be in instructions given or in instructions refused. Such assignment of errors shall form part of the transcript of the record and be printed with it. When this is not done, counsel will not be heard, except at the request of the court; and errors not assigned according to this rule will be disregarded, but the court, at its option, may notice a plain error not assigned."

The majority of the court have made an assignment of error for the defendant, which it did not make for itself, and upon that assignment reversed the case. That the alleged error is not such a plain one that the court should, of its own motion, take notice of it, will plainly appear when all the trial court said on that subject is considered. The court told the jury:

"It is the duty of a person about to cross a railroad track to make a vigilant use of his senses of sight and hearing; and if, for any reason, the view is obstructed, it then becomes his duty to make a more vigilant use of the sense of hearing. For the purposes of this case, no neglect of duty on the part of the railroad company will excuse the plaintiff, upon approaching a highway crossing in question on the track of the defendant, from using the senses of sight and hearing, where these can be availed. An injury to such person, where the use of either or both of such faculties would have given sufficient warning to have enabled him to avoid the danger, conclusively proves the negligence of the plaintiff, and there can be no recovery for such injury; and if the plaintiff had such warning as would, with ordinary caution, in such circumstances, have saved him from danger, he will be held to have knowingly contributed to his own injury, and cannot recover.

"It is the duty of a person about to cross a railroad track to look in each direction for an approaching train; and a failure so to do, if any injury results, will not be excused because a train of a railroad company may be claimed to have omitted the giving of the appropriate signals of its approach.

"A person approaching a railroad crossing is bound to look and listen, and to use ordinary care to ascertain if there is a train approaching; but if he fails to so do, and injury results, he is not entitled to recover from the railroad company, even though it was guilty of negligence in not giving the required signals. If, using his eyes and ears, he sees or hears the approaching train, and tries the experiment of crossing in advance of it, his failure to do so will be his own fault, and he cannot recover of such company.

"The negligence of an engineer of a railroad train to sound its whistle or ring its bell on nearing a public crossing, does not relieve the traveler on such highway from taking ordinary precautions for his own safety. Before

attempting to cross the railroad track he is bound to use his senses,—to listen and to look,—in order to avoid any possible accident from an approaching train. If he fails to use them, and drives upon the track, or if, using them, he sees the train coming, and, instead of waiting for it to pass, undertakes to cross the track, and in either case receives an injury, he so far contributes thereto as to deprive him of any right of complaint. If one in such a position takes risks, he must suffer the consequences. They cannot be visited upon the railroad company."

This charge points out with distinctness and particularity the degree of care the plaintiff was required to exercise, by specifying the acts required of him. The term "high" was used by the lower court in the sense that the defendant was required to exercise a degree of care commensurate with the danger at the crossing. By itself, the term could have little or no meaning to a jury. The inquiry would arise at once, what was a high degree of care, as applied to a railroad at a level crossing in a town or its suburbs? Did it require that the company should keep a flagman stationed at the crossing, or have a gate across the railroad track, or sound the whistle, or ring the bell?

The court, immediately after its opening remark, defined what it meant by the use of the term, by telling the jury:

"If you believe from the evidence in this case that the defendant railway company, through its agents and servants, did operate and propel its cars in the manner described in the complaint, and that by the unusual speed of this train, and the failure of the servants to give signals,—to ring a bell or blow a whistle,—the plaintiff in this cause was injured at the public crossing without any fault or negligence on his part, you will find for the plaintiff."

"And if you believe, from the evidence in this case, that the defendant's servants or employes saw the plaintiff upon the track, or by the use of ordinary care might have seen him there, and saw him in time for warning him by ringing the bell or blowing the whistle, or giving other signals, to have prevented this accident, and such agents or servants, after seeing him, failed to give these signals or these warnings, and that injury resulted from such failure, you will find for the plaintiff in the case."

"Before the plaintiff can recover in this action it is his duty to satisfy you, by a preponderance of the evidence, that on the 4th day of March, 1891, he was injured by being run over by one of the defendant's trains, and that the negligence of the defendant's agents, servants, and employes in not giving any signal of the approach of its train was the cause of his being so injured, and that the plaintiff himself was not guilty of any negligence that assisted in producing or causing the accident."

The correctness of the instruction must be determined, not by the use of a single epithet or adjective, quite meaningless in itself, but by the definition given to it by the court; and no exception was taken to the definition. It makes no difference that the phrases "ordinary care" or "high degree of care" were used in the course of the charge, if the enumeration and specification of the particular things the plaintiff and defendant, respectively, were required to do, were given to the jury. As to the duty of the plaintiff, the language of the court goes further than that of the supreme court in defining the duty of a plaintiff under such circumstances. In *Improvement Co. v. Stead*, 95 U. S. 164, the supreme court said: "Those who are crossing a railroad track are bound to exercise ordinary care to ascertain whether a train is approaching." The

court in this case defined at length, and accurately, what was meant by "ordinary care" in such cases.

It is perfectly obvious that, taking the charge as a whole, the jury must have understood that it was the duty of the plaintiff to do the very things that in law constituted a high degree of care, or, in other words, to exercise the same degree of care that was required of the defendant. The court told the jury that it was the duty of the plaintiff "to make a vigilant use of his senses of sight and hearing, and if, for any reason, the view is obstructed, it then becomes his duty to make a more vigilant use of the sense of hearing;" and that "an injury to such person, when the use of either or both of such faculties would have given sufficient warning to have enabled him to avoid the danger, conclusively proves the negligence of the plaintiff, and there can be no recovery for such injury;" and that it was the duty of the plaintiff, when about to cross the "railroad track, to look in each direction for an approaching train;" and that "before attempting to cross the railroad track he is bound to use his senses,—to listen and to look,—in order to avoid any possible accident from an approaching train."

The language of this charge, pointing out, as it does, specifically what the plaintiff was required to do, was much better calculated to impress the jury with the idea that the plaintiff was required to exercise a high degree of caution and diligence than if the court had simply said to them that he was required to exercise a high degree of care. Unquestionably, the enumeration of the particular acts required is a more effective mode of conveying to the mind of a jury what is required of a party than the use of any single adjective descriptive of the degree of care can be. The expressions "high degree of care" and "ordinary degree of care," as applied to a case like this, convey to the minds of jurors, at best, a very imperfect idea of the acts which go to make up these different degrees of care. It is the illustrations and definitions given by the court, and not a mere descriptive epithet, that are controlling with the jury. The plain and sensible men who compose our juries know very little of the nice distinctions between the adjectives used to describe the different degrees of care and negligence. Indeed, many courts and lawyers have expressed their disapprobation of any such distinctions, and among them the supreme court of the United States.

"The theory," says Mr. Justice Curtis, "that there are three degrees of negligence, described by the terms 'slight,' 'ordinary,' and 'gross,' has been introduced into the common law from some of the commentators on the Roman law. It may be doubted if these terms can be usefully applied in practice. * * * One degree, thus described, not only may be confounded with another, but it is quite impracticable exactly to distinguish them. Their signification necessarily varies according to circumstances, to whose influence the courts have been forced to yield, until there are so many real exceptions that the rules themselves can scarcely be said to have a general operation. * * * If the law furnishes no definition of the terms 'gross negligence,' or 'ordinary negligence,' which can be applied in practice, but leaves it to the jury to determine in each case what the duty was, and what omissions amount to a breach of it, it would seem that imperfect and confessedly unsuccessful attempts to define that duty had better be abandoned. Recently, the judges

of several courts have expressed their disapprobation of these attempts to fix the degrees of diligence by legal definitions, and have complained of the impracticability of applying them. *Wilson v. Brett*, 11 Mees. & W. 113; *Wyld v. Pickford*, 8 Mees. & W. 443, 461, 462; *Hinton v. Dibbin*, 2 Q. B. 646, 651. It must be confessed that the difficulty in defining 'gross negligence,' which is apparent in perusing such cases as *Tracy v. Wood*, 3 Mason, 132, and *Foster v. Bank*, 17 Mass. 479, would alone be sufficient to justify these complaints. It may be added that some of the ablest commentators on the Roman law and on the Civil Code of France have wholly repudiated this theory of three degrees of diligence, as unfounded in principles of natural justice, useless in practice, and presenting inextricable embarrassments and difficulties. See 6 *Toullier, Droit Civil*, p. 239, etc.; 11 *Toullier, Droit Civil*, p. 203, etc.; *Makeldey, Man. Du Droit Romain*, 191, etc." *The New World v. King*, 16 How. 469, 473, 474.

And in *Railway Co. v. Arms*, 91 U. S. 489, 494, the supreme court says:

"Some of the highest English courts have come to the conclusion that there is no intelligible distinction between ordinary and gross negligence. *Redf. Carr.* § 376. Lord Cranworth, in *Wilson v. Brett*, 11 Mees. & W. 113, said that gross negligence is ordinary negligence with a vituperative epithet; and the exchequer chamber took the same view of the subject. *Beal v. Railway Co.*, 3 Hurl. & C. 337. In the common pleas, *Grill v. Collier Co.*, (1866,) L. R. 1 C. P. 600, was heard on appeal. One of the points raised was the supposed misdirection of the lord chief justice, who tried the case, because he had made no distinction between gross and ordinary negligence. Justice Willes, in deciding the point, after stating his agreement with the dictum of Lord Cranworth, said: 'Confusion has arisen from regarding "negligence" as a positive, instead of a negative, word. It is really the absence of such care as it was the duty of the defendant to use. "Gross" is a word of description, and not of definition; and it would have been only introducing a source of confusion to use the expression "gross negligence" instead of the equivalent, "a want of due care and skill," in navigating the vessel, which was again and again used by the lord chief justice in his summing up.' 'Gross negligence' is a relative term. It is doubtless to be understood as meaning a greater want of care than is implied by the term 'ordinary negligence;' but, after all, it means the absence of the care that was necessary under the circumstances.

* * *

It can be said of the word "high," as is here said of "gross," that it is a word of description, and not of definition, and means nothing more, than due care under the particular circumstances of the case; and "ordinary care" means the same. "Ordinary care or diligence" is defined to be such care or diligence as men of common prudence, under similar circumstances, usually exercise; and a "high degree of care," in this class of cases, means nothing more than that degree of care or diligence that would be exercised by men of common prudence under the like circumstances. In other words, what would be due or ordinary care at an unfrequented crossing in the country would not be due or ordinary care at a crossing much traveled in a town or its suburbs. But in both cases the care required is the care dictated by the exigencies of the occasion; and, whether called "high" or "ordinary," it is, at last, but due care, having reference to the situation, and it admits of no doubt that the jury understood the instructions in this sense.

The majority of the court attach more importance to a single epithet than to pages of accurate definition. The extremely fine distinction drawn by the majority of the court is too refined for the comprehension of a jury or for a rule of social conduct, and is

calculated to confirm an impression, already too prevalent, that the courts pay more regard to technicalities than to justice,—to form than to substance.

But, if a milder or stronger adjective ought to have been used, descriptive of the degree of care the plaintiff was required to exercise, the failure to use it was not assigned for error, and the court should not disregard one of its most wholesome rules when there is not the remotest probability that the supposed technical error had the slightest effect with the jury in making up their verdict.

The judgment of the court below ought to be affirmed.

WALKER et al. v. MILLER.

(Circuit Court of Appeals, Eighth Circuit. January 29, 1894.)

No. 303.

1. REVIEW ON ERROR—WAIVER OF JURY—FINDINGS OF FACT.

On a writ of error in a case in which a jury has been waived in writing, the court cannot inquire whether the special findings are sustained by the evidence; and in the absence of exceptions to the admission or exclusion of evidence, or to rulings upon declarations of law tendered to the court, the review is limited to the question whether the judgment is supported by the pleadings and findings.

2. CORPORATIONS—INSOLVENCY—PREFERENCES.

If the theory that corporate property is a trust fund for its creditors is invoked to invalidate a conveyance which operates a preference, there is no reason why it should not also operate to prevent complaining creditors from obtaining priority by an attachment.

3. SALE—BONA FIDE PURCHASERS—ATTACHMENT.

A purchaser in good faith, for full value, without notice of defects in the seller's title, can hold the property, as against an attaching creditor of the corporation from which the seller obtained it, even if the seller had notice of the insolvency of the corporation, and his title would have been invalidated thereby.

In Error to the Circuit Court of the United States for the District of Kansas.

At Law. Action to recover damages for wrongful attachment, brought by Charles R. Miller against Richard L. Walker and the sureties on his official bond as United States marshal for the district of Kansas; said sureties being George R. Peck, Lyman U. Humphrey, and Orrin E. Walker. A jury was waived by stipulation in writing. Findings by the court and judgment in favor of plaintiff. Defendants bring error. Affirmed.

Henry L. Call, (David Overmyer, on the brief,) for plaintiffs in error.

Henry Keeler, for defendant in error.

Before CALDWELL, Circuit Judge, and THAYER, District Judge.

THAYER, District Judge. This writ of error was brought mainly for the purpose of presenting the question whether a business corporation, when it becomes insolvent, thereafter holds all of its property

in trust for equal distribution among its creditors, and is deprived of the common-law power of preferring creditors, which individuals ordinarily possess. But the record fails to present the question in such form that it can properly be determined. The case was tried before the circuit court on a written stipulation waiving a jury, and there was a special finding of facts. No exceptions were taken to the admission or exclusion of testimony, which have been argued in this court, and no instructions were either asked, given, or refused. The record contains the pleadings, the special findings, the judgment, and a bill of exceptions showing the testimony upon which the findings of fact were predicated; but, as no exceptions were saved by the bill of exceptions which we are asked to review, it might as well have been omitted from the record. In the federal appellate tribunals, it is well settled that the only question presented for consideration by a record like the one now in hand is whether the pleadings and the special findings of fact are adequate to support the judgment. Neither the supreme court nor the court of appeals will undertake to determine, in a case like the one at bar, whether the special findings are supported by the testimony contained in the bill of exceptions, for to do so would be simply to review the decision of the trial court on questions of fact, rather than of law. By filing a written stipulation waiving a jury, the parties to the litigation may impose upon the circuit court the duty of making a general or special finding on questions of fact; but they cannot impose upon an appellate court a like duty. The finding of the trial court, whether it be general or special, has the same conclusive effect when the record is removed by writ of error to an appellate tribunal as a similar finding by a jury; and exceptions must be saved and presented in the same manner, either by objections to the introduction or to the exclusion of testimony, or by tendering declarations of law and obtaining a ruling thereon. These several propositions are well established by repeated adjudications. *Insurance Co. v. Folsom*, 18 Wall. 237, 249; *Cooper v. Omohundro*, 19 Wall. 65, 69; *Norris v. Jackson*, 9 Wall. 125, 127; *Schuchardt v. Allans*, 1 Wall. 359; *Kearney v. Case*, 12 Wall. 275; *Burr v. Navigation Co.*, 1 Wall. 99; *Lehnen v. Dickson*, 148 U. S. 71, 13 Sup. Ct. 481; *Martinton v. Fairbanks*, 112 U. S. 670, 5 Sup. Ct. 321; *Bank v. Farwell*, 6 C. C. A. 24, 56 Fed. 570.

The suit at bar was an action on the official bond of the United States marshal for the district of Kansas, against him and his sureties, for a wrongful levy on the property of Charles R. Miller under a writ of attachment issued by the United States circuit court for the district of Kansas against the Alma Coal-Mining Company. The property in question had been sold by the coal company, prior to the levy, to one J. H. Bailey, and Bailey had sold the same to Charles R. Miller, the defendant in error, who was in possession of the same when the levy was made. The circuit court found, in substance, that the coal company was indebted to Bailey in the sum of \$17,500; that the property in question (a large stock of merchandise) was transferred by the coal company to Bailey in payment of such indebtedness; that at the time of such transfer

the coal company was indebted to other persons in the sum of \$13,263; that the assets of the coal company consisted of coal lands, leases for coal lands, machinery, etc.; that the property of the coal company, outside of its said stock of goods, was worth the sum of \$60,000; that a portion of the company's lands were incumbered by mortgage, and that for some months prior to the sale to Bailey other creditors of the coal company were pressing for the payment of their demands, and that the coal company had no ready money to pay the same; that judgments had been recovered upon several claims against the coal company; and that executions had been levied thereon prior to the sale to Bailey. It further found, in substance, that at the time of the sale to Bailey he did not know the amount of the other indebtedness of the coal company, and did not know whether the company would eventually succeed in paying its debts, but that he did know that it was indebted to other persons than himself, who were pressing for the payment of their demands. It also found that Bailey sold and delivered the property in controversy to Charles R. Miller; that Miller paid for the stock of goods the sum of \$17,000, which was the full market value of the property; that Miller was a purchaser of the property, in good faith, for its full market value, and was the owner thereof at the date of the levy of the writ of attachment thereon by the United States marshal. The court further found that the writ of attachment against the coal company was levied upon the property in controversy while the same was in the possession of Miller, and that the value of the goods so levied upon and sold was \$9,366.83. Having made these findings, the circuit court held that Miller was entitled to a judgment in the sum of \$9,366.83, which it accordingly rendered.

The principal contention of the plaintiffs in error seems to be that the foregoing findings show that the Alma Coal Company was practically insolvent, and for that reason was incapacitated from making the sale to Bailey, because it operated as a preference. But, if this contention was meritorious, is it not obvious that the attaching creditors are attempting to secure a like preference over other creditors of the coal company, and that their effort in that behalf will be successful if they prevail in the present action? If this trust-fund theory is to be adopted to prevent the corporation from granting a preference because of its insolvency, we know of no reason why it should not be invoked to keep attaching creditors at bay, and thus relegate the disposal of the fund, so far as judicial proceedings are concerned, to a court of equity. *Vide Hollins v. Iron Co.*, 150 U. S. 371, 14 Sup. Ct. 127, and *Brown v. Furniture Co.*, 7 C. C. A. 225, 58 Fed. 286, 292.

But we do not find it necessary or proper to express any opinion with reference to the question whether a state of insolvency precludes a corporation from making a conveyance which will operate as a preference, for, even if such was the law, the findings in the present case clearly show that Miller was a purchaser for value, in good faith, and without notice of any defect in Bailey's title to the property in controversy. It is not contended, as we under-

stand, that the insolvency of the coal company impairs Miller's title, unless he had notice of such insolvency. It is simply insisted that under the testimony contained in the record the trial court should have found that Miller was not an innocent purchaser for value. In other words, we are asked to review certain findings of fact, and to determine whether they were authorized by the evidence preserved in the bill of exceptions. As we have already sufficiently shown, this is a duty which is not imposed on this court by the present record. We have no doubt that the judgment below is amply sustained by the pleadings and the special findings of fact, wherefore the same must be affirmed, and it is so ordered.

THATCHER v. GOTTLIEB.

(Circuit Court of Appeals, Eighth Circuit. January 29, 1894.)

No. 329.

1. APPEAL—DECISION—LAW OF THE CASE—SAME FACTS ON NEW TRIAL.

A decision by an appellate court, upon facts found by the court below, that payment of taxes on vacant land was under color of title "made in good faith," becomes the law of the case, binding upon the appellate court on a subsequent writ of error, and upon the trial court on a new trial, when the facts proved to the jury are substantially the same as those originally found.

2. LIMITATION OF ACTIONS—VACANT LANDS—PAYMENT OF TAXES—CONSTRUCTION OF STATUTE.

Under the Colorado statute which declares that any person paying taxes on vacant lands under color of title made in good faith, for five successive years, shall be deemed the legal owner, according to the purport of his paper title, (Gen. St. 1883, § 2187,) no possession whatever is necessary, and the court has no power to read into the statute a condition to that effect.

In Error to the Circuit Court of the United States for the District of Colorado. Affirmed.

J. Warner Mills, (Henry C. Dillon, on the brief,) for plaintiff in error.

R. T. McNeal, (E. T. Wells and John G. Taylor, on the brief,) for defendant in error.

Before CALDWELL and SANBORN, Circuit Judges, and THAYER, District Judge.

THAYER, District Judge. This case comes before us a second time on a writ of error, which was sued out this time by Thatcher, who was the defendant in error when the case was formerly before this court. The decision on the former hearing, and a full statement of the facts out of which the litigation arises, is reported in 4 U. S. App. 616, 2 C. C. A. 278, 51 Fed. 373. After the record had been remitted to the circuit court, and a judgment had been rendered in favor of the defendant, Gottlieb, pursuant to the mandate and opinion of this court, Thatcher, who had prevailed on the first trial in the circuit court, paid all the costs, and obtained an order vacating the last judgment,

in favor of the defendant, and granting to the plaintiff a new trial, pursuant to section 272 of the Colorado Code of Procedure relating to new trials in suits for the possession of real property. Another trial was then had in the circuit court, which resulted in a verdict in favor of the defendant, Gottlieb. The latter verdict was returned by the jury in obedience to a peremptory instruction directing them to find for the defendant. To reverse the judgment entered on that verdict, the present writ of error is prosecuted. When the case was formerly in this court, it was brought here on a special finding of facts made by the trial judge, a jury having been waived on the first trial. After a full consideration of the facts reported in such special finding, this court held that the deed under which Gottlieb claimed title to the land in controversy constituted color of title; that the facts found and reported by the trial court showed that such color of title was "made in good faith," and, as a matter of law, would not warrant or justify an inference of bad faith; and, lastly, that having paid the taxes legally assessed on the premises in dispute for more than five years, under color of title, made in good faith, Gottlieb thereby became entitled to the premises, under the Colorado statute quoted in our former opinion. Gen. St. Colo. 1883, § 2187. It must be carefully borne in mind that this court cannot review the decision of a circuit court on a question of fact, in a law case, even where a waiver of a jury is filed, but can only decide as to whether the findings are adequate to support the judgment. *Walker v. Miller*, 59 Fed. 869. Therefore, the decision on the former hearing as to the question of good faith was in fact a decision that the facts reported in the former special finding would not warrant an inference of bad faith, and were insufficient in law to support such a finding. We are not disposed to recede from that position, nor could we do so, for the ruling formerly made has now become the law of the case, if the evidence on the first and last trials is substantially the same. *Skillerns v. May's Ex'rs*, 6 Cranch, 267; *Bridge Co. v. Stewart*, 3 How. 413; *Barney v. Railroad Co.*, 117 U. S. 228, 6 Sup. Ct. 654; *Dodge v. Gaylord*, 53 Ind. 365; *Trust Co. v. Coulter*, (Or.) 31 Pac. 280; *Elliott's App. Proc.* § 578.

It is suggested, however, that the testimony bearing on the issue of good faith, which is incorporated in the present record, differs materially from the facts reported in the special finding of the trial judge, which was contained in the former record; and, because of the alleged difference in the testimony, it is urged that the question of good faith should have been submitted to the jury on the last trial, and that the court erred in withdrawing it, and in directing a verdict for the defendant. With reference to this contention, it is quite sufficient to say that we have made a careful examination of the record, with a view of discovering, if possible, any new fact or circumstance which could fairly be regarded as giving to this feature of the case a new complexion, and we have failed to discover any such additional testimony. The evidence on which the former special findings were based was largely of a documentary and record character, and the same documentary and record evidence was adduced at the last trial. Neither do we observe any material differ-

ence between the former findings, which apparently rested on oral testimony, and the facts that were established at the last hearing by verbal testimony. The most that can fairly be said is that in some few instances the same fact or proposition is stated in the respective records in a slightly different form, and that one fact, of no special significance or importance, which is narrated in the seventh paragraph of the former special findings, does not appear to have been either proven or disproven on the last trial. Perhaps we could give no better illustration of the practical identity of the facts established on the respective trials than to allude to the fact that the learned counsel for the plaintiff in error, in attempting to show that there is a material difference in the testimony, has been compelled to place much stress on the circumstance that on the last trial the defendant showed by the testimony of his former attorney, Mr. Brown, that the latter advised the defendant to make a levy on the McCormick note, whereas on the former trial it was found by the circuit court "that before having his execution levied on said note the defendant took the advice of his counsel as to whether the same was subject to levy and sale under execution, and was advised that it was so subject." We confess our inability to comprehend the distinction which is thus attempted to be made between the testimony in the two trials upon this point. But, without pursuing this subject further, it is sufficient to say that we are unable to point out a single fact or circumstance having any material bearing on the question of the defendant's good faith in asserting title to the property in controversy that was not disclosed with equal certainty by the findings in the former record; and this court then held, on full consideration, that the facts found and reported were insufficient to warrant an inference of bad faith. We must accordingly conclude that the circuit court on the last trial properly withdrew that question from the consideration of the jury, for the reason that the evidence bearing on that issue in the respective trials was substantially the same, and this court had already determined the legal effect of such testimony.

It was also contended by the plaintiff in error on the last trial—and this contention was overruled by the circuit court—that section 2187 of the Colorado Statute, *supra*, cannot be given effect according to its plain and obvious meaning, but that there must be incorporated therein, by judicial construction or legislation, a proviso that the party paying the taxes assessed against vacant land, for five years, under color of title thereto made in good faith, cannot invoke the title or right thus acquired in an action of ejectment brought against him, unless during the five years, or thereafter, he takes actual possession of the premises. Hence it was urged before the circuit court, and the argument is repeated here, that as the lands in dispute had never been actually occupied by the defendant, so far as the proofs show, the payment of the taxes thereon for the period of five years or more—that is to say, from and after April 1, 1879—is of no avail as a defense to the plaintiff's suit. This question was not considered by this court upon the former hearing, because counsel for the plaintiff in error, for some

reason, did not see fit to present or suggest it. The contention thus made is not based upon any decision of the courts of Colorado construing the statute in question, but upon certain decisions of the courts of Illinois construing a similar statute, from which latter state the Colorado statute is said to have been borrowed. In an early case in Illinois (*Harding v. Butts*, 18 Ill. 502) a similar statute, enacted in that state in 1839, was before the supreme court of that state for interpretation, and it was declared to be unconstitutional. The court seems to have reached the conclusion last stated on the ground that the legislature had not intended the statute to operate as a limitation law, because the act was entitled "An act to quiet possessions and confirm titles to land," and that as an act of the latter nature it was void, because it assumed to transfer the title of the true owner to one having merely color of title, without providing any adequate means whereby the merits of the respective titles could be tried and determined. In other words, it was said to be an act forfeiting a man's title to property if he failed in the race of diligence to get to the tax collector's office first. The court pointed out in its opinion that the act did not provide that the party claiming under color of title, and paying taxes, should be deemed for that reason to be in possession, so as to enable the true owner to bring a suit in ejectment against him; and it expressly declared that in Illinois such an action would not lie against a person who simply had color of title to vacant land, and had paid the taxes thereon. Vide *Harding v. Butts*, 18 Ill. 510. We think it manifest from that decision that the court acted upon the assumption that a person who simply paid taxes on vacant land under color of title, and exercised no other acts of ownership, could not be successfully sued in ejectment by the holder of the true paper title, and that the sole defect in the statute was that it provided no adequate means whereby the true owner could assert his title to unoccupied lands against one who was disposed to divest him of the same by paying the taxes assessed thereon. The decision in *Harding v. Butts* was subsequently overruled, in so far as it declared the statute in question to be unconstitutional; but that decision, obviously, had a very marked influence on all subsequent adjudications, and gave rise to many conflicting views, which led to an important modification of the terms of the statute before such conflicting views were finally reconciled. The doctrine which now seems to obtain in that state is that the payment of taxes on vacant land under color of title, for any length of time, will not operate as a bar to the claim of the holder of the superior title, unless the party so paying taxes has at some time taken actual possession; but if such possession is taken for a space of time, however short, after the payment of taxes has been commenced, such possession for a day or an hour, coupled with the payment of taxes for the statutory period, operates to create a perfect legal title, upon which a recovery can be had in ejectment, even as against the holder of the true paper title, if the latter succeeds, in any manner, in getting possession. *Newland v. Marsh*, 19 Ill. 376; *Stearns v.*

Gittings, 23 Ill. 387; Paullin v. Hale, 40 Ill. 276; McCagg v. Heacock, 42 Ill. 153; Hale v. Gladfelder, 52 Ill. 91; Whitney v. Stevens, 77 Ill. 585. We have failed, however, to discover any adjudicated case in the state of Illinois which explicitly holds that the payment of taxes on vacant land constitutes such an act of ownership or claim of title as will in itself suffice to support an action of ejectment in the courts of that state.

When section 2187 (Gen. St. 1883) was first enacted in Colorado, it was declared to be a limitation law. Vide Laws Colo. 1887, p. 177. The state was then a new state, having within its borders a great quantity of vacant and unoccupied land; and one of the obvious purposes of the enactment was to furnish to the owners of such lands an inducement to pay their taxes promptly, by making the payment of taxes tantamount to adverse possession, and prescribing a short period of limitation. This purpose is as manifest from the face of the enactment as though it was expressly stated therein; and the statute itself is clear, concise, and unambiguous, leaving little room for interpretation, and no reasonable doubt of the object of the lawmaker. Moreover, it has always been the law in the state of Colorado—and the present action illustrates the rule—that a suit for the possession of real estate may be maintained against one who has committed no other act of ouster than paying the taxes on vacant land under a claim of title thereto. In view of these considerations, the objections that were first urged against the validity of the Illinois statute in that state, and which subsequently led to a modification of its terms by judicial interpretation, have no application to the Colorado statute now under consideration. Its language is plain, its purpose is manifest, the period of limitation prescribed is reasonable, and we are persuaded that if the legislature of the state of Colorado had intended to adopt in that state the important qualifying provisions which have been added to it elsewhere by judicial construction, and which tend to defeat its manifest purpose, it would have done so by appropriate language, rather than have left them to be supplied by inference. It must be conceded on all sides that there is nothing in the phraseology of the statute to indicate, or even to suggest, that the payment of taxes for the statutory period of five years will be of no avail unless accompanied by a transitory possession of the premises for a few days or for a few hours; and that view is so wholly arbitrary, and contrary to the apparent intent of the lawmaker, that it does not commend itself to our judgment as a sound exposition of the statute in Colorado, where it has always been regarded as a limitation law, and where the courts have always upheld the right to bring a suit for the possession of vacant land against one who merely pays the taxes thereon under a colorable title. The statute under consideration has now been in force in Colorado for nearly 20 years; and it is a little remarkable, if the construction contended for by the plaintiff in error meets with the approval of any considerable number of the legal profession in that state, that some evidence of the fact cannot be found in the judicial decisions of the state.

The result is that we have been constrained to hold that the payment of taxes pursuant to the provisions of section 2187 for a period of more than five years, under color of title made in good faith, was a good and sufficient defense to the present suit.

Wherefore, the judgment of the circuit court must be, in all things, affirmed.

McCAULEY v. HAZLEWOOD.

(Circuit Court of Appeals, Eighth Circuit. January 29, 1894.)

No. 228.

UNLAWFUL DETAINER—WHEN ACTION LIES.

The vendee of a leasehold term cannot maintain an action of unlawful detainer in the Indian Territory, under Mansf. Dig. Ark. § 3348, to recover possession from his vendor, who refuses to surrender the premises at the time agreed.

In Error to the United States Court in the Indian Territory.

At Law. Action of unlawful detainer, brought by Collett E. McCauley against J. M. Hazlewood. The court directed a verdict for defendant, and plaintiff brings error. Affirmed.

George B. Denison and N. B. Maxey, for plaintiff in error.

S. O. Hinds and W. T. Hutchings, for defendant in error.

Before CALDWELL, Circuit Judge, and THAYER, District Judge.

THAYER, District Judge. The only question that arises upon the present record is whether a vendee of a leasehold term can maintain an action of unlawful detainer against his vendor, if the latter refuses to surrender possession of the premises at the time stipulated in the contract of sale. This question is to be determined with reference to the Arkansas statute concerning unlawful detainer, which has been extended over the Indian Territory, and is as follows:

"Sec. 3348. When any person shall wilfully and with force hold over any lands, tenements or other possessions after the determination of the time for which they were demised or left to him, or shall lawfully and peaceably obtain possession, but shall hold the same unlawfully and by force, or shall fail or refuse to pay the rent therefor when due and after demand made in writing for the delivery of possession thereof by the person having the right to such possession, his agent or attorney, shall refuse to quit such possession, such person shall be deemed guilty of an unlawful detainer." Mansf. Dig. p. 703.

The facts out of which the controversy arises are these: The defendant, Hazlewood, was in possession of certain lands situated in the Cherokee Nation, in the Indian Territory, under a lease which was to expire January 1, 1894. About the 1st day of June, 1890, he agreed with the plaintiff, McCauley, to exchange his leasehold for a race horse belonging to McCauley. The horse was delivered to Hazlewood when the trade was made, but it was agreed that possession of the leasehold premises should not be surrendered to McCauley until Hazlewood had gathered his growing crops,

but that McCauley should, in any event, have possession of the premises by the 1st of January, 1891. After the 1st of January, 1891, the defendant refused to surrender possession of the premises, as he had agreed to do, on the ground that the plaintiff had made certain fraudulent representations with respect to the breed and quality of the race horse. Thereupon, the plaintiff made a formal demand for the possession of the premises, and afterwards brought the present action of unlawful detainer. The section of the statute above quoted must receive the same interpretation in the Indian Territory that had been given to it by the court of last resort in the state of Arkansas before it was imported into the territory, and it seems to have been the well-settled rule in that state that an action of unlawful detainer would not lie, unless the relation of landlord and tenant had been created between the parties, either by express contract or by a clear implication of law. In *Dortch v. Robinson*, 31 Ark. 296, 298, it was held that the action could not be maintained by a purchaser at an execution sale against the tenants of the defendant in the execution. The court said that a mere right of possession in the plaintiff was insufficient to support the action; that the relation of landlord and tenant, either express or implied, must be shown to exist between the plaintiff and the defendant. In *Necklace v. West*, 33 Ark. 682, the same doctrine was reaffirmed, and it was ruled that the purchaser at a mortgage sale could not maintain an action of unlawful detainer against the mortgagor. To the same effect are the subsequent cases of *Johnson v. West*, 41 Ark. 535, 540, and *Mason v. Delancy*, 44 Ark. 444. In the former case it was said that:

"Unlawful detainer is a remedy provided by statute for the benefit of landlords against tenants who hold over after the expiration of their terms. It is founded upon the breach of a contract implied by law, if not expressed, that the tenant shall restore a permissive possession to the hands from which it was received."

And in the latter case (*Mason v. Delancy*) it was held that a vendor of lands could not maintain an action of unlawful detainer against his vendee, who had gone into possession under a parol contract of sale, but had paid nothing on account of his purchase. We are of the opinion that these cases clearly show that the present action of unlawful detainer was erroneously brought, and that it cannot be maintained. The proof offered at the trial was sufficient to show a right of possession in the plaintiff, which might possibly entitle him to maintain a suit in ejectment against Hazlewood; but it had no tendency to establish the relation of landlord and tenant, either express or implied, such as is essential to support the action. The plaintiff, it seems, never had possession of the premises in controversy; and as the defendant did not acquire possession thereof under or by virtue of any license, contract or agreement with the plaintiff, it is impossible to concede that any such relation existed between the parties as will suffice to support the present action under the Arkansas statute. The result is that the trial court properly directed the jury to return a verdict in favor of the defendant, and its action in that behalf, and in rendering a judgment in favor of the defendant, is hereby affirmed.

CENTRAL VERMONT R. CO. v. SOPER et al.

(Circuit Court of Appeals, First Circuit. January 12, 1894.)

No. 75.

1. ACTIONS—JOINDER OF CAUSES.

Under the Massachusetts practice acts, a count on a bill of lading may be united in the same declaration with a count in tort for negligence in the loss of the goods shipped.

2. PLEADING—CONDITIONS SUBSEQUENT—WAIVER.

The defense to an action against a carrier for loss of goods shipped, that the claim was not made nor the suit brought within the time stipulated in the contract of shipment, must be specially pleaded; but, if the objection that the answer fails to set up such defense is not taken at the trial, it will be considered waived.

3. APPEAL—REVIEW—BILL OF EXCEPTIONS.

On questions of admissibility of evidence, not involving any substantial error contrary to the law and justice of the case, the court will not look outside the bill of exceptions, although the bill assumes to make all the evidence and proceedings in the court below a part of it.

4. TRIAL—OBJECTIONS TO EVIDENCE.

An objection to testimony as irrelevant, where such testimony is admitted on the understanding that it is to be connected, to be available, must be renewed after the failure to connect it.

5. EVIDENCE—COMPETENCY—OPERATION OF MACHINERY.

On the question of the origin of a fire in an elevator, testimony of witnesses is admissible to show the tendency of the bearings of the machinery to become heated, and of the inflammable character of the dust collecting around such bearings, and that a previous fire was caused by such heated bearings.

6. APPEAL—REVIEW—OBJECTIONS NOT RAISED BELOW.

Where an instruction is strictly in accordance with law, but, by the way in which some expressions were emphasized, might possibly mislead the jury, and the party does not object to any specific expressions, nor ask the court to give any additional instructions, an exception thereto is unavailing.

7. BILL OF LADING—STIPULATION AS TO TIME FOR MAKING CLAIM FOR LOSS OR DAMAGE.

A stipulation in a bill of lading which requires a written claim for loss or damage to be made within 30 days after the loss or damage occurs, where the entire transit may not unreasonably consume the whole of such time, is unreasonable and void.

8. SAME—LIMITATION OF ACTION FOR LOSS OR DAMAGE—WANT OF KNOWLEDGE.

A stipulation in a bill of lading—appearing to be in common and public use, with general acquiescence, and agreed to by the parties without protest—requiring an action for loss or damage to be brought within three months after it occurs, will not, with reference to the particular transit in this case and the circumstances shown, be held unreasonable and void; and it cannot be controlled by want of knowledge of loss or damage, where such want of knowledge is not due to extraordinary circumstances.

In Error to the Circuit Court of the United States for the District of Massachusetts.

At Law. Action by John E. Soper and others against the Central Vermont Railroad Company for the loss of 3,600 bushels of grain. Verdict and judgment for plaintiffs. Defendant brings error. Reversed.

The bill of exceptions was as follows:

This was an action for the loss of certain grain. The plaintiffs' declaration was in six counts. The defendant, by its answer, denied generally the

allegations of the plaintiffs, and also claimed that the grain was being transported under certain bills of lading, and that, by the terms of said bills of lading, which were binding upon the plaintiffs, the defendant was not liable.

In the opening of their case, the plaintiffs introduced six bills of lading. The bills of lading were all dated August 11, 1890, except one, which was dated August 18, 1890. In all other respects, they were alike. A copy of one of them is attached to, and made a part of, this bill of exceptions.

It appeared that the grain in question was being transported from Chicago, in the state of Illinois, under these bills of lading, to Boston, in the state of Massachusetts. In the course of such transportation, the grain was brought by boat from Chicago to Ogdensburg, N. Y., where it was unloaded into the elevator of the defendant, and thence transferred to the cars. Henry B. Moore, one of the plaintiffs, testified that, at the time they bought the grain in suit, it was probably in the elevator of the defendant at Ogdensburg; that the indorsement, "Hold at Ogdensburg for orders," was made upon all the bills of lading by their instructions; that although the destination of the grain, as minuted upon the bills of lading, was Boston, the grain was intended for sale at New England points other than Boston; that the purpose of ordering the grain held at Ogdensburg was to enable them to change the destination, and order it forwarded to its proper destination, after it was sold; and that, in case of a bill of lading so stamped, the defendant, in the ordinary course of business, would have no right to load and forward the grain until so directed by them. He further testified that they had been extensive shippers of grain by the defendant's route for some years, and when grain was held at Ogdensburg by their direction, as this grain was, they were accustomed to insure it against loss by fire at their own expense. It also appeared that a portion of the grain sued for was covered by insurance which the plaintiffs had taken out, and on account of which they received a certain sum after the commencement of this suit, which the plaintiffs agreed should be credited on account of this claim in suit; but this became immaterial by the election of the plaintiffs to proceed upon the third count, as hereinafter stated.

It was conceded that the grain in question was destroyed by fire while in the defendant's elevator at Ogdensburg, and before the plaintiffs had given orders to forward the same. The plaintiffs claim that the defendant had been guilty of negligence in the management of its elevator in which the grain was stored, which contributed to the loss, for which the defendant was liable in this action. It appeared that the fire in question was first discovered a little before five o'clock in the morning of Tuesday, September 9, 1890. The elevator had been started at seven o'clock in the morning of the day previous, and had run, with an hour's intermission for noon, and another hour's intermission for supper, until between eight and nine o'clock in the evening, when it was shut down; and the entire crew left the building, and went to work in what was known as the "New Elevator," situated between two and three hundred feet from the elevator in question, which was known as the "Old Elevator." The plaintiffs claimed, in the opening of their case, that the fire originated at the foot of what was known as the "lofting leg." This lofting leg was a piece of machinery by which the grain was carried from the bottom to the top of the elevator. It consisted of an iron tube inside, which ran a belt upon which were fastened, at intervals of about two feet, buckets. This belt passed over a pulley at the top of the loft, about three and one half feet in diameter, and over another at the foot of the loft, about two feet in diameter. The grain was carried in these buckets from the bottom to the top of the building, and there discharged into spouts by which it was conveyed to the bins in different parts of the elevator. The pulley at the bottom of the lofting leg made about ninety-six revolutions per minute; and the claim of the plaintiffs was that the bearings at the sides of this pulley had become heated, and thereby ignited the dust which had accumulated upon them, from which the fire was communicated to the building. There was no direct evidence that the fire started at the foot of the lofting leg, nor as to the place or manner of its origin.

The plaintiffs introduced as a witness one Aaron Linton, who testified that he was for many years foreman in this elevator, and well acquainted with

its construction and method of operation. The witness had ceased to be foreman August 14, 1887, and from that time had not been employed in or about the elevator. The witness testified, among other things, that the bearings of this pulley at the foot of the lofting leg were beneath the elevator floor, and were oiled by pouring oil into two pieces of pipe, about two feet long, which led from above the floor down into the bearings. He was allowed to testify, against the objection and exception of the defendant, that while he was foreman of the elevator these bearings frequently became heated, that there was a tendency for dust to accumulate at that point, and that there was also a tendency for the pipes to become clogged and filled with dust and grease. He further testified that there were plugs in the end of these pipes, which were removed when the oil was poured in. This evidence was admitted, as appears in the report of the evidence, upon the understanding that the plaintiffs would show that the condition of things at the foot of the lofting leg at the time of the fire was substantially the same as when the witness was in the defendant's employ.

The plaintiffs introduced the deposition of one Timothy O'Connor, who testified that he was at the time of the fire, and for some time previous had been, what was known as "weighman" in the old elevator; that in that capacity he was assisted by another weighman, whose duties were the same as his own; that he was required to weigh the incoming grain for one hour, and then to lay off for one hour; that, as weighman, he stood about eight feet distant from the foot of the lofting leg; that, when not weighing, a part of his duty was to oil the bearings at the foot of this leg; and that he oiled them once an hour. Against the objection and exception of the defendant, this witness was allowed to testify as follows:

"Q. Did you ever know the bearings at the foot of the lofting leg to become heated? A. I do.

"Q. You have known it? A. Yes, sir.

"Q. How long prior to this time had you noticed it? A. I do not remember.

"Q. About how long before? A. I do not remember.

"Q. Was it a month? A. It might have been less.

"Q. You say it might have been a month. Would you say two weeks? A. I do not remember.

"Q. All I want to get at is your best understanding. A. I will say a month.

"Q. These bearings, you say, would become heated at this point? A. Yes, sir.

"Q. Would they ignite any dust or accumulations there? A. Yes, sir.

"Q. Have you ever known the dust to become ignited? A. Yes, sir.

"Q. Many times? A. Once.

"Q. Was this the time you were speaking of? A. No, sir."

The same witness testified that on the day before the fire he had discharged his usual duties as weighman in the elevator, that he had oiled the bearings at the foot of the lofting leg at 6:30 o'clock in the evening, and that at no time during the day had he noticed any indications that the bearings were heated.

The plaintiffs also introduced one Robert H. Jenkins, who testified that he had had considerable experience in the management of elevators, that the dust which accumulated in the operation of handling grain in the elevator was very combustible, and that if this dust was suffered to remain upon a bearing, and the box became sufficiently heated, it would burn. Having so testified, he was permitted to answer the following questions, against the objection and exception of the defendant:

"Q. Whether or not there is a tendency, in running an elevator, for the machinery to get hot? A. Yes, sir; there is.

"Q. What is necessary to prevent it? A. Well, a box may get heated from the shaft being out of line, or a box may get heated if no oil comes onto the spindle,—the arbor of the shaft. The oil tube may be clogged up, and the box get heated from friction, or the shaft may get heated from being out of line. Either case will produce a hot box."

There was no direct evidence in the case tending to show that any shaft in the defendant's elevator was out of line, or that the oil tubes to the bear-

ings at the foot of the lofting leg, or to any other bearings in the defendant's elevator, had become clogged. All the foregoing testimony was introduced by the plaintiffs in the opening of their case.

At the close of the plaintiffs' case, the defendant moved that the plaintiffs be required to elect upon which count in the declaration they would proceed, and the plaintiffs elected to proceed upon the third count. At the close of the case, and before the same was submitted to the jury, the defendant filed a motion that the court direct a verdict in its favor—First, for that the plaintiffs could not proceed against the defendant upon its common-law liability as a common carrier, as they were attempting to do by electing to proceed upon the third count in the declaration, but must recover, if at all, upon the contract as determined by the bill of lading; second, for that there was no evidence of any neglect upon the part of the defendant, which should be submitted to the jury. This motion the court overruled, and the defendant excepted.

The defendant also filed a motion that the court direct a verdict in its favor for that it appeared that no notice was given within thirty days, and that the suit was not begun until more than ninety days after the happening of the loss. This motion was also overruled by the court, and the defendant excepted. Copies of both these motions are attached to, and made a part of, the bill of exceptions. The evidence, exhibits, and the charge of the court, are referred to, and made a part of this bill of exceptions.

In reference to the right of the plaintiffs to recover, notwithstanding that the suit was not begun within ninety days from the happening of the fire, the court instructed the jury as follows: "As to the provision, gentlemen, which provides that suit must be brought within ninety days, my instruction is that this limitation is binding upon the plaintiffs, and they would be bound to pursue their remedy within ninety days, provided they had full knowledge of the cause of the fire. But if the consignees or plaintiffs were not in possession of the facts and circumstances or situations concerning the loss, and were not wanting in the exercise of reasonable diligence to ascertain the situation, then it would work an unreasonable limitation, if allowed to operate to defeat the plaintiffs' right of recovery, provided, of course, you should find that the defendant was negligent. But if you should find that the plaintiffs had full knowledge within the ninety-days period of the cause of the fire, or if, by the exercise of reasonable diligence, they could have discovered the cause, then they cannot recover, as their suit should have been brought within that period; and upon this question the burden is on the plaintiffs to show want of knowledge, and the exercise of due diligence; but you may find the fact in view of all the evidence from both sides, considering all the situations and circumstances, and whether the cause was clothed in obscurity or otherwise." To the submission of this question to the jury, and to the terms in which it was submitted, the defendant excepted.

The defendant claimed that, from all the circumstances in the case, it was evident that the fire was of incendiary origin. In reference to this aspect of the case, the court instructed the jury: "Now, gentlemen, if you should find that this fire did not result from the defective appliances, or from the gathering debris, but was the result of incendiarism, the defendant will not be liable, provided the defendant furnished reasonable watchmen, and other reasonable protection against such hazard. Of course, a party having an obligation upon them to protect property must exercise reasonable care to protect it against all hazard. There can be no arbitrary rule as to the number of watchmen, but the provision should be reasonable with respect to all risks and hazard of this kind. If you should find, therefore, that the fire was set, and that the defendant did not provide reasonable safeguards by way of watchmen,—a reasonable number, or reasonably prudent and safe watchmen,—and that caused or permitted the setting of it, then the plaintiffs would be entitled to recover." To the charge as above given, in this respect, the defendant excepted.

C. A. Prouty and Sigourney Butler, for plaintiff in error.

I. The testimony of Mr. Linton, who was foreman at the elevator previous to 1887, that the bearings at the foot of the lofting leg frequently became

heated, was inadmissible. The time referred to was more than three years before the happening of the fire. It does not appear, nor can it be fairly inferred, that the bearings at the foot of the lofting leg ever became heated if they were properly cared for. If the plugs in the ends of the pipes which served as oil tubes were suffered to remain out, so that the tubes became filled up with dirt and grease, and the oil did not find its way into the bearings, they became heated. But that the employees, whose business it was to oil these bearings when Mr. Linton was foreman, in 1887, neglected their duty on some occasions, had no possible tendency to show that the employees of the defendant also neglected their duty at the time in question. It is not permissible to show that a person is habitually careless, as bearing upon the question whether he has been careless upon a particular occasion. *Gahagan v. Railroad Co.*, 1 Allen, 187; *Maguire v. Railroad Co.*, 115 Mass. 239; *Whitney v. Gross*, 5 N. E. 619, 140 Mass. 232; *Propsom v. Leathem*, (Wis.) 50 N. W. 586.

II. The testimony of Mr. O'Connor that at one time, about a month before the happening of the fire, the bearings at the foot of the lofting leg became sufficiently heated to ignite the dust upon them, does not tend to show that they did so become heated upon the occasion in question, and is inadmissible. 1 Greenl. Ev. § 52; 1 Best, Ev. pp. 353, 354, § 255; *Collins v. Inhabitants of Dorchester*, 6 Cush. 396; *Bloor v. Town of Delafield*, 34 N. W. 115, 69 Wis. 273; *Phillips v. Town of Willow*, 34 N. W. 731, 70 Wis. 6; *Parker v. Publishing Co.*, 69 Me. 173; *Early v. Railway Co.*, 33 N. W. 813, 66 Mich. 349; *Railway Co. v. Wynant*, 17 N. E. 118, 114 Ind. 525; *Edwards v. Navigation Co.*, 39 U. C. Q. B. 264.

III. The testimony of Mr. Jenkins that there was a tendency, in the running of an elevator, for machinery to get hot, was incompetent. When asked what was necessary to prevent it, he said that a box might get heated from the fact that a shaft was out of line, or that the oil did not come in contact with the bearings. There was no evidence tending to show that any shaft in the defendant's elevator was out of line, or that there was any bearing which had become clogged up so that the oil did not reach it.

IV. The plaintiffs sued in three counts,—the first, in contract, on the bills of lading; the second, in contract, against the defendant as common carrier and insurer; the third, in tort against the defendant as common carrier, for its negligence, whereby the grain was destroyed. At the close of the plaintiffs' case, they elected to withdraw the first and second counts and stand on the third. Subsequently, the defendant moved that the plaintiffs could not proceed against the defendant upon its common-law liability as a common carrier, as they were attempting to do by electing to proceed upon the third count in the declaration, but must recover, if at all, upon the contract as determined by the bill of lading, and, therefore, that the court should order a verdict for the defendant. This motion the learned judge overruled.

By the issuance of the bill of lading by the defendant, and by the acceptance thereof by the plaintiffs, a new contractual relation was created, entirely replacing that of common carrier and shipper or consignee. The case was thereupon taken out of the class of common carriers, and carried into one of the numerous classes of special bailment, and was henceforth governed by the law of the latter. The common law defines the duty and liability in the former class. In the latter, the parties themselves make their own special laws governing that particular contract, and are bound thereby. *York Co. v. Illinois Cent. R. Co.*, 3 Wall. 107; *Liverpool & G. W. Steam Co. v. Phenix Ins. Co.*, 9 Sup. Ct. 469, 129 U. S. 397; *Farnham v. Railroad Co.*, 55 Pa. St. 53.

The special contract constitutes the only contract or relation between the parties. The plaintiffs are bound by its terms, and the defendant is entitled to the relief that such special contract gives. *Squire v. Railroad Co.*, 98 Mass. 239; *Grace v. Adams*, 100 Mass. 505; *Pemberton Co. v. New York Cent. R. Co.*, 104 Mass. 144; *Graves v. Railroad Co.*, 137 Mass. 33.

No recovery can be had, either in an action against a carrier on any common-law liability for loss of goods which were in fact carried under a special contract limiting liability, (*White v. Railway Co.*, 2 C. B. [N. S.] 7; *Latham v. Rutley*, 2 Barn. & C. 20; *Railway Co. v. Bennett*, 89 Ind. 457; *Snow v.*

Railroad Co., 9 N. E. 702, 109 Ind. 422,) or in an action against a common carrier on a statutory liability for loss of goods carried under a special contract, (*Bassett v. Railroad*, 13 N. E. 370, 145 Mass. 129.)

The plaintiffs must stand by their election. *Clapp v. Campbell*, 124 Mass. 50. V. There was no evidence which justified the submission of the question of negligence to the jury.

While the jury, in all cases, are to say whether the particular inference of fact ought to be drawn from the testimony, it is for the judge to determine, as a preliminary matter, whether that inference can be drawn by a fair and reasonable man. *Railway Co. v. Jackson*, 3 App. Cas. 193; *Pleasants v. Fant*, 22 Wall. 121; *Randall v. Railroad Co.*, 3 Sup. Ct. 322, 109 U. S. 478; *Ryder v. Wombwell*, L. R. 4 Exch. 33.

A warehouseman is bound to exercise only such care as a man of ordinary prudence would use in reference to his own property under similar circumstances. *Knapp v. Curtis*, 9 Wend. 60; *Schmidt v. Blood*, Id. 268; *Clafin v. Meyer*, 75 N. Y. 260; *Garside v. Navigation Co.*, 4 Term R. 581; *Ducker v. Barnett*, 5 Mo. 97.

The burden is on the plaintiffs to prove negligence. *Willett v. Rich*, 7 N. E. 776, 142 Mass. 356; *Railroad Co. v. Capps*, 16 Am. & Eng. R. Cas. 118; *Clafin v. Meyer*, 75 N. Y. 260.

The plaintiffs must point out with reasonable certainty the particular in which the negligence consists. *Daniel v. Railway Co.*, L. R. 3 C. P. 216; *Noble v. Toronto*, 48 U. C. Q. B. 519; *Wheelan v. Railroad Co.*, (Iowa,) 52 N. W. 119; *Elison v. Truesdale*, 51 N. W. 918, 49 Minn. 240; *Draper v. Canal Co.*, 23 N. E. 131, 118 N. Y. 118.

Not only must the plaintiffs affirmatively show negligence upon the part of the defendant, but they must further prove that this negligence contributed proximately to the injury. *Railroad Co. v. Reeves*, 10 Wall. 176; *Denny v. Railroad Co.*, 13 Gray, 481; *Hoadley v. Transportation Co.*, 115 Mass. 304; *Morrison v. Davis*, 20 Pa. St. 171; *Whart. Neg.* (2d Ed.) § 85; *Roberts v. Gurney*, 120 Mass. 33; *Worthington v. Railroad Co.*, 23 Atl. 590, 64 Vt. 107; *McNally v. Colwell*, (Mich.) 52 N. W. 70.

VI. The trial court erred in its rulings and charge as to the effect of the provision as to notice of loss or damage, and as to the time of beginning suit.

A contract for bailment, with special clauses limiting liability, may be made, and is binding upon the parties thereto, provided the clauses limiting liability are reasonable. *York Co. v. Illinois Cent. R. Co.*, 3 Wall. 107; *Liverpool & G. W. Steam Co. v. Phenix Ins. Co.*, 9 Sup. Ct. 469, 129 U. S. 397.

A clause in a contract limiting the time within which, for breach of the contract, a claim shall be made or an action shall be brought, is lawful, and often resorted to. *Amesbury v. Insurance Co.*, 6 Gray, 596; *Express Co. v. Caldwell*, 21 Wall. 264.

A clause limiting the time within which claim is to be made has been held good in cases of forwarding goods: Ninety days, (*Express Co. v. Caldwell*, ut supra;) seven days, (*Lewis v. Railway Co.*, 5 Hurl. & N. 867;) three days, (*Moore v. Railway Co.*, L. R. 10 Ir. 95;) in cases of delivery of telegrams, (*Wolf v. Telegraph Co.*, 62 Pa. St. 83;) and of insurance, (*Riddlesbarger v. Insurance Co.*, 7 Wall. 386; *Fullam v. Insurance Co.*, 7 Gray, 61.)

A clause limiting the time within which an action shall be brought has been held good in a great number of insurance cases. See *Amesbury v. Insurance Co.*, ut supra.

The same reasoning is applicable to a special contract of bailment. *Amesbury v. Insurance Co.*, ut supra; *Cray v. Insurance Co.*, 1 Blatchf. 280; *Wood*, Lim. (1882) p. 80.

And the courts have sustained clauses limiting the time in which suit shall be brought to sixty days (*Thompson v. Railroad Co.*, 22 Mo. App. 321) and to forty days, (*Railway Co. v. Trawick*, 4 S. W. 567, 68 Tex. 314.)

VII. Whether or not the clause limiting the time for bringing suit is reasonable, is a question for the court, and not for the jury, to decide. *Thompson v. Railroad Co.*, 22 Mo. App. 321; 2 Thomp. Trials, § 1572.

VIII. The court erred in its instruction as to defendant's duty and liability in case the jury found the fire to have been of incendiary origin.

A warehouseman must take all ordinary and reasonable measures to see

that the goods in his hands are kept reasonably secure from all ordinary risks. He must show such degree of care as a man of ordinary prudence would show. He is responsible for ordinary negligence. *Norway Plains Co. v. Boston & M. R. Co.*, 1 Gray, 263, and cases cited ante, V.

The jury should have been instructed that the defendant was obliged to show only such diligence and precaution as the exigencies of the particular service in question reasonably required, and that the defendant was not obliged to guard against unforeseen and unprecedented occurrences. *Railroad Co. v. Reeves*, 10 Wall. 176; *Denny v. Railroad Co.*, 13 Gray, 481; *Hoadley v. Transportation Co.*, 115 Mass. 304; *Searle v. Laverick*, L. R. 9 Q. B. 122; *Lancaster Mills v. Merchants' Cotton-Press Co.*, 14 S. W. 317, 89 Tenn. 1; *Norris v. Railway Co.*, (Fla.) 1 South. 475; *Cowles v. Pointer*, 26 Miss. 253.

Robert M. Morse, (William M. Richardson and Charles E. Hellier, on the brief,) for defendants in error.

I. Linton's testimony was properly admitted.

The record states that his testimony was admitted upon the understanding that plaintiffs would show that the condition of things at the foot of the lofting leg was the same at the time of the fire as in 1887. Defendant made no motion to strike out Linton's testimony for want of such evidence, and the exceptions do not state or imply that the testimony is now objected to upon that ground. Therefore, it is not open to defendant to maintain that the evidence is inadmissible upon that ground.

The testimony is admissible as showing, and affecting the defendant with knowledge of, a dangerous condition of things at the particular place and as showing the possibility or probability of fire from the causes described. *Railroad Co. v. Richardson*, 91 U. S. 454; *Piggot v. Railway Co.*, 3 Man. G. & S. 229; *Sheldon v. Railroad Co.*, 14 N. Y. 218; *Field v. Railroad Co.*, 32 N. Y. 339; *Webb v. Railroad Co.*, 49 N. Y. 420; *Cleaveland v. Railway Co.*, 42 Vt. 449; *Railroad Co. v. McClelland*, 42 Ill. 358; *Smith v. Railroad Co.*, 10 R. I. 22; *Longabaugh v. Railroad Co.*, 9 Nev. 271. See, also, *Standish v. Washburn*, 21 Pick. 237; *Todd v. Rowley*, 8 Allen, 51.

II. The testimony of O'Connor was properly admitted for the same reasons.

III. The testimony of Jenkins that bearings might in several ways become sufficiently heated to ignite grain dust was properly admitted as expert testimony, in connection with the testimony of Linton and O'Connor that at several times before the fire the bearings had become sufficiently heated so as to ignite the dust, as also in connection with the testimony in the case that the fire, when first seen, was at the foot of the lofting leg near the bearings.

IV. It was rightly ruled that plaintiffs might proceed under the count in tort.

The existence of a written contract does not estop the plaintiff from suing in tort for negligence. The remedy in tort and the remedy upon the contract are coexistent, and plaintiff may elect which he will pursue. *School Dist. in Medfield v. Boston, H. & E. R. Co.*, 102 Mass. 552.

By the Massachusetts practice act, (Pub. St. c. 167, § 2, subd. 5.) a count in tort and a count in contract may be inserted in the same declaration, when both counts are for the same cause of action. Thus, a count in tort, for the conversion of goods, may be joined with a count for breach of a contract to hold the goods until plaintiff's lien was paid. *New Haven & N. Co. v. Campbell*, 128 Mass. 104; *Cunningham v. Hall*, 7 Gray, 559.

V. There was evidence for the jury of negligence upon the part of the defendant.

The only question that the court will consider is whether there was any evidence upon which the jury might properly find a verdict for the plaintiff. The court will not pass on the weight of the evidence. *Robbins v. Potter*, 98 Mass. 532; *Forsyth v. Hooper*, 11 Allen, 419; *Hillyer v. Dickinson*, 28 N. E. 905, 154 Mass. 502.

There can be no question that under the decision in *Railroad Co. v. Richardson*, supra, there was evidence from which the jury might find that the defendant was negligent, and that its negligence caused, or contributed to produce, the loss.

VI. It is a well-recognized principle that a carrier's exemption from liability must include such grounds only as are just and reasonable, in contemplation of law. *Railroad v. Lockwood*, 17 Wall. 357; *Judson v. Railroad Corp.*, 6 Allen, 483; *Squire v. Railroad Co.*, 98 Mass. 239; *Grace v. Adams*, 100 Mass. 505; *Pemberton Co. v. New York Cent. R. Co.*, 104 Mass. 144; *Hoadley v. Transportation Co.*, 115 Mass. 304; *Bank of Kentucky v. Adams Exp. Co.*, 93 U. S. 174; *Peek v. Railway Co.*, 10 H. L. Cas. 478, 493; *Express Co. v. Caldwell*, 21 Wall. 264.

Whether or not a condition is reasonable is a question for the court to determine, and in each case depends upon the peculiar circumstances of the case. *Railroad Co. v. Lockwood*, 17 Wall., at pages 380, 381.

In *Bank of Kentucky v. Adams Exp. Co.*, supra, a condition that the carrier would not be liable for loss by fire on connecting lines was held unreasonable. In *Railroad Co. v. Lockwood*, supra, so held in regard to a stipulation for exemption from responsibility for negligence of defendant's servants. In *Express Co. v. Caldwell*, 21 Wall. 264, an agreement was made between the express company and the plaintiff that the company should not be liable in case of loss unless claim should be made within 90 days from delivery of the property to the express company. The court upheld the reasonableness of this condition, but said, (page 271:) "Possibly, such a condition might be regarded as unreasonable, if an insufficient time was allowed for the shipper to learn whether the carrier's contract had been performed. But that cannot be claimed here. The transit required only one day."

In the present case, the condition that written claim must be made within 30 days after loss to the party sought to be made liable was unreasonable, as will be seen by applying it to the facts of the case.

But, should the condition be considered to be reasonable, it cannot be set up in defense to this action, because not specially pleaded, and evidence thereof cannot be given under the answer. *School Dist. in Medfield v. Boston, H. & E. R. Co.*, supra; *Westcott v. Fargo*, 61 N. Y. 542.

The condition is a condition subsequent, and performance thereof need not be alleged in the declaration. *Newcomb v. Brackett*, 16 Mass., at page 166.

The statute of limitations must be specially pleaded. *Pond v. Gibson*, 5 Allen, 19; *Emmons v. Hayward*, 11 Cush. 48.

VII. The condition that suit must be brought within 90 days after loss is unreasonable, for the same causes as the condition requiring claim to be made within 30 days.

It is true that, in suits upon fire insurance policies, conditions therein limiting the time within which suit must be brought have been held valid. *Ridlesbarger v. Insurance Co.*, 7 Wall. 386; *Amesbury v. Insurance Co.*, 6 Gray, 603. Also, in the case of telegraph companies. *Wolf v. Telegraph Co.*, 62 Pa. St. 83. But such cases are easily distinguishable from the present. In the former, the mere proof of loss makes a prima facie case against a defendant, and any defense thereto rests solely upon facts wholly within knowledge of the plaintiff. No reason exists, therefore, why suit should not be begun within a stipulated period, nor why such a stipulation should not be considered reasonable and valid. In the present case, however, the plaintiffs cannot recover without showing negligence on the part of defendant. The burden of proof is upon the plaintiffs. The facts are, from their nature, solely within defendant's knowledge. To hold, therefore, that a limitation of time shall run against a plaintiff whose property has been intrusted to defendant, has been destroyed while in defendant's possession; who has no knowledge of the causes of loss; who exercises reasonable diligence to ascertain the causes; whose acts in no respect have contributed to produce the loss, except in making the mistake of intrusting his property to defendant,—is utterly wrong, and a great injustice.

VIII. The direction of the court that defendant must exercise reasonable care to protect property in its hands from all hazards was proper. *Aldrich v. Railroad Co.*, 100 Mass. 31; *Barron v. Eldredge*, Id. 455.

And also the further instruction that defendant was liable if the fire was caused or permitted by its failure to provide suitable or sufficient watchmen. *Vincent v. Rather*, 31 Tex. 77; *Hamilton v. Elstner*, 24 La. Ann. 455; *Chenoweth v. Dickinson*, 8 B. Mon. 156; *Clarke v. Earnshaw, Gow*, 30; *Deposit Co. v. Pollock*, 85 Pa. St. 391.

Before COLT and PUTNAM, Circuit Judges, and NELSON, District Judge.

PUTNAM, Circuit Judge. This suit was brought against the Central Vermont Railroad Company, which was not only a common carrier from Ogdensburg towards Boston, but also proprietor of elevators at Ogdensburg, in one of which the grain of plaintiffs below was destroyed by fire, the elevator also being totally consumed. The grain was shipped August 11, 1890, at Chicago, on the barges or steamers of the Ogdensburg Transit Company, stated in the bills of lading to be bound for Ogdensburg, and there, according to the bills of lading, to be delivered to the next carrier for forwarding to the place of final destination. The bills of lading showed that the grain was consigned to the order of the plaintiffs, and specified the through rate of freight from Chicago to Boston. They also had indorsed across the face: "Hold at Ogdensburg for orders." They also provided that, "these companies" (meaning any company or carrier concerned in the transportation from Chicago to Boston) should not be responsible as common carriers for the grain "while at any of their stations awaiting delivery" to the consignee or the next carrier; adding, further, that while so awaiting the companies were liable as warehousemen only. Accordingly, the grain was forwarded, water-borne, to Ogdensburg, and there warehoused in one of the elevators of the defendant below. When it was destroyed, it was there awaiting further orders from the plaintiffs below, as provided in the memorandum written across the face of the bills of lading. The bills of lading also provided that, among other charges and liens on the property, was the "expense of storage." So that, while the case does not show, specifically, that the defendant below was to receive elevator charges, yet this may be inferred from this expression. Certainly, no point was made by defendant below to the contrary. So that the liability at the time the grain was destroyed was as warehouseman, and as warehouseman only.

Certain questions of pleading arise in the case which we feel bound to state, but which, on the exceptions, will be found to be unimportant on this appeal. Under the Massachusetts practice acts, the plaintiffs below combined in their declaration two classes of counts,—one on the bills of lading, or on the agreements contained in them, taking the place of assumpsit at common law, and the other in tort, based on the common-law liability of carriers and warehousemen, and corresponding to the common-law action on the case for negligence. An objection was taken by the bill of exceptions that counts of the latter class are not sustainable. But the common law permitted actions against carriers and warehousemen for the loss of merchandise actually delivered into their possession to be brought either in assumpsit, or in case for negligence, at the option of the owner of the merchandise. This is so clearly settled that it needs no explanation here. The principles on which this option was based were undoubtedly carried into the practice acts of Massachusetts with only this qualifica-

tion: That, under those acts, counts in tort and for breaches of contract may be united in one declaration. Therefore, the propositions for the defendant below in this behalf do not meet the approval of the court.

It is said in the bill of exceptions that at the trial the plaintiffs below elected to proceed on the third count alone. This count, as well as all the other counts in the declaration, was framed against the defendant below as a common carrier, while, clearly, its liability, if it exists, is as a warehouseman,—a substantial variance, which, however, was waived, so far as this bill of exceptions is concerned, and is of importance here only with reference to a matter which will be next referred to.

One of the main branches of defense is based on a provision in the bills of lading that no action should be sustained for loss or damage unless a claim therefor was made within a time specified, and a suit brought within another time specified. On this appeal, plaintiffs below maintain that this defense cannot be availed of, because it was not set up in the answer. On general rules of pleading, inasmuch as it was not necessary for the plaintiffs below to set out this provision, as it is in the nature of condition subsequent, it would seem that a mere denial of the allegations of the declaration would not raise the issue which the defendant below has raised on this part of the case, and that, therefore, if the defendant below relied upon it, it should have been specially pleaded. However, the parties have not called our attention to any decision bearing directly on this question as it arises under the practice acts of the state, and it is not necessary that we should determine it.

Federal courts justly seize upon slight circumstances for establishing a waiver of defects or errors appearing in the pleadings or in the course of a trial, which might be remedied if objection was seasonably taken, and they ordinarily hold that such waiver is implied from the mere fact that no objection is taken. If the answer was insufficient, on objection being taken the insufficiency could have at once been removed by an amendment; and if the plaintiffs below permitted the defendant below to urge in that court this defense, which is the principal one set up in the cause, without then raising any question of pleadings, the mere silence of the plaintiffs below was a sufficient waiver in this behalf. The exceptions show that the learned judge of the circuit court submitted this question to the jury; thus indicating either that no objection was taken on the score of a defective answer, or that, if any was taken, it was overruled by him. In the absence of any statement touching this matter in the bill of exceptions, it is impossible for this court to determine which of these two contingencies existed in the court below; and, as the rulings of that court are presumed to be correct in all matters not shown by the bill of exceptions, it was the duty of the plaintiffs below, if they raised this question at the trial, and there insisted upon it, to have had that fact appear in the bill. In the absence of anything expressly to the contrary, this court

must assume that any objection of that character was waived, upon the same grounds and for the same reasons that it must assume that the variance between the third count, charging the defendant below as common carrier, and the proofs, showing its liability to be that of warehouseman, was also waived.

Although the conclusions which we reach do not necessarily require us to notice the exceptions touching the admissibility of evidence, nevertheless, as the case must go back for a new trial, and the same evidence will probably again be offered, it seems advisable that we should express our views concerning them. First of all, we desire to say that, although the bill of exceptions assumes to make all the evidence and proceedings in the court below a part of it, yet, whatever we might do in the case of a substantial error, clearly contrary to the law and justice of the case, we cannot be required to look outside of the bill with reference to any question, except the request of the defendant below that the court should instruct the jury to return a verdict in its favor on the whole evidence. The authorities sustaining this proposition will be found summed up in an opinion of the circuit court of appeals for the fourth circuit in *Improvement Co. v. Frari*, 58 Fed. 171.¹ And, if we did thus look into the record at large, we might find that there was no question touching the admissibility of evidence requiring our attention, because all such questions were raised by mere objections, without assigning the grounds for the objections, and therefore without furnishing the basis of exceptions. Authorities on this well-settled point are referred to in the opinion of the circuit court of appeals for the eighth circuit in *U. S. v. Shapleigh*, 4 C. C. A. 237, 54 Fed. 126, 137.

It is not impossible that the testimony which we have to consider, was inadmissible, or should have been stricken out, in a certain view of it not presented by the bill of exceptions, although there suggested, with reference to the evidence of Linton. This testimony relates to the bearings at the foot of the lofting leg. It was claimed by the defendant below that there was no evidence that the fire originated at that point. It is frequently the right and the duty of the trial court to admit evidence which, when admitted, is not apparently relevant, upon the assurance of counsel that it will afterwards be connected. This relates to the order of a trial, but it does not deprive the party against whom the evidence is offered of his just rights with reference to it. He may object to it on the ground of irrelevancy at the time it is offered, and, if not afterwards connected, move to have it stricken out; and, if not stricken out, he, by thus seasonably objecting at the outset, and seasonably renewing his objection, secures to himself a legal right to exceptions. It may be that all this testimony came in under such circumstances; so that, if there was no evidence at the close of the plaintiffs' case connecting the fire with the foot of the lofting leg, the defendant below, having seasonably objected when the evidence was offered, and possibly with-

¹ 7 C. C. A. 149.

out doing so, was, perhaps, for the reasons stated, entitled, on renewing objections, to have it stricken out. With reference to the testimony of Linton, the bill of exceptions states that his evidence was admitted upon the understanding that the plaintiffs below would prove that the condition of things at the foot of the lofting leg, at the time of the fire, was substantially the same as it was at the time with reference to which the witness testified, but there is nothing in the bill showing that the defendant below subsequently called the attention of the court to it anew; so that this statement in the bill is wholly ineffectual. Therefore, on the face of the bill, all the objections to the testimony ruled in relate entirely to its quality; and in no particular to its relevancy in connection with other evidence as to the place where the fire originated.

Those portions of the evidence of Linton and Jenkins which were objected to relate entirely to the tendency of things,—inanimate objects,—being, in this case, the machinery. The plaintiff in error has argued as though they related to the peculiar habits of certain specified human beings. The distinction is a broad one; and, if it is kept in mind, the evidence was clearly admissible, for the purpose, not of showing that the employes of the defendant below were negligent, but of showing facts, some of which the jury might, perhaps, have assumed without evidence, namely, that it is the tendency of certain parts of rapidly-running machinery to get heated, and of dust in mills where grain is ground or stored to be of a highly inflammable character. These facts might have been properly brought to the attention of the jury, both for the purpose of showing a point where the fire might have originated, and also of showing the necessity of care to guard that point. *Maguire v. Railroad Co.*, 115 Mass. 239, cited by the plaintiff in error, which related to the negligent acts on other occasions of the defendant's driver, for whose unskillfulness he was sued, is not in point. The fact that the tendency to get heated, and the inflammable character of the dust, were explained by witnesses, even if the jury might have assumed a part thereof as true without proof, cannot prejudice either party.

The testimony of O'Connor, objected to, goes a little further. He stated, in substance, that he had known of instances when the bearings at the foot of the lofting leg became heated, and that he had also known the dust to become ignited at this point. This evidence is clearly within the rule established in *Railroad Co. v. Richardson*, 91 U. S. 454, and in the other cases referred to in *Railway Co. v. Johnson*, 10 U. S. App. 629, 4 C. C. A. 447, 54 Fed. 474.

The defendant below also excepted to certain rulings of the learned judge of the circuit court with reference to its duty as to guarding against fires of incendiary origin; and it now claims that the learned judge, in instructing the jury with reference to this matter, should have ruled that it was obliged to show only such diligence and precaution as the exigencies of the particular service in question reasonably required, and was not obliged to

guard against unforeseen and unprecedented occurrences. It seems to us that the instruction of the court objected to was strictly in accordance with the law, yet, notwithstanding this, the way in which some expressions in it were emphasized might possibly have misled the jury; and, probably, if the learned judge had been requested to instruct additionally in the language which the plaintiff in error now insists upon, he might properly have done so. It does not appear, however, from the bill of exceptions, that the defendant below objected to any specific expressions, or asked the court to give any additional instructions; and as the rulings were strictly in accordance with law, as already stated, the exception on this point cannot be sustained, in the absence of something more specific than the record presents.

The most important question in this case turns on the following language in the bills of lading: "The said company" (meaning the Ogdensburg Transit Company, whose part of the transit was water-borne from Chicago to Ogdensburg) "shall not, nor shall any carrier, person, or party aforesaid," (meaning "any carrier or any person or party in possession of" the grain during its transit from Chicago to Boston,) "be liable, in any case or event, unless written claim for the loss or damage shall be made to the person or party sought to be made liable within thirty days, and the action in which said claim shall be sought to be enforced shall be brought within three months after said loss or damage occurs."

It is now settled that such questions appertain to the domain of general law, and that in determining them the federal courts are not bound by the decisions of the courts of the states in which the contracts were made, or by other local decisions. We have not been referred to, nor have we found, any decisions touching this subject-matter, which are binding on us, except *Riddlesbarger v. Insurance Co.*, 7 Wall. 386, and *Express Co v. Caldwell*, 21 Wall. 264. Nor, except upon the proposition that provisions of this kind are not necessarily contrary to public policy, have the decisions of the courts, either in the United States or England, become sufficiently settled to afford us any satisfactory guide. They are very contradictory and inconsistent, as will be seen by turning to the mass of them cited in *Wheeler on the Modern Law of Carriers*, (page 123,) and in *Hutchinson on Carriers*, (2d Ed., § 259.)

The fundamental proposition that parties exercising the quasi public functions of common carriers cannot, at their pleasure, impose conditions beyond those which the law imposes, is too well settled to need elaboration, resting, as it does, both upon general grounds of public policy, and upon the fact that a shipper of merchandise does not ordinarily stand on an equal footing with the carrier. Yet it must be confessed that where bills of lading are in printed form like those at bar, and therefore apparently in common use, and no suggestion is made that they are not in such use, and no suggestion that there has been any public or private complaint touching them, although, on account of their general use, the stipulations must be well known to ordinary shippers, this court should be well satisfied, before hold-

ing that clauses as to which there has been no line of decisions by other courts, or of expressions by the text writers, are unreasonable, and therefore void.

We must take this provision in its consolidated form. As such, it relates, not only to such portion of the transit as is carriage at common law, but also to such portion as is warehousing. If the provision had been limited to the latter, the position might be different; but, as it stands, we must test it with reference to the former. So, also, it covers, not only damage, but loss. If it had been limited to damage, and this with reference to the time when the damage was ascertained, or when the merchandise came into the hands of the consignee, it might all be valid, on the same principle on which, in many jurisdictions, it is held a reasonable state of the law to require that a person claiming a warranty cannot, after receipt and opportunity to inspect the merchandise purchased, set up a breach on account of what was patent, or what might have been discovered. But in the case at bar the provision relates, not only to damage ascertainable on the arrival of the goods, but also to damage wherever occurring, and to loss wherever occurring. The court cannot fail to take judicial knowledge of the fact that on bills of lading like these, with a right to hold at Ogdensburg for orders, the entire transit may not unreasonably consume the whole of 30 days. As the damage, or even the loss of part, might be in the early stages of the transit, it is not unreasonable to suppose that it might well happen, in many ordinary cases, that the loss or damage will fail to even come to the knowledge of the consignee within the short period named for giving notice of his claim. Moreover, the delay involved in correspondence touching occurrences over so long a transit, coupled with the unreasonableness of requiring that in the event of loss or damage the consignee should at once go upon the route, in lieu of availing himself of the usual methods by mail, must in many cases, in the ordinary course, be so great as to enable the court to assume that the time named would not ordinarily give reasonable opportunity for investigation, so far as to enable consignees to state properly a written claim, or even to know against whom the claim should be made. *Express Co. v. Caldwell*, ubi supra, does not directly aid the court on this point, because there the carriage covered ordinarily but a single day, and the time allowed for giving the notice was 90 days from delivery to the express company; but the line of argument in that case is impliedly against the reasonableness of the period of 30 days allowed in the case at bar.

On the whole, without attempting to balance the conflicting decisions relative to matters of this sort, which would be of no advantage, especially as the circumstances are so apt to differ, the court is satisfied that, in view of the consolidated form of this provision, the portion of it which requires a written claim for loss or damage to be made within 30 days after the loss or damage occurs, covering a transit which may be expected to be so long as this one may be, is so liable to defeat valid claims,

notwithstanding the best of diligence and good faith on the part of the consignees, that it must be held void. The ruling of the court below in this particular was correct, but the other limitation of three months contained in the same bills of lading cannot be so clearly criticised.

Riddlesbarger v. Insurance Co., 7 Wall. 386, already cited, is directly in point that the limitation of the time of suit to three months, contained in these bills of lading, is not invalid on the mere ground that it contravenes the statute of limitations; and this case, with *Express Co. v. Caldwell*, 21 Wall. 264, already cited, seems to be sufficient to justify the court in holding that this limitation is not invalid, provided it is not in its nature unreasonable. Neither of these decisions, however, nor any other which binds this court, goes further than this in aiding this court in the case at bar. Parties having agreed to this provision without protest, and, as already said, the bills of lading being apparently in common and public use, with apparent general acquiescence, it would seem to rest on the court to sustain the provision, unless it find it unreasonable; and such is the state of the law, in any event.

On the whole, the court concludes that there have not been brought to its attention, on the record, as it now stands, sufficient considerations to enable the court to pronounce unreasonable the limitation of three months now in question, although the limit of time is sufficiently short to bring it within the field of doubt, and to leave its solution to stand upon the fact that the presumption is in its favor, unless the court is satisfied that it ought to be held void. The court does not deem it proper to go beyond that general statement at present, or to enter into detailed discussion, as the case must go back for a new trial, and it is possible that the question may come before the court again with considerations and circumstances somewhat modified.

So far this court agrees with the learned judge who presided at the trial; but, perhaps for the purpose of raising the question, he gave the plaintiffs below the benefit of an exception to this stipulation as stated in the bills of lading, in the following form:

"My instruction is that this limitation is binding upon the plaintiffs, and they will be bound to pursue their remedy within ninety days, provided they had full knowledge of the cause of the fire."

Then comes another sentence, in which the learned judge gave the plaintiffs the benefit of the circumstances of their not being "wanting in the exercise of reasonable diligence to ascertain the situation," and then the following:

"But if you should find that the plaintiffs had full knowledge, within the ninety-days period, of the cause of the fire, or if, by the exercise of reasonable diligence, they could have discovered the cause, then they cannot recover, as their suit should have been brought within that period."

Then comes an instruction that the burden of proof on this proposition rests on the plaintiffs below, which was correct.

We do not consider, nor is it necessary for us to consider, whether there is any evidence in the cause touching the knowl-

edge which the consignees had, or touching their exercise of reasonable diligence to ascertain, concerning the loss, which justified the submission to the jury of the issues covered by the instructions now under consideration, because we are not satisfied that any such exception as these instructions imply can be raised, under any circumstances which have been brought to our attention. To incorporate this exception, or any exception whatever, is to go beyond the letter of the contract, and put into the mouths of the parties words which they themselves have not used. There are circumstances under which this may be done by necessary implication; but they are of an extreme character, such as the intervention of war prohibiting a suit by one party against the other, or an injunction from some court accomplishing the same prohibition, or the absconding or absence of the party against whom the claim is to be made. Very likely an exception would arise, if there was an entire lack of knowledge on the part of the consignee, during the entire period of limitation, of the existence of any loss or damage, when coupled with a lack of circumstances imposing the duty of making inquiry, or for so much of the period as practically bars investigation during what remains of it, even with the utmost diligence. We do not undertake to define accurately all the possible exceptions, or to hold that there are not others, as it is not now necessary that we should; but the exception made at the trial does not grow out of matter of an extraordinary character, arising from the necessity of things, like those which we have instanced. It involves only circumstances transpiring in the ordinary course of transactions, and which, therefore, must be assumed to have been anticipated and met by the express stipulation which the parties have agreed on. We are therefore of the opinion that, as the case stands, the plaintiff in error must prevail on its exception to the refusal of the learned judge to direct a verdict for it on the ground that it appeared that the plaintiffs below did not bring their action for the loss within three months after it occurred.

Judgment reversed. New trial ordered.

Ex parte HART.

(Circuit Court, D. Maryland. January 15, 1894.)

1. INTERSTATE EXTRADITION—INFORMATION AS AFFIDAVIT.

An information stating facts on which it charges a crime, sworn to by a prosecuting attorney before a notary public or the clerk of the court, and filed in court, having on its back the names of witnesses examined at the time of filing, on which the court orders the arrest of the accused, meets the requirement in Rev. St. § 5278, of "an affidavit made before a magistrate" charging the crime.

2. SAME—SUFFICIENCY OF FACTS CHARGED.

The accused in a case of interstate extradition should not be discharged because it may be doubtful whether, on the facts stated in the application for the requisition, the transaction complained of constituted a crime, where the question involves the construction of statutes of the state demanding him.

At Law. Petition of Samuel H. Hart for habeas corpus. Petitioner remanded.

Wm. Pinkney White and Joseph White, for petitioner.

John P. Poe, Atty. Gen., for the State of Maryland.

MORRIS, District Judge. Habeas corpus to release petitioner, who is held in custody under a warrant from the governor of Maryland, as a fugitive from justice, upon the requisition of the governor of Washington, to be conveyed to the state of Washington, to answer a charge of larceny by embezzlement. Section 5278 of the Revised Statutes of the United States provides that a fugitive from the justice of another state shall be delivered up by the executive of the state to which he has fled whenever the executive of the state in which the fugitive has committed the crime demands his return and produces "a copy of an indictment found or an affidavit made before a magistrate of any state or territory charging the person demanded with having committed treason, felony or other crime."

In *Roberts v. Reilly*, 116 U. S. 95, 6 Sup. Ct. 291, it was said:

"It must appear, therefore, to the governor of the state to whom such demand is presented, before he can lawfully comply with it—First, that the person demanded is substantially charged with a crime against the laws of the state from which he is alleged to have fled by an indictment or an affidavit certified as authentic by the governor of the state making the demand; and, second, that the person demanded is a fugitive from the justice of the state, the executive authority of which makes the demand. The first of these prerequisites is a question of law, and is always open upon the face of the papers to judicial inquiry, on application for a discharge under a writ of habeas corpus. The second is a question of fact, which the governor of the state upon whom the demand is made must decide, upon such evidence as he may deem satisfactory."

In the present case there was no copy of an indictment, but, in lieu thereof, a copy of an information, which had been filed in the superior court of Pierce county, in the state of Washington, by the prosecuting attorney of that county, and which had been sworn to by him, charging Hart, the petitioner, with the crime of larceny by embezzlement. Although in similar proceedings of interstate extradition it has been, in some cases, held that a copy of an information is a substitute for an indictment, and gratifies the requirement of the act of congress, I should hesitate to so hold. An indictment by a grand jury results from an investigation and hearing of sworn testimony by a body of jurors drawn from the whole community. At least 12 must unite in its finding, while an information may be the action of the prosecuting officer alone. Considering the great difference between them, and the distinction because of this difference which has been zealously maintained in the federal constitution, in the acts of congress, and in the rulings of the United States supreme court, I cannot think that it is a fair interpretation of the requirement to hold that a simple information may be substituted for an indictment found by a grand jury.

The substitute for an indictment provided by the statute is a copy of "an affidavit made before a magistrate of any state or ter-

ritory, charging the person demanded with having committed treason, felony, or other crime." Does the copy of the information sworn to by the prosecuting attorney, and certified as authentic by the governor of Washington, meet the requirements of this clause of the law?

The information sets out certain facts, and, upon these facts, charges Hart with the crime of larceny by embezzlement. It is sworn to by the prosecuting attorney, and filed in court. On the back nine names are given as witnesses examined and known at the time of filing the information. Then follows an order of the judge of the court, reciting the filing of the indictment found, and directing a warrant to issue for the arrest of Hart; and then follows the warrant of arrest, and the return of the sheriff of Pierce county that Hart could not be found in the state of Washington. I can see no sufficient reason why this information, thus sworn to, should not be considered as a substantial compliance with the requirement that there shall be produced an affidavit made before a magistrate charging the person demanded with the crime. The same paper, properly sworn to by a private person as true, and called an "affidavit," and not an "information," would be sufficient in every particular. Why should not the same affidavit, made by a prosecuting officer, although called an "information," be received? It is objected that the prosecuting attorney does not swear to the existence of the facts set out on the paper, but only that he believes them to be true. But many, if not most, of the complaints upon which arrests for crime are ordered by magistrates, are made by officers of the law, who have investigated the facts, and made the oath upon the belief thus arrived at. In this case we find by the paper certified by the governor of Washington as part of his requisition that, upon this sworn information, the court in which it was filed acted and ordered the arrest, and we find nine witnesses named as examined at the time it was filed. It appears to me that, treating this information, not as a substitute for an indictment, but as an affidavit, charging the person demanded with the crime, it gratifies every requirement of the law. It is urged that, as to one of the two informations against Hart, it is not sworn to before a magistrate, but before a notary public; and, as to the other, that it is sworn to before the clerk of the court in which it was filed; and that, therefore, neither was sworn to before a magistrate. But both, it appears, were produced before the judge of the court in which they were filed, and accepted as sufficient, and became part of the regular judicial proceedings by which Hart was charged with the crime before a magistrate, and that the magistrate acted upon them, and ordered Hart's arrest. This, it seems to me, is a substantial compliance with the requirement of an affidavit made before a magistrate.

It is further objected that although the facts averred in the information, if proved, might be sufficient to convict Hart of the crime of larceny by embezzlement under the statute of Washington, still the facts set out in the application to the governor for the requisition are sufficient to show that the transaction complained of

did not constitute that crime, but was merely a failure to pay a creditor. This has seemed to me the most difficult question presented. It involves in part a construction of the statute law of the state of Washington, and in part the legal conclusion to be drawn from the affidavit. It may be said to raise a doubt, but it is that character of doubt which, under the circumstances of this case, the courts of the demanding state should, in my judgment, be permitted to solve. The party demanded was in that state, doing business there, and it was there that the whole transaction complained of took place. He was subject to the laws of that state; and in a case of interstate extradition, where there is no special hardship, and no evidence of any sinister purpose, it is proper that the courts of the demanding state should construe their own laws, and determine to what transactions they apply, and the party charged remanded, unless it is clear that, upon the facts shown by the papers, he cannot properly be found guilty.

The prisoner is remanded.

PLATT v. FIRE-EXTINGUISHER MANUF'G CO.¹

(Circuit Court of Appeals, Third Circuit. January 30, 1894.)

No. 12.

1. **PATENTS—LICENSE—FORFEITURE.**

A license which has been declared forfeited by the licensor, according to the terms thereof, for breach of conditions, cannot be restored to validity by the licensee's subsequent tender of money in payment of royalties, which tender is rejected.

2. **SAME—CONDITIONAL ASSIGNMENT—ASSIGNEE'S RIGHT TO SUE INFRINGERS.**

An assignment on condition that the assignee shall not make any assignment thereof, or grant any license thereunder, vests in the assignee, until condition broken, a right to sue infringers. *Littlefield v. Perry*, 21 Wall. 205, followed.

3. **SAME—ESTOPPEL.**

The validity of a patent cannot be denied by one who undertakes to justify his use of it under a license.

Appeal from the Circuit Court of the United States for the Eastern District of Pennsylvania.

In Equity. Suit by the Fire-Extinguisher Manufacturing Company against William K. Platt for infringement of patent. Decree for complainant. Defendant appeals. Affirmed.

R. A. Parker, (Jerome Carty, on the brief,) for appellant.

J. Edward Ackley, for appellee.

Before DALLAS, Circuit Judge, and WALES and GREEN, District Judges.

WALES, District Judge. The Fire-Extinguisher Manufacturing Company, a corporation of the state of New York, brought suit against William K. Platt, to restrain him from the infringement of

¹ Rehearing denied.

letters patent dated July 9, 1878, and numbered 205,942, which had been originally issued to Archibald Graham, administrator of the estate of William A. Graham, for the process of extinguishing fires by means of a stream of mingled water and carbonic acid gas thrown upon the fire by the expansive force of the gas. The defendant, in his answer, set up several defenses, but relied chiefly upon the alleged want of title in the complainant and a license to himself. The complainant's bill was sustained, and a decree was entered ordering an injunction and an accounting, from which the defendant appealed.

The history of the case is this: The inventor of the process described in the letters patent was William A. Graham, who died in the year 1852. During his lifetime he had made several unsuccessful applications for a patent, and just before his death he had assigned a one-quarter interest of his invention to Augustus W. Burton. In the year 1869, letters patent were obtained by Carlier and Vignon for a process similar to that invented by Graham, which were reissued in 1872. In a suit brought for its infringement the patent of Carlier and Vignon was decreed to be invalid, and to have been anticipated by the invention of Graham. *Northwestern Fire-Extinguisher Co. v. Philadelphia Fire-Extinguisher Co.*, 1 Ban. & A. 177. Thereupon Archibald Graham, as administrator of William A. Graham, renewed the application for a patent, which was again refused, on account of the length of time which had elapsed since the last application of his intestate. He then applied to congress for the passage of an act to remove this obstacle, but soon discovered that this measure was opposed by a number of persons, including the defendant, who had been for some time using the Graham invention in making and selling extinguishers; and he was finally compelled to compromise with his opponents by entering into an agreement with them to the effect that, if they would cease their opposition, and he should succeed in getting a patent, he would give to each one of them a license. This agreement was dated January 30, 1878.

The enabling act having been passed by congress, letters patent were issued to Archibald Graham, as administrator, on the 9th of July, 1878, as already stated. On the 18th of the same month he issued a license to the defendant, and at about the same time issued a license to each of the six other persons who were parties to the agreement of January 30, 1878. All of these licenses contained the same covenants and conditions. By section 7 of the defendant's license it was stipulated:

"That the said Graham, or his successor, shall have the right to forfeit and annul this license upon any failure to faithfully comply with the terms or conditions of either of the sections herein contained, and numbered 1st, 3rd, 4th, and 6th, or upon failure to manufacture or sell machines for six consecutive months, or for making any false or fictitious statement or return, upon giving, in any case of forfeiture, thirty days' notice in writing of his election so to do to the said William K. Platt."

By section 9 the defendant agreed not to assign or sell his license to any person not holding a license from the licensor, without the

consent of all the other licensees. Section 10 provides that the sale of the license contrary to the terms of the ninth section shall amount to and be an absolute forfeiture, unless at the same time the entire business of the licensee is also sold; and the licensor agrees not to issue any more licenses, and not to manufacture any of the patented machines; the purpose being to limit the number of licenses to manufacture under the patent to seven. The terms and conditions of the license are extended to and made binding on the heirs, executors, administrators, and successors of all the parties. The first, third, fourth, and sixth sections, referred to, regulate the payment of royalties, the making of quarterly returns of the machines made, and the keeping of books and accounts by the licensee.

On the 15th of March, 1879, the defendant sold his license and all his good will and business to a corporation known as the Consolidated Fire-Extinguisher Company, which soon afterwards became insolvent, and on the 16th of June, 1880, went into the hands of a receiver, who sold its property, patents, and licenses to William N. Frew. The confirmation of the receiver's sale was opposed by the defendant, but was confirmed by the court which had appointed the receiver, on July 18, 1881.

Pending these last-mentioned transactions, Archibald Graham had died, and John A. Graham had been appointed administrator d. b. n. of William A. Graham. On the 5th of February, 1881, John A. Graham, as administrator, caused written notice to be served on the Consolidated Fire-Extinguisher Company of his election to forfeit and annul the Platt license, as provided in section 7 of the license; and on the 17th of February, 1881, a similar notice was served on William N. Frew, the purchaser of the Platt license at the receiver's sale.

On November 25, 1881, William N. Frew, in consideration of the withdrawal of the defendant's objections to the confirmation of the receiver's sale, executed a reassignment to the defendant of the license which the latter had sold to the Consolidated Fire-Extinguisher Company, and in the following month (December) the defendant rendered an account, and offered to pay royalties, to John A. Graham, but the latter returned Platt's check, and refused to recognize the validity of his license.

The complainant having bought up one or more of the seven original licenses, on January 27, 1879, purchased of Julia L. Burton, widow and administratrix of Augustus W. Burton, all of her deceased husband's interest in the one-quarter part of William A. Graham's invention, and by virtue of this ownership of the Burton interest and of the license claimed the right to make and sell the apparatus covered by the Graham patent; whereupon there ensued a protracted litigation between the complainant and John A. Graham. A bill was filed by the complainant and a cross bill was filed by John A. Graham, in the circuit court of the United States for the western district of Virginia, and on May 17, 1883, the court entered a decree declaring the Burton interest to be invalid, and incidentally also that all the licenses granted by Archibald Graham, with the exception of the one issued to Charles T. Holloway, had been for-

feited. Subsequently, a bill of review having been filed by the complainant, this decree was vacated and set aside, and the cause was ordered to be reheard on the original bill and cross bill, and the evidence which had been taken under them. But the parties litigant subsequently compromised their differences by consenting to the entry of a decree by which all the licenses, except the one held by Charles T. Holloway, were adjudged to be null and void, leaving the Burton interest unaffected. At the same time the complainant assigned the Burton interest to John A. Graham, and Charles T. Holloway surrendered his license to him, so that John A. Graham thus became possessed of the whole title and interest in and to the Graham patent. Immediately thereafter John A. Graham granted a new license to Charles T. Holloway, and assigned the Graham patent, subject only to the Holloway license, to the complainant. The license to Holloway and the assignment to the complainant bear date the 1st of April, 1886. In all of these proceedings John A. Graham acted in his representative capacity of administrator.

The facts contained in the foregoing statement are admitted, or abundantly established by the proofs. The court below was not called on to declare a forfeiture of the Platt license. The question was whether the license had already been forfeited by the acts of the parties pursuant to the terms and conditions contained therein. The defendant agreed that if he failed to perform his covenants the license might be forfeited by a written notice served on him, or his successor, and this was done. His subsequent tender of money in payment of royalties, and a promise to perform his covenants, could not avail to remove the forfeiture without the consent of the licensor and the other licensees. Almost identically the same question was presented in *Hammacher v. Wilson*, 26 Fed. 239, in which the court held that a license which had been forfeited by the agreement of the parties would not protect an infringer, although he might offer to pay whatever was due for royalties. See, also, *White v. Lee*, 3 Fed. 222. Not only was the Platt license forfeited pursuant to the terms of the seventh section of the license, but the attempted sale and retransfer of the license by Frew to Platt worked an absolute forfeiture, because such sale and transfer were made without consent of the other licensees, and without a sale at the same time of the business of the Consolidated Fire-Extinguisher Company, or of Frew, contrary to the provisions of the tenth section of the license. The reassignment to Platt was made after the notices of forfeiture had been served, of which both Platt and Frew had knowledge. By a written contract of April 7, 1881, Frew had agreed to transfer to Platt the license "in the condition in which it then stood;" and that condition was well understood by Platt, as appears from his letter to Holloway, of September 21, 1880, in which, after giving the history of the Consolidated Fire-Extinguisher Company, he says: "The company has not paid me for my patents and Graham license, and has willfully allowed it [meaning the license] to lapse." This admission by the defendant completes the testimony on this branch of the defense, and leaves no doubt that the license was duly forfeited and annulled.

The complainant's title to this patent, and his right to sue for an infringement, are questioned because the assignment from John A. Graham to the complainant, it is alleged, does not convey the whole monopoly. The deed of assignment stipulates that the complainant shall not during the term of the said patent make any assignment thereof, or grant any license under it, and shall make certain payments as agreed upon between the company and Graham; and the assignment is also made subject to the license granted to Holloway. With these exceptions, the assignor sells, transfers, and assigns all of his right, title, and interest in and to the patent. Of even date with the assignment to the complainant an agreement was made between the latter and Charles T. Holloway, which, after reciting that the complainant is vested with the entire title and interest in the patent, and that Holloway is powerless to prosecute any infringer, provides that he may institute proceedings against such infringer whenever the complainant, upon reasonable notice of infringement, shall neglect or refuse to do so.

The complainant succeeded to the ownership of John A. Graham, administrator, in the patent, and whatever rights the latter had passed to the complainant, except the right to execute an assignment or issue a license. Graham had divested himself of the right to sue for an infringement, and, if the complainant could not sue, no one could. The property would thus become a prey to all who might choose to use it. This would be unreasonable and inequitable. The title was conveyed to the complainant subject only to certain conditions, and the assignor had no more right to it than a stranger, so long as the conditions should remain unbroken. If the complainant should fail to keep his covenants, then the conditions would be broken, and the property would revert to Graham. Until this event happens the complainant has the right to protect his interests by suing infringers of the patent. *Littlefield v. Perry*, 21 Wall. 205.

The other defenses presented by the defendant's counsel have not been overlooked; but, on a view of the whole case, we are all of the opinion that the bill of the complainant was rightly sustained. Infringement by the defendant was not denied, and the validity of the patent could not be disputed by one who undertook to justify his use of it under a license. *Kinsman v. Parkhurst*, 18 How. 289; *Brown v. Lapham*, 27 Fed. 77. Moreover, the validity of the patent had been repeatedly recognized by judicial decisions. The license had been forfeited by the defendant or by his successor, and the title to the patent had passed to the complainant by the assignment from Graham, which also gave it the right to bring this suit.

The decree of the circuit court is affirmed.

CONSOLIDATED BRAKE-SHOE CO. et al. v. DETROIT STEEL & SPRING CO. et al.

(Circuit Court, E. D. Michigan. January 25, 1894.)

No. 3,235.

1. PATENTS—INVENTION—ERROR IN DRAWINGS.

An error in the drawings made by a solicitor can have no weight in disparagement of the invention, where it is such as to suggest, to persons familiar with the art, a practical identity with a prior device, and to warn them that the language of the inventor in the specifications, clearly describing the actual invention, is rather to be followed than the inaccurate drawing.

2. SAME—ANTICIPATION—IDEA NOT EXEMPLIFIED.

In a claim for railway brake shoes, the use of the words, "or otherwise so shaping them as to bear upon the flange and those portions of the tire which are not worn in rolling," cannot operate to shut out subsequent inventors, when the specifications and drawings fail to exemplify, in a practical form, the idea of bearing on the parts not worn by the rail.

3. SAME—INVENTION—WHAT CONSTITUTES.

One who, by overcoming difficulties which for years have baffled all others, perfects a device which satisfactorily supplies a long-existing and imperative need, and supersedes all other appliances, both at home and abroad, proves the exercise of inventive faculty, notwithstanding that the change from existing devices seems comparatively slight.

4. SAME—RAILWAY BRAKE SHOES.

The Ross patent, No. 292,861, for a railway brake shoe, shows patentable invention over the English patent to Steel, No. 1,763, of 1875. 47 Fed. 894, reaffirmed.

In Equity. Bill for infringement of a patent. A preliminary injunction was heretofore granted. See 47 Fed. 894. Decree for complainants.

The complainants are the assignees of the Ross Brake-Shoe Company, a New Jersey corporation, to which had been assigned by George P. Ross all his right, title, claim, and interest in letters patent of the United States No. 292,861, for an improvement in railway brake shoes, granted to said Ross February 5, 1884.

The bill of complaint charges that defendants are infringing the right secured by the letters patent, and prays an injunction, an accounting, and decree for profits. The answer asserts the invalidity of the Ross patent, and denies "that George P. Ross was the original or first inventor of the thing patented in said patent, or of any material or substantial part thereof, but says that the same had been, prior to the alleged invention by him, shown and described in the United States patent of George W. Brill, dated February 22, 1876, No. 173,890, and in the English patent of James Steel, dated May 11, 1875, No. 1,763, and in the printed publication, Spon's Dictionary of Engineering, published in London, England, by E. & F. N. Spon, in 1870, in volume 2 of said publication, article 'Brake,' p. 589, and that said Ross patent is therefore wholly null and void." In fact, the defense is based solely on the want of patentable novelty and invention.

The motion for injunction was fully argued before Judge Brown upon affidavits and counter affidavits, and the prior state of the art was discussed by counsel and duly considered by the court. Judge Brown sustained the patent, and granted the injunction. His opinion is reported in 47 Fed. 894.

The case is now here upon pleadings and proofs. It is claimed by the defendants that their proofs make a stronger showing against the validity of the patent than that made upon the argument of the motion for injunction, and are further supplemented by the original drawing of the Ross patent, which was not introduced on the argument of the motion.

In describing his invention, Ross states in his specification: "The object of this invention is to avoid the unequal wearing of the wheels by the track, or, more correctly, to cause them to wear more evenly, and thereby avoid the necessity of sending them so often to the shop to be turned up in the lathe. * * * His brake shoe is constructed with two grooves, one of which conforms to and fits the flange of the wheel, and the other spans that part of the tread of the wheel which, in the revolution, ordinarily receives the wear of the rail. From the outer side of the ordinary tread of the wheel—that is, from the outer line of rail wear to the outer rim of the wheel—the shoe has a bearing or friction surface upon the portion of the tread or surface of the wheel which is not engaged or brought into contact with the rail. A lug or rib coming down to the wheel between the inside of the flange and the inner line of the rail wear of the tread of the wheel constitutes the second bearing of the shoe. A third bearing or friction is afforded by the groove made to closely fit the flange. The side of the shoe brought into contact with the wheel is a plain surface conformed to the arc or surface of the wheel at the bearing points, and attached to the brake-operating mechanism in the usual way. Ross' invention is limited to this single claim: "A brake shoe provided with the grooves, A', A', and the wearing portions, C, C', the portion or rib, E, projecting down to the wheel, substantially as and for the purposes specified."

William A. Redding, Henry S. Sherman, and James H. Raymond,
for complainants.

George Payson, for defendants.

SWAN, District Judge, (after stating the facts.) The single question arising upon this record is as to the patentability of the Ross railway brake shoe. The defense admits this to be the only issue, and insists that the prior state of the art and the simplicity of the device both negative the validity of the patent. The proofs taken in the cause since the granting of the injunction by Judge Brown afford no ground for varying the conclusions which he then reached. The drawing of the Ross shoe in the patent office was made by his attorney, and shows that the lug or rib on the inner side of the flange was not carried down to the wheel, as is done in the shoe as constructed. Ross' first application was rejected in the patent office on this, and the further ground that the extension of the inner lug or rib to the wheel was not described in the specification, and therefore the Steel patent answered Ross' claim of invention. The error in the drawing was that of Ross' attorney. The patentee's own drawing showed the projection of the wheel. The examiner, however, was in error in the statement that the extension of the rib, C, to the tread of the wheel, was not described in this specification. This expressly states that "between the grooves in the shoe is a rib, C, which forms a portion of one side of the flanged groove, and projects down to reach that portion of the wheel not worn much by the track." Notwithstanding this error or defect in the drawing, it is plain that this explicit language not only sets forth unmistakably the inventor's idea, but also, in view of the declared purpose of the device,—to produce uniformity of wear in the surface of the wheel,—no mechanic of ordinary skill could have failed to make the device from the specifications alone. The specifications are addressed to those skilled in the kind of appliances described by the inventor. Familiar, presumably, with the

state of the art and the deficiencies of the appliances in use, it would be evident to them at once that the deliberate phraseology of the specification—which, in substance at least, is the inventor's own—was rather to be followed than an inaccurate drawing, which on its face, in the state of the art, suggested its practical identity with the Steel shoe. The drawing, therefore, is entitled to no weight in disparagement of Ross' invention.

His shoe is designed and adapted to get its friction surface only from those portions of the tread of the wheel not worn by the rail, and thus to avoid increasing the rail wear upon the tread proper. The inventor evidently believed, and it is the claim of his original and amended specification, that the wear of the shoe upon the wheel would practically equal, and thus offset, that of the track upon the wheel tread proper. His specifications indicate this, for, after describing the operation of the shoe, he adds, as a result:

"Those portions of the wheel which are not worn by the rail are worn down by the shoe, and the tread is thereby kept longer in its proper shape, as, while the track is wearing down one portion, the shoe is wearing down the other, thereby effecting a large saving in the wear of the wheel itself, and also in the matter of re-turning the tires or wheels."

While there is a marked similarity, which to a casual observer amounts almost to identity, in form and use, in the Ross and Steel devices, there is a substantial difference between them, which not only determined, in the patent office, the patentability of Ross' device, but has caused the former to supersede Steel's both in Great Britain and in this country. The Stilmant and Brill patents which are pleaded in defense may be laid out of consideration altogether. There is nothing anticipatory of Ross' invention in either. The issue is solely between Ross and Steel. The aim of each was to produce a brake shoe which would so operate upon the wheels of railway cars as to obviate, as much as possible, the effect of the rail wear upon the tread of the wheel, and insure its constant profile. Both accepted, as a necessity for reducing the velocity or bringing to rest the moving car, the application of the restraining power or frictional energy directly upon the face or periphery of the wheel, and relied upon the grinding down, by the application of the shoe, of those parts of the tire upon which its pressure was exerted, to equalize the frictional wear of the tread proper by the track. To accomplish this result, Steel gave his device two bearings on the wheel,—one on the outside of the tread, spanning it from its outer edge with a groove or channel which extended to the upper part of the inside of the flange, at which point he formed another groove or channel in the brake block or shoe, which engaged the rim or periphery of the flange, thereby constituting the second bearing of the shoe. Ross' shoe claims three bearings, viz.: one on the outside of the tread, one on the inside, between the tread and the flange, and the third upon the periphery of the flange. The second of these bearings affords the distinctive feature of difference between the two appliances. In Steel's specifications he states expressly that "When the brake block is brought into operation, so as to stop or retard the motion of the train, it does not act upon the part, D, D,

of the tire," (that is, the face of the wheel between the outer bearings and the inside of the flange, as he delineates it in his drawing,) "which is subject to the ordinary wear and tear of rolling, but it acts upon those portions which are not so worn away,—that is to say, the portions opposite the parts B and E of the block," (which are, respectively, B, the face of the wheel outside the tread, and E, the periphery of the flange.) He adds: "Under a modification of my said invention, the brake blocks may be constructed without the longitudinal channel, A," which spans the tread proper in both the Steel and Ross shoes; "that is to say, they are made solid at that part, the channel, E, however, being maintained as shown in the drawings." He states that what he claims as his invention is, "arranging or constructing brake blocks with or without a longitudinal hollow or channel therein, and otherwise so shaping them as to bear upon the flange and those portions of the tire which are not worn in rolling."

Under this proposed modification it is argued that no one following out Steel's instructions could help making the Ross shoe, and that Ross' change in the shoe was neither a change in the principle of the invention nor a new idea; and, further, that "the invention was whole and complete as soon as Steel had told us to make a brake shoe that should be so shaped as to wear only on those parts of the wheel not worn by rolling;" and, further, that there is no room, after that, for anything but the ordinary knowledge of the mechanic skilled in this particular art.

It is very doubtful if Steel's specification can be extended beyond the form of brake blocks set forth in his drawing, notwithstanding his claim that they may be constructed "either with or without a longitudinal hollow or channel therein." This suggestion, and its accompaniment,—“otherwise so shaping them as to bear upon the flange and those parts of the tire which are not worn in rolling,”—does not propose the substitution of a solid block extending to the flange, for the obvious reason that such a block must act upon the tread of the tire which is worn by the rail, while his leading idea, as expressed in his specification, is to avoid such contact, and to rely upon the wear of the block on other parts of the tire. How far the solid block should extend is not stated. He suggests no mode or form of "otherwise so shaping the blocks" as to avoid this double wear, and the phrase itself is vague and indefinite, conveying to those skilled in the art no idea of the form of the alternative. His invention should be limited to the device described in his specification. He could not close the field of invention to others by "an all-embracing claim, calculated, by its wide generalization and ambiguous language, to discourage further invention in the same department of industry." *Carlton v. Bokee*, 17 Wall. 472. Nor was the invention complete when Steel proposed to shape the brake block so as to wear only upon those parts of the wheel not worn by rolling. If the idea of such a construction must be credited to him, he failed to exemplify it so as to insure its object,—the even wear of the tire, and the avoidance of the cost of re-turning them. He

evidently had no thought of the bearing upon the face of the wheel next to the flange, and made no provision for reducing its surface at that point to meet the wear of the tread, and thus preserve the normal contour of the wheel. Experience has also demonstrated, as shown by the testimony, that the necessary effect of the Steel shoe is to produce a ridge or shoulder on the inner face and in the throat of the flange. Without quoting at length from the testimony, it is enough to say that the Steel shoe has failed to meet the need of the railroads, both in this country and Great Britain, and has been discarded as impracticable, indeed detrimental, if not dangerous. Starting with the same idea of applying the resistance to the parts of a tire not worn by the track, and after a long practical experience with the ordinary flat shoe and a practical test with the Steel shoe, Ross, in August, 1883, eight years after Steel's patent had been granted, formulated his conception in the device here in issue. It has been adopted on nearly three-fourths of the railroads in the United States, and is also in use in Great Britain. Ross was master mechanic of the New York, Lake Erie & Western Railroad Company at Buffalo from February, 1881, until April, 1885, and as such had charge of all the repairs made on the locomotives of that company at its Buffalo shops. In August, 1882, his attention was called to the excessive wear of the tires of the rear drivers of a locomotive of the Mogul type by the action of the brake shoe with which it was equipped, which necessitated re-turning of the tires about every four months. He then suggested to Mr. Wilder, the superintendent of motive power, the use of a brake shoe which should have its friction surface only upon the outside of the tread and the periphery of the flange. Wilder objected that the proposed change would simply transfer the objectionable wear to the flange of the wheel, and possibly destroy it. In July, 1883, after the tires of this engine had been three times re-turned, he again mentioned to Wilder the rapid destruction of the tire, and consequent injury to the machinery, attributable to the shoe used, and, with Wilder's permission, made and applied substantially the Steel brake shoe. This he tested by use for about a month, but found that it produced a ridge or shoulder upon the flange, and also upon the outside of the tread. By continued experiments and close study of the subject he realized the necessity of a third bearing upon the inside of the tread and the throat of the flange, and this he obtained by extending a lug or projection bearing both upon the wheel and the top and inside of the flange. This obviated the ridge formed in the throat of the flange by the brake shoe then in use, and, preserving the groove of that part of the shoe fitting the flange, he practically equalized the friction surface of the shoe on the flange and the inside of the tread with that on the outer part of the tread, and thus secured the equal wear of those parts. He constructed and put in experimental use on the same locomotive a shoe of this pattern—the present Ross brake shoe—in August, 1883, and it remained in successful operation until he resigned his position on the New York, Lake Erie & Western Railroad, April 1, 1885. Ross'

letters patent bear date February 5, 1884. From October, 1884, until April, 1887, there were sold by the licensees under it 462,110 lbs. of the Ross brake shoe, and since the last date, and during the years 1887, 1888, and 1890, the licensees have sold 11,727,542 lbs. of those shoes, making the total sale since September, 1884, to and including the year 1891, 12,189,652 lbs. The proofs show that 164 of the railroads of the United States made purchases of the Ross shoe in 1890 to a greater or less extent. With the exception of the Chicago, Burlington & Quincy Railroad, which has assumed the defense in this suit, the railroads of this country have acquiesced in the validity of the Ross patent. This shoe has become the standard brake shoe for locomotive driving wheels upon the Pennsylvania Railroad and its leased lines, and is mainly, if not exclusively, used on the Old Colony Road, the Boston & Albany Railroad, the Pittsburgh Railroad, and many of the eastern trunk lines, and also upon the smaller roads of the Union. Seventy-five per cent. of the 30,000 locomotives in this country are equipped with it. The statistics of railroads for 1890 compiled by the interstate commerce commission give the number of general officers of railroads of the United States, in 1889, at 47,039; engineers, 30,217; machinists, 25,214; and other shopmen at 75,959; and the total number of all their employes at 704,743. These figures are, of course, considerably larger than those of previous years, as each successive year exhibits an extension of railway mileage, and consequently a corresponding ratio of increase in the number of employes. Excluding from consideration the total number of railway employes, and assuming that the general officers, as practical men, have studied the problems incident to the maintenance of railroad equipment, and that the engine men, machinists, and other shopmen are mechanics of average skill, and familiar with the rolling stock, its usage, wear, the cost and frequency of its repair, and the causes thereof, it is remarkable that, during the 40 years and more in which the expense of re-turning tires has been so large a factor in the maintenance of the equipment, and "sharp flanges" and defective wheels have caused so many accidents, no one, in these armies of mechanics and experts, has discovered a preventive, or suggested an improvement on known appliances, until Ross had remedied their defects. Conceding that Steel's idea that the brake shoe should be made to bear only on the parts of the tire not worn by the rail is exemplified in the Ross shoe, whether this suggestion be styled a "principle" or an "idea," it was a mere abstraction and unpatentable; not a complete device or machine. *Leroy v. Tatham*, 22 How. 132; *Burr v. Duryee*, 1 Wall. 531; *Fuller v. Yentzer*, 94 U. S. 288.

Long before Bell patented the telephone it was the general belief of scientists that speech could be transmitted by electricity if the requisite electrical effect could be produced. Bell discovered and perfected the apparatus and the process by which this could be done; and, although the previous labors of Reis in the same field had brought him almost to the point of success, he failed to reach his goal. Over 20 years before Bell's invention an eminent scientist

had said, in reference to the mode of transmitting speech by electricity: "Reproduce precisely these vibrations," to wit, the vibrations made by the human voice in uttering syllables, "and you will produce precisely the syllables;" yet Bourseul neither claimed nor invented the telephone. Like Bourseul, Steel told what to do, but not how to do it. His conception of counteracting the rail wear by the shoe friction was meritorious, but not inventive. Its crude expression in his brake block not only failed to meet its purpose, but added to the defects caused by the rail wear equally prolific sources of danger in the "sharp flange," and the failure to equalize the friction area of the shoe upon the flange with that on the tread. These defects not only caused its supersedure by the Ross shoe, but condemned its usefulness and safety. Ross' device, though but slightly varied in form from that of Steel's, has not only demonstrated its utility in years of use by prolonging the life of the tire, and obviating the great expense of frequent re-turning and the loss of use of the locomotive during such repairs, but has promoted the safety of railway travel by conserving the efficiency and contour of the wheel. Now that 10 years of successful use have established its merits, and since it has practically supplanted all others, and has been accepted in Great Britain, the home of the Steel patent, and after the skill of the mechanics and railway employes of both countries had been challenged in vain for eight years by the defects of the Steel shoe to the need of an effective device, it is too late either to refer the merits of this appliance to the suggestions of its imperfect predecessor, or to declare it merely the work of a mechanic of ordinary skill. Without essaying to define the line between the skill of the mechanic and the ingenuity of the inventor, it may be safely affirmed that one who perfects a device of confessed utility, which satisfactorily supplies a long-existing and imperative need of any branch of industry, and which excels in operation and results other existing appliances, superseding them at home and abroad, and by its structure overcoming difficulties and objections which have for years baffled the ingenuity of his fellow craftsmen the world over, including Steel himself, for whose conception so much breadth is claimed, has proved beyond cavil that average mechanical skill was not equal to what he has accomplished. His success is his individual achievement, the product of his inventive faculty, not merely that of his training or vocation. The merit and originality of his device is not to be determined by the application of a measure to its parts, or the extent of the difference of form between it and a contrivance which fails to answer the same purpose, when that difference, as in this case, not only produces a desired local effect, but insures the proper operation of the entire device. The lug or projection in Ross' shoe bearing upon the wheel upon the flange and the inner side of the tread performs a double function. It preserves the normal shape of that part of the wheel and flange, and aids to equalize the friction surface of the shoe on each side of the tread. It also prevents the lateral vibration of the shoe. It is essential to the success of the device, and is lacking

in the Steel brake block, which has no compensating feature. The difference between these contrasted devices is therefore not merely in form, but in their mechanical and economic results. This test, and the considerations above adverted to, establish the originality of Ross' shoe, and sustain its patentability.

Examples of patented inventions which have been upheld by the courts, although they differed very little in form, mechanism, or operation from other appliances, are numerous. *Krementz v. S. Cottle Co.*, 148 U. S. 556, 13 Sup. Ct. 719; *Loom Co. v. Higgins*, 105 U. S. 580; *Consolidated Safety-Valve Co. v. Crosby Steam Gauge & Valve Co.*, 113 U. S. 157, 5 Sup. Ct. 513; *Magowan v. Packing Co.*, 141 U. S. 332, 12 Sup. Ct. 71; *The Barbed Wire Patent*, 143 U. S. 275, 12 Sup. Ct. 443, 450; *Gandy v. Belting Co.*, 143 U. S. 587-594, 12 Sup. Ct. 598; *Topliff v. Topliff*, 145 U. S. 156-163, 12 Sup. Ct. 825.

For the reasons given, and those mentioned by Mr. Justice Brown in awarding the injunction in this cause, there must be a decree for complainants, with a reference to a master to ascertain damages; and the injunction is made perpetual.

PUTNAM NAIL CO. v. AUSABLE HORSE NAIL CO.

(Circuit Court of Appeals, Second Circuit. February 27, 1894.)

No. 40.

Appeal from the Circuit Court of the United States for the Southern District of New York.

Frederick P. Bellamy, for appellant.

Livingston Gifford, for appellee.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

Affirmed on opinion of court below. See *Putnam Nail Co. v. Ausable Horsenail Co.*, 53 Fed. 390.

MISTER v. BROWN et al.

(District Court, D. Maryland. February 16, 1894.)

FISHERIES—STATE OYSTER NAVY—SHOOTING BY OFFICER—LIABILITY FOR.

Code Md. art. 72, which regulates the oyster fishery in the waters of the state, provides for the maintenance of vessels to guard the waters, directs their commanders to arrest all violators of the law and seize offending vessels, and authorizes them to use arms, in their discretion, for the enforcement of the law. Section 25 directs the board of public works to furnish the necessary arms and ammunition for the several vessels; and Act Md. 1886, c. 296, vests in it the appointment of a commander in chief and deputy commanders for the state fishery force, and the supervision of the commander in chief in his control of the force. *Held*, that the action of the board in appointing officers and furnishing ammunition is purely official and ministerial, and its members are not personally liable for the abuse by a deputy commander of the discretion vested in him by statute in the matter of using such arms.

In Admiralty. On exception to libel. Libel by Jacob Mister against Frank Brown, Marion De K. Smith, Spencer C. Jones, Thomas C. B. Howard, and Waters Ford. Exception sustained.

Thomas S. Hodson, for complainant.

John P. Poe, Atty. Gen., for board of public works.

MORRIS, District Judge. This is a libel in admiralty to recover for an alleged maritime tort committed upon navigable waters within the admiralty jurisdiction of this court. The libelant sues for alleged pecuniary loss suffered by reason of the death of his son, John W. Mister, who was killed by a shot fired from the sloop Maria, one of the vessels of the Maryland state fishery force. Libelant's son was master of the oyster-dredging schooner Ostrich, and when shot was fleeing from the sloop Maria, whose commander, Waters Ford, was attempting to arrest him, and to seize his schooner, for illegal dredging in the waters of the Chesapeake bay, within the territorial limits of Maryland. The defendants (other than Waters Ford, who was in actual command of the sloop Maria) are the governor, the comptroller, and the treasurer of Maryland, who constitute the state board of public works; and Thomas C. B. Howard, another defendant, is the commander in chief of the state fishery force. They are all sued as individuals, and recovery is sought against them personally. The questions to be now decided arise on the exception to the sufficiency of the libel pleaded in the answers of the members of the board of public works and of the commander in chief of the state fishery force.

The law of Maryland (Code, art. 72) prescribes regulations for taking oysters in the waters of the state, and directs the deputy commanders in charge of the vessels of the state fishery force to constantly guard the waters of their respective districts, and to arrest and bring to justice all violators of the law, and to seize offending vessels. By section 25 the board of public works are empowered and directed to purchase for each guard boat such arms and ammunition as may be necessary to make them efficient, and the same section directs that the officers of such boats shall be authorized to use such arms, in their discretion, for the enforcement of the provisions of the oyster laws of the state. The board of public works is composed of the governor, the comptroller, and the treasurer of the state. This board is established by the constitution of Maryland, which confers upon it the power to hear and determine matters affecting the public works of the state, and to supervise those in which the state is interested as stockholder or creditor, and to vote its stock. By the act of 1886, c. 296, the additional duty was imposed upon the board to supervise the commander in chief of the state fishery force in his control and direction of the force, and to appoint the commander in chief for the whole force and a deputy commander for each vessel. Neither the commander in chief nor any member of the board of public works was present when the shot was fired that killed libelant's son. It was not the duty of any one of them to be anywhere in that locality, the law providing that their office shall be in the city of Annapolis. The participation in the alleged tort charged against them in the libel is that they had caused arms and ammunition to be put on the sloop Maria, and "wrongfully directed,

authorized, or allowed Waters Ford, the master, and the crew, of said vessel, to use said arms, in their discretion, in the enforcement, or supposed enforcement, of the oyster laws of Maryland," and "that the authority given and the license allowed by defendants to the officers of the oyster police force to shoot persons suspected of violations of the oyster laws, while fleeing, was without warrant of any valid law." The fault charged against the members of the board of public works and the commander in chief is, substantially, as was conceded in argument, that they did not instruct the commander of the sloop Maria to refrain from shooting when the circumstances were such as are alleged to have existed when Mister was shot.

The connection of these defendants with the state fishery force is purely an official connection. The vessels belong to the state of Maryland, and the salaries and expenses are paid by the state. The board of public works (section 27) are empowered to appoint a suitable person to command the force, and a deputy commander for each vessel. The commander and deputy commanders each takes an oath of office, and gives a bond to the state for the faithful performance of his duties as prescribed by law. The duties of the deputy commanders are prescribed by law, and not by the board of public works, nor by the commander in chief, (sections 30, 31, 36;) and, while the board of public works are directed to purchase arms for the vessels, (section 25,) it is the law itself which declares that "the officers of such boats shall be authorized to use such arms in their discretion for the enforcement of the provisions of this article." It is apparent that there is no duty imposed upon the board of public works or the commander in chief to instruct the deputy commanders, or their crews, under what circumstances they may or may not shoot, in the enforcement of the law. It is not, therefore, the members of the board of public works or the commander in chief who allowed or directed or authorized the commander of the sloop Maria to use arms, in his discretion, in the enforcement of the law, but the legislature of Maryland. It is not specifically alleged in the libel that the board of public works or the commander in chief ever gave orders to Deputy Commander Waters to shoot fleeing offenders, and it is not contended in argument that any such proof is forthcoming. Nothing is alleged, and it is not contended that anything can be established against the board of public works and the commander in chief, except that they have furnished the vessels with arms, as required by the law, and have instructed the officers to enforce the law. The manner of enforcing the law has been left, as the statute has left it, to the individual discretion of the deputy commanders. For this purely official and ministerial action, in my judgment, neither the members of the board of public works nor the commander in chief can be held personally liable, even though it should be established by proof that the deputy commander in charge of the vessel abused the discretion committed to him by the statute. It was held by the supreme court of the Unit-

ed States in *Robertson v. Sichel*, 127 U. S. 515, 8 Sup. Ct. 1286, that "a public officer or agent is not responsible for the misfeasance or positive wrongs, or for the nonfeasance or negligence or omissions of duty, of the agents or servants or other persons under him, in the discharge of his official duties." In order to charge the members of the board of public works or the commander in chief, it must be alleged and proved that they have been guilty of personal neglect, misfeasance, or wrong.

It is urged that the law which directs the board of public works to supply the guard boats with arms and ammunition, and authorizes the officers of the boats to use such arms, in their discretion, for the enforcement of the law, is unconstitutional, in that it authorizes the officers of the vessels to deprive suspected persons of their lives without due process of law. This objection, it is plain, is addressed, not to the constitutionality of the law itself, but to the consequences of its possible abuse. The necessity for arming the state's vessels cannot be gainsaid; otherwise, they would be at the mercy of any combination of lawbreakers who saw fit to combine together to attack or resist them. How far the law is a protection to the particular act of the officers or men who used the arms in this case, is a question which does not now arise on these exceptions, and has not been argued or considered. I am of opinion that the exception contained in the answer of the members of the board of public works and of the commander in chief to the libel is well taken, and it is sustained.

CECIL NAT. BANK v. THURBER et al.

(Circuit Court of Appeals, Fourth Circuit. February 7, 1894.)

No. 52.

1. EQUITY JURISDICTION—DISCOVERY.

Where a bill seeks relief as well as discovery, the prayer for discovery cannot be made the ground of equity jurisdiction unless complainant alleges his inability to establish, at law, the matters of which discovery is sought; and the bill should be dismissed when the answer in fact contains no discovery, and it appears that complainant is abundantly able to establish such matters by other evidence.

2. SAME—INJUNCTION.

A prayer for injunction, not as a primary remedy, but merely to preserve property from sale pending litigation concerning it, cannot be made a ground of equity jurisdiction, when it appears that the property had already been sold when the bill was filed, of which fact complainants had knowledge, or the means of knowledge.

3. SAME—TRUSTS.

A suit to hold a bank liable for the value of goods wrongfully pledged to it by complainants' agent as security for a personal loan, and sold by the bank thereunder, is not cognizable in equity on the theory that the goods were impressed with a trust of which the bank had notice, when complainants do not attempt to trace the proceeds into any particular fund of which they still form a part, but merely seek a decree which will bind all the bank's property, as a judgment at law would. 52 Fed. 513, reversed.

Appeal from the Circuit Court of the United States for the District of Maryland.

This was a suit by Horace K. Thurber, Francis B. Thurber, Albert E. Whyland, Alexis Godillott, Jr., and Jacob S. Gates, copartners trading as H. K. & F. B. Thurber & Co., against the Cecil National Bank and Arian M. Hancock. The bill alleged that Hancock, agent of plaintiffs, wrongfully hypothecated certain warehouse receipts to the defendant bank; charged the bank with notice; and asked for a discovery and injunction, and a decree that the bank deliver the goods covered by these receipts or their proceeds if sold. A decree was rendered in the circuit court against the defendants, (52 Fed. 513,) whereupon the bank appealed.

Robert H. Smith and W. L. Marbury, for appellant.

Thomas G. Hayes, for appellees.

Before GOFF, Circuit Judge, and SEYMOUR and SIMONTON, District Judges.

SEYMOUR, District Judge. This is an appeal by one of the defendants in a suit brought by the members of the firm of H. K. & F. B. Thurber & Co. against the appellant and one Arian M. Hancock. A decree was rendered in the circuit court against the defendants, (52 Fed. 513,) but only the bank appeals. As to Hancock, there has been an order of severance, and leave has been granted to the bank to prosecute its separate appeal.

Appellees alleged in their amended bill, that the defendant Hancock was their agent, and as such was authorized to sell for them
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canners' goods in Hartford county, Md.; that he was further authorized to make advances to canners to assist them in preparing canned goods for market; that such advances were to be secured by hypothecation of the goods to plaintiffs, and, when prepared, the goods were to be shipped to them for sale; that, after sale, any balance that might remain after paying advances, charges, and commissions, was to be paid to the canners, and any deficiency to be charged against them; that Hancock was to be paid a commission. The bill further alleges that Hancock made large advances in pursuance of this employment, but that, instead of shipping the goods upon which he had made such advances to plaintiffs, he deposited them in various warehouses, taking warehouse receipts in his own name as agent, and on such receipts hypothecating them to the defendant the Cecil National Bank for loans made by the bank to him personally; that said Hancock caused said goods to be delivered to the bank, and that the bank had sold them, either wholly or in part. The bill charges the bank with notice. Plaintiffs ask for a discovery, an injunction, and a decree that the bank deliver to them any of the goods which may remain in their hands, and pay them the value of those sold. No injunction was ever issued, as all the goods were sold before the institution of the suit; nor was any discovery made by any of defendants. A decree was rendered by the circuit court for the payment of \$13,188.32, with interest.

We think the bill should have been dismissed for want of jurisdiction. It cannot be sustained as a bill for discovery for several reasons. It is not a bill for discovery, but for relief. To make his prayer for discovery a ground of equitable jurisdiction, plaintiff should allege his inability to establish at law the facts of which the discovery is sought. It would have been otherwise were the bill merely for a discovery. "It is not necessary to allege in the bill [for discovery] that the plaintiff has no other witness or evidence to establish at law the facts of which the discovery is sought. It would be otherwise if the bill should not only ask discovery, but should ask relief in equity, for in the latter case the bill would seek to withdraw the whole jurisdiction from the proper court of law, and to give it to the court of equity." Story, Eq. Pl. § 324. As appears from the evidence, plaintiff was abundantly able to prove the facts with respect to which he resorts to discovery by witnesses other than defendants. No discovery was made by the answers. "If the answer of the defendant discloses nothing, and the plaintiff supports his claim by evidence in his own possession, unaided by the confessions of the defendant, the established rules limiting the jurisdiction of courts require that he should be dismissed from the court of chancery, and permitted to assert his rights in a court of law." *Russell v. Clark*, 7 Cranch, 69.

Nor is the jurisdiction of the court aided by the prayer for an injunction. This is not a bill for an injunction as a primary remedy, but a bill for relief, seeking to secure certain property, and containing a prayer that it may be preserved from sale during the

litigation by an injunction; but there is no allegation that defendant is insolvent. The fatal difficulty with the injunction as a ground of equitable jurisdiction is, however, that, when the bill was filed, there was no property to protect,—it had all been sold; and that within the knowledge of plaintiffs, or at least plaintiffs had the means of knowledge within their reach.

The only remaining ground of equitable relief averred in the bill is the court's jurisdiction over trusts; and it is upon this ground that the court below sustained the jurisdiction. Courts of equity administer trusts by appointing and removing trustees, by controlling their use of trust funds and their distribution, and by compelling trustees to account for, and pay over or deliver, money or property in their possession as trustees. They lend their aid to the owner of money held in trust, and misappropriated by the trustee. When trust property has been misapplied and converted into some other species of property, if its identity can be traced, they consider it, in its new form, as still impressed with the trust. If it has gone into the hands of a third party affected with knowledge of the trust, they treat it, notwithstanding any change of form or custody, as still subject to the original rights, and make its new holder a trustee in invitum. The right ceases when the means of ascertainment fail, which is the case, Mr. Justice Story says, "when the subject-matter is turned into money, and mixed and confounded in a general mass of property of the same kind." Eq. Jur. § 1259. The last proposition is generally true, but, according to the later cases, does not apply when the money can be traced into some existing fund of which it forms a part. It does apply, however, when the trust property has been converted, as is alleged in the present case, and its proceeds can in no way be distinguished among the assets of the party who has received them. The plaintiffs are not seeking to trace the money advanced by them to their agent, and by him to canners, into either the canned goods hypothecated to them or into any new form which may have resulted from the sale of such goods. They have asked for, and have obtained, a decree for money, which affects all of appellant's estate, but not any particular part of it, in precisely the same way that a judgment at law would have done. The bill does not ask for a decree specifically charging the bank's estate, or any part of it; nor would the facts have justified such a bill. At the institution of the suit there was no special fund to be followed. The case of *National Bank v. Insurance Co.*, 104 U. S. 54, which was relied upon to sustain the bill, is not, as we conceive, an authority in point. It was a suit brought by the insurance company to recover money deposited by one of its agents in the defendant bank. The money was the property of the insurance company, and this was known to the bank. Against this deposit the bank asserted a lien, as banker, for a personal obligation of the agent. The defense of want of jurisdiction was raised by the answer. The supreme court held that it was a case of equitable jurisdiction, because the facts created no privity between the insurance company and the bank, and therefore no action at law

could be maintained by the former against the latter; in other words, as plaintiff could obtain no remedy at law, and had a right, he was entitled to pursue it in equity. In *Warner v. Martin*, 11 How. 225, no objection to the jurisdiction was taken by any pleading, and the point was disregarded by the court when raised for the first time on the argument. Nothing is said on the subject in the opinion. *Duncan v. Jaudon*, 15 Wall. 165, is also cited as sustaining the jurisdiction; but the question of jurisdiction was not raised or mentioned, either in pleading, by counsel or in the opinion. A court of equity does not ordinarily raise the exception that a case is not one of equitable jurisdiction of its own motion. *Amis v. Myers*, 16 How. 492.

In his opinion in *National Bank v. Insurance Co.*, Mr. Justice Matthews quotes from the leading case of *Knatchbull v. Hallett*, 13 Ch. Div. 696, a criticism by the master of the rolls, Sir George Jessel, upon the common legal adage that "money has no earmarks," and upon a dictum of Lord Ellenborough's in what is also a leading case,—*Taylor v. Plumer*, 3 Maule & S. 562. The dictum criticised was adopted by Justice Story in his *Equity Jurisprudence*, and has been quoted *supra* from that work. Sir George Jessel dissents from the proposition that trust property cannot be traced "when the subject is turned into money, and confounded in a general mass of the same description," because equity will follow money, even if put into a bag or an undistinguishable mass, by taking out the same quantity; and he says the doctrine that money has no earmarks must be taken as subject to the application of this rule. Doubtless, it is true that, while the currency of a country circulates from hand to hand so freely as to render it impossible to identify and trace a particular coin or note, as a rule, yet money may, in exceptional cases, be marked and traced. So, if Lord Ellenborough's statement that money mingled with other money cannot be traced is to be construed as conveying the proposition that in no case can money be traced, it would state what is not a fact; but the question is really one not of law, but of fact. Like *National Bank v. Insurance Co.*, *supra*, *Knatchbull v. Hallett* was a case of a bank account and its ownership. The numerous American cases which cite *Knatchbull v. Hallett* are the most of them cases of bank deposits, usually complicated by the failure of the banks and the conflicting claims of creditors on the one hand to a preference, and on the other to an equal distribution of the assets of the bank. I do not purpose to examine this class of cases. They do not turn, any more than does *National Bank v. Insurance Co.*, upon whether equity has jurisdiction, but upon the rights of the parties to particular deposits or money, or other subjects, a lien upon or right in which is sought to be enforced. Some priority or other is claimed which could only be enforced in equity. These cases are not authorities upon the subject now under consideration. In the present case there is no fund, bank deposit, or particular property which plaintiffs seek to apply to their claim; the conversion of plaintiff's goods to their own use created simply a pecuniary liability. Even though a cause of action involves

equitable features, if the legal remedy by pecuniary judgment is complete, sufficient, and certain, it must be resorted to. *Buzard v. Houston*, 119 U. S. 347, 7 Sup. Ct. 249.

The judiciary act of 1789 provides that "suits in equity shall not be sustained in either of the courts of the United States in any case where a plain, adequate, and complete remedy may be had at law." Rev. St. § 723. While a defendant may waive his right to object to the jurisdiction, by failure to take the objection in due time, he is entitled, whenever he expressly claims it, as the defendant has done in this case by his answer, to its benefit. The right is one involving his constitutional privilege of a trial by jury, and cannot be denied by the court. In the present action the remedy granted is substantially the same as that which could have been given in an action at law, and no other relief could have been granted. These facts are conclusive of the question of jurisdiction. It results that the decree of the court below must be reversed, and the cause be remanded to the circuit court with instructions to dismiss the bill as to this appellant for want of jurisdiction, but without prejudice; costs to be taxed against appellee.

BLACK et al. v. RENO et al.

(Circuit Court, E. D. Missouri, E. D. February 24, 1894.)

No. 3,653.

1. MORTGAGES—TRANSFER—LIEN—DISCHARGE.

Where negotiable notes secured by a mortgage duly recorded are transferred for value before maturity to a third person, a subsequent acknowledgment of record by the mortgagee of satisfaction of the debt secured does not impair the lien of the mortgage unless it was made with the knowledge or assent of the holder of the notes; and hence a purchaser of the mortgaged land is not protected by such release, though he purchases on the faith of it.

2. NEGOTIABLE INSTRUMENTS—TRANSFER—HOLDERS FOR VALUE.

Taking notes as collateral security for money loaned at the time will constitute the lender a holder for value of such notes.

3. SAME—COLLATERAL SECURITY—ACTION.

The recovery of judgment against the maker of a note will not bar the creditor's action on other notes taken by him as collateral security for the loan, so long as that judgment remains unsatisfied.

4. MORTGAGES—FORECLOSURE—INSTALLMENTS OF DEBT.

A mortgage recited that it was given to secure the payment of two notes, one payable in five, and the other in ten, years, with interest payable annually; and the condition required the maker to pay "the notes and all interest that may be due thereon, according to the tenor and effect of said notes." Both notes and mortgage were transferred as collateral security for a loan, which was not paid at maturity; and the holder brought suit to foreclose the mortgage, the first note being due and unpaid, and no interest having been paid on either note. *Held*, that he was entitled to foreclose without waiting for the maturity of the second note.

5. SAME—SALE—INSTALLMENTS NOT YET DUE.

Where foreclosure is sought of a mortgage securing several notes, only part of which are due, the court will order the sale of so much of the land as is necessary to pay the overdue notes, leaving the decree to stand as security for the others; or, if the land is not susceptible of division,

it will order that the whole be sold, and that the balance of the proceeds, after paying the overdue notes, be paid into court, and held subject to its order.

6 SAME—PURCHASERS SUBJECT TO LIEN—MARSHALING.

Where part of the mortgaged land has been sold, but remains subject to the lien, its sale on foreclosure will be postponed until it is sure that the proceeds of the residue are not sufficient to satisfy the debt; and a reasonable time will be given the owner in which to satisfy any balance due after such proceeds are applied to the debt.

7 SAME—LIEN—HOMESTEAD.

Where the owner of land executes a mortgage thereon while he is unmarried, his subsequent marriage cannot raise any homestead right in the land as against the mortgagee.

8. USURY—WHEN AVAILABLE AS DEFENSE.

Where a note has been reduced to judgment, and the amount recovered is no greater than what might have been recovered under the laws of the state, even if the contract had been usurious, the question of usury in the original transaction cannot be raised by one who is proceeded against in respect of collateral security given for such note.

In Equity. On final hearing. Bill by Robert J. Black and others against John W. Reno and others. Decree for complainants.

This is a bill in equity to foreclose a mortgage on real estate situate in Pemiscot county, in this state. On the 13th day of September, 1886, the respondent W. A. Reno, then unmarried, executed his two several promissory notes to the co-respondent John W. Reno, each for the sum of \$5,000, payable to order,—the first of said notes being payable five years after date, and the second ten years after date; the first bearing 10 per cent. interest, and the second 8 per cent. interest, per annum from date,—to secure the payment of which the said W. A. Reno, at the time of the execution of said notes, executed and delivered to said John W. Reno a deed of mortgage on certain described lands in said county, containing about 391.63 acres, which said mortgage was duly recorded in the recorder's office of said county on the 14th day of December, 1886. The conditions of said mortgage were, in substance, that if the said W. A. Reno should pay the sum specified in said notes, and the interest due thereon, according to the tenor and effect of said notes, the conveyance should be void, "but, if the said he should not be well and truly paid when same become due and payable according to tenor and effect thereof, the deed should remain in full force;" and the said John W. Reno was authorized to proceed to sell the said real estate, or any part thereof, at public vendue to the highest bidder, at the courthouse door of said county, on giving 30 days' public notice, and upon such sale and payment of the purchase money he should execute and deliver a deed of said property to said purchaser, and out of the proceeds of such sale he should pay, first, the expenses of the trust, and next whatever might be in arrears and unpaid on said land, whether principal or interest, and the balance, if any, should be paid over to said William A. Reno. To understand the last recitation it should be stated that the said notes represented what was claimed by the parties thereto to be the purchase money of the sale of said land from said John W. to William A. Reno, the said John W. being the father of said William A. Thereafter, on the 26th day of March, 1889, said John W. Reno borrowed from the complainants the sum of \$4,000, and executed to them his two several promissory notes, each for \$2,500, payable in one and two years thereafter; and to secure the payment of said notes, and as a part of the consideration of said loan, the said John W. Reno transferred them by the indorsement of his name thereon, and delivered the same to the complainants, together with said mortgage deed. Upon the maturity of said notes so executed by John W. Reno to complainants, the same remaining unpaid, complainants instituted suit in this court against said John W. Reno, and obtained judgment thereon, June, 1891, for the sum of \$4,000, with 6 per cent. interest from the 26th day of March, 1887, and which judgment was by consent of

parties. No part of said judgment having been satisfied, the complainants instituted this action on the 10th day of March, 1892, on said notes for \$5,000 each, so held by them as collateral security, and to foreclose said mortgage, and to have the lands sold to satisfy the same. The bill joins, as co-respondents with the said Renos, James H. Howard and W. R. Fields, as subsequent incumbrancers, or as asserting some right and interest in the said property. As the respondent Fields has offered no proof in support of his answer, and does not appear at the hearing of this cause, it is not deemed necessary to make, in this connection, any detailed statement relative to his defense, as it does not touch the merits of the controversy. After the transaction aforesaid between the complainants and John W. Reno, the said Reno went to the recorder's office in Pemiscot county, and entered satisfaction, on the margin of the record of said mortgage deed, as to 160 acres of said land, and thereupon he took from his said son, William A. Reno, another note for \$1,800, secured by mortgage on said 160 acres of land. This was of date June 10, 1890. This note John W. Reno negotiated to one Hunter for value received, on exhibiting to him an abstract of the title to said land, showing said satisfaction of the mortgage to the 160 acres. This mortgage was foreclosed, and Hunter became the purchaser thereunder, and then conveyed to the respondent Howard, who claims to be a purchaser for value, without notice of the first mortgage. He sets up in his answer other matters, which are sufficiently noticed in the opinion herein.

Harvey & Hill and J. E. McKerghan, for complainants.
W. W. McDowell and Lubke & Muench, for respondents.

PHILIPS, District Judge, (after stating the facts.) 1. The claim of respondent Howard that he sustains the relation of an innocent purchaser is not tenable. It is the settled rule of law in this state, where the land is situated, and the transaction respecting the mortgage was had, that where negotiable notes, like these, secured by deed of mortgage or trust duly recorded, are transferred for value to a third party before maturity, such transfer not only carries the mortgage with the notes, but a subsequent acknowledgment of record by the mortgagee of satisfaction of the debt secured, or any part thereof, without the knowledge or assent of the holder of the note, does not affect or impair the mortgage lien, and is of no effect in favor of one buying on the faith of such release. *Anderson v. Baumgartner*, 27 Mo. 80; *Goodfellow v. Stillwell*, 73 Mo. 19; *Joerdon v. Schrimpf*, 77 Mo. 383; *Logan v. Smith*, 62 Mo. 459; *Lee v. Clark*, 89 Mo. 553, 1 S. W. 142; *Hagerman v. Sutton*, 91 Mo. 520-533, 4 S. W. 73.

2. Taking the notes as collateral security for money at the time loaned on the faith thereof constituted the complainants innocent holders for value. 2 *Rand. Com. Paper*, §§ 456, 799; 1 *Daniel, Neg. Inst.* § 771; *Logan v. Smith*, 62 Mo. 455. This is especially the rule of the federal courts. *Carpenter v. Longan*, 16 Wall. 271; *Swift v. Smith*, 102 U. S. 442; *Sawyer v. Prickett*, 19 Wall. 147; *Bank v. Matthews*, 98 U. S. 621; *Oates v. Bank*, 100 U. S. 246.

3. The resort to the action at law and recovery of judgment thereon on the notes executed by John W. Reno to complainants constituted no bar to this action, that judgment being unsatisfied; and especially so when Reno is insolvent. 2 *Rand. Com. Paper*, § 796. The pledgee takes commercial paper as a trust for the pledgor, and it becomes his duty to proceed to collect the same on its maturity;

and he need not defer its collection until the maturity of the original debt. Id. § 795.

4. It is objected that this action is premature, for the reason that, by the terms of the mortgage deed, no foreclosure is permissible until after the maturity of the 10-years note. The first note and all the interest thereon were past due when this suit was instituted, and no interest had been paid on the 10-years note. If this action is to be postponed until after December 13, 1896, the situation of the creditor is most unfortunate. It is very questionable whether the whole security be sufficient to discharge the judgment of complainants against John W. Reno, and it is quite clear, from all the evidence and circumstances in the case, that it is not near adequate, at this time, for the redemption of the mortgage debt. The principal and interest of the two notes at the end of 10 years would amount to \$19,000. The maker of the notes, as well as the assignor, is not only insolvent, but the possession of the land and the usufruct thereof have passed from them under a junior incumbrance and judgment. In such condition of the security, a chancellor would at least grant the prayer of the bill for the appointment of a receiver, to secure to the mortgagor the rentals of the lands in mitigation of the accumulating interest, amounting to \$900 per annum,—a sum undoubtedly far in excess of the value of the rentals. Before a court of equity would give a construction to the mortgage productive of such dire results, it should certainly clearly appear on the face of the mortgage deed that it was within its terms that the mortgagee should be so postponed. Of course, a court of equity could not, in this action, afford relief against the express contract of the parties. The courts universally hold that, under a mortgage to secure a debt payable in installments, the right to foreclose arises on a default in any one installment, in the absence of any provision clearly interdicting the right; and there is a strong disposition and tendency in the courts of chancery to apply this rule to defaults in the payment of annual accruing interest. 2 Jones, Mortg. §§ 1176, 1177. They combat the proposition, often taken by counsel, that such interest ought not to be considered in the light of an installment of the principal, but they assert that interest unpaid becomes principal pro tanto. In *Seaton v. Twyford*, L. R. 11 Eq. 591, there was a loan of £400, by way of mortgage, at 5 per cent., not to be called in for five years. Judgment at law was sought by the mortgagor to be enjoined. Inter alia, the chancellor observed:

"It is not, in my opinion, open to question that, if the case were taken into chambers for the purpose of preparing a mortgage deed under such decree as I have mentioned, the mortgage would not be in the most ordinary form, giving five years to pay the mortgage money, but making it a condition of that postponement that the interest, in the mean time, should be paid. The failure to pay the interest in a mortgage prepared in the most ordinary form would release the mortgagee from the necessity of waiting five years before he exercises such powers as a mortgagee possesses. The mortgagor who stipulates that he shall have five years to pay the mortgage money must, of necessity, whether it is expressed or not, undertake at the same time that, if he fails to do that which is incumbent upon him during the period of five years to do, the restrictions upon the mortgagee (that is, to wait five years on the mortgagor) should cease."

See, also, *Edwards v. Martin*, 25 Law J. Ch. 284; *Bank v. Chester*, 11 Pa. St. 292; *Richards v. Holmes*, 18 How. 145, 146.

This mortgage recites the two notes,—one payable in five, the other in ten, years, with interest per annum,—and it specifically requires the maker to pay said notes, “and all interest that may be due thereon, according to the tenor and effect of said notes.” While the word “he” occurs in the conditions inadvertently instead of “notes,” the clear meaning and import is that if the said notes, “when they become due and payable according to the tenor and effect thereof,” should not be paid, the right to foreclose should attach. These notes might have been transferred separately to different purchasers. In such case, would not the default in the payment of the first note at maturity have been a failure to pay when the same became due and payable according to the tenor and effect thereof? The holder would have been entitled to foreclose, and the proceeds of the sale thereunder would be applied, first, to the satisfaction of the first note. *Buford v. Smith*, 7 Mo. 489; *Mitchell v. Ladew*, 36 Mo. 531; *Huffard v. Gottberg*, 54 Mo. 271. Construing this mortgage in the light of the whole transaction, this objection is overruled.

5. We are next brought to face the question as to the character and extent of the decree to be rendered where the holder of all the notes proceeds to foreclosure on default of the first, but before maturity of the last, note. In the absence of a provision in the mortgage that a default in the one shall render the others due for the purpose of foreclosure, there being no statutory regulation on the subject in this state, I understand the chancery rule to be that a decree of foreclosure will go for the amount of the debt due, and a sale will be decreed of so much of the mortgaged premises as will be sufficient to satisfy the amount due, and the decree will stand as a security for the remaining installments as they become due; but, if the property be not susceptible of division into parcels without injury to the whole, it may be sold as an entirety, and any surplus realized beyond a sum requisite to satisfy the debt due will be returned into court, subject to application by the chancellor. In such case, in the conservation of the best interests of all concerned in the fund, the chancellor will at once direct its application to the liquidation of the deferred installments, with such rebate of interest thereon as may be just and equitable. *King v. Longworth*, 7 Ohio, 585; *Peyton v. Ayres*, 2 Md. Ch. 67; *Brinkerhoff v. Thalhimer*, 2 Johns. Ch. 486; *Olcott v. Bynum*, 17 Wall. 62, 63; *Railroad Co. v. Fosdick*, 106 U. S. 68, 69, 1 Sup. Ct. 10. To this end the chancellor may refer the matter to a master to report upon the divisibility of the land into parcels, and its value, as to whether it would be probably sufficient to so satisfy the whole debt, and the like; in short, the chancellor, in the exercise of a wise discretion, will, in the particular case, make such decree as, in his judgment, will best subserve the rights and interests of all parties concerned. The evidence taken in this case obviates the necessity of a reference to a master. As the respondent Howard holds 160 acres of the land under the Renos, subject to complain-

ants' mortgage, it is equitable to direct that the portion of the premises covered by the mortgage not claimed by him should first be sold under the decree herein, as the same is practically segregated from the 160 acres occupied by Howard, and that the latter should be sold, if necessary, to satisfy any balance due the complainants, according to respondent Howard, of course, a reasonable time to satisfy any balance on complainants' debt after sale of the other portion of the premises, and also giving to him the right of election as to whether the 160 acres shall be sold in lump or parcels.

6. W. A. Reno being unmarried at the time of the execution of the notes and mortgage and their transfer to complainants, there is no foundation for the claim set up in Howard's answer respecting a homestead right in the land arising on the subsequent marriage of W. A. Reno.

7. The only remaining question of importance to be answered is as to the sum for which the mortgage lien shall be enforced against the lands. The general rule is that the pledgee of a note and mortgage is, on default, permitted to recover the full value of the security, holding the surplus for those having equities therein. 2 Rand. Com. Paper, §§ 795-797. He holds as a trustee, and should take action against the maker, W. A. Reno, for the whole sum due for the protection of John W. Reno, and the surplus on a foreclosure sale, if any, after satisfying complainants' debt, would go in equity to the respondents, who have acquired all the title and estate in the land of said Reno. Prima facie, the amount called for on the face of the notes executed by J. W. Reno to complainants, to wit, \$5,000, and interest, is the sum which the complainants are entitled to have in this action. But they reduced their claim to judgment at law, and the notes became merged therein. If it be conceded that the respondent Howard is not precluded by said judgment, is he in a position to show, as is claimed in argument by his counsel, that a part of the consideration of the notes executed by John W. Reno was for usurious interest? It may be conceded, for the purposes of this case, that a junior incumbrancer has an equitable right to come into chancery to redeem against a prior lienor, and to have the amount thereof reduced to the extent of the usury injected into the transaction. *Perrine v. Poulson*, 53 Mo. 309. But this respondent has not put himself in a position to avail himself even of such questionable equity. He does not admit the complainants' right to any lien whatever; nor does he offer to redeem for the sum justly due; nor, indeed, has he tendered any proper issue of usury in his plea. The only and entire allegation is contained in the following hypothetical paragraph:

"If it be true that the complainants did acquire or receive possession of any notes described in the alleged mortgage of said lands by William A. Reno to John W. Reno, yet this defendant avers that complainants did so acquire possession of said notes and mortgage by virtue of an illegal and usurious transaction, and not in good faith or for value."

What transaction, and how was it usurious? This is a mere statement of a conclusion, and not the statement of an issuable

fact. It is slander without the actionable words. Beyond all this, "the purchaser of an equity of redemption cannot set up usury as a defense to a bill brought for foreclosure, especially if the mortgagor has himself waived the defense." *De Wolf v. Johnson*, 10 Wheat. 367. Furthermore, this being a contract made and to be performed, as appears on the face of the notes, in the state of Tennessee, it is to be judged of by the statutes of that state respecting usury. *De Wolf v. Johnson*, *supra*. The Code of Tennessee (section 2707) provides that "a defendant sued for money may avoid the excess over legal interest by a plea setting forth the amount of the usury;" and following sections require that the plea shall be verified by affidavit, etc. The Code permits recovery for the principal debt with 6 per cent. interest, and that is precisely the amount for which complainants obtained judgment in the action at law against Reno, and this is the amount the decree herein will direct to be paid to complainants. Decree ordered for complainants, conformably to this opinion.

BROOKS et al. v. RAYNOLDS.

(Circuit Court of Appeals, Sixth Circuit. December 24, 1893.)

No. 110.

1. WILLS—CONSTRUCTION—TRUSTS—NATURE OF ESTATE.

A devise to an executor in trust to apply and expend the income for the benefit of testator's son, "Cassius, and his family," makes the "family" a beneficiary as much as the son, and he has no power to divert from the other members thereof the portion properly applicable for their benefit.

2. SAME—CODICIL.

This construction is not affected by an item in a codicil, inserted expressly to clear up a contradiction as to the time when the expenditure shall cease, and providing that "the income which is to be expended for the benefit of my son, Cassius, and his family, is to be so expended for his benefit only until the time arrives for the final distribution," for the words "for his benefit" obviously refer to him as the head of the family.

3. SAME—TRUST FOR MAINTENANCE AND SUPPORT—RIGHTS OF CREDITORS.

A devise to an executor in trust directed him to expend one-half the net income "for the benefit of my son, Cassius, and his family," (Cassius being a spendthrift,) or, in the executor's discretion, to pay any part thereof to Cassius in cash; the children of the "family" to be educated and maintained "on a scale comporting with their condition and rank in life;" and if, in the executor's judgment, the entire half of such income could not be thus expended judiciously, the surplus to be held in trust so that it might be applied, as the executor might deem best, for the benefit of "Cassius and his family." *Held*, that this was a gift for the mere maintenance and support of Cassius and his family collectively, and Cassius had no separable interest in such income, which could be subjected by his creditors. 55 Fed. 783, reversed.

4. SAME—DISCRETION OF TRUSTEE.

The fact that the executor was also given a purely personal discretion to invest any part of the surplus income "for the benefit of Cassius," to be expended for his benefit alone, or paid to him in such amounts as the executor might deem best, gave Cassius no interest, which his creditors could reach, in any part of an existing surplus, when the executor had not in fact invested any part thereof for Cassius alone.

5. SAME.—CONSTRUCTION OF STATUTE.

The Ohio statute giving judgment debtors an action to reach equitable and other interests which are not subject to levy, (Rev. St. § 5464,) being a part of the Code of Civil Procedure, should not be regarded as dealing with substantive laws of property, but merely as extending the remedy of creditors to property interests not subject to seizure by execution, on account of the narrowness of the common-law writ; and it gives no right to subject income held in trust for mere maintenance and support, and in which the debtor has no vested interest.

Appeal from the Circuit Court of the United States for the Northern District of Ohio.

Creditors' bill filed by F. A. Raynolds against Cassius B. Hanna, Hattie L. Hanna, his wife, and J. Twing Brooks, executor and trustee of the estate of Robert Hanna, deceased. The bill was based upon the claim that Cassius B. Hanna had, under the will of his father, Robert Hanna, an estate for life, which might be subjected to the payment of his debts, in an undivided one-half of the real and personal property devised and bequeathed by the will in trust to J. Twing Brooks, the executor. On final hearing the circuit court held that Cassius B. Hanna had an equitable interest in an undivided one-fourth of the income. 55 Fed. 783. Both parties appealed; plaintiff contending that Cassius had an undivided half interest which the plaintiff might subject to the payment of his judgment, and the executor and trustee insisting that Cassius had no interest or estate under the will capable of being subjected by the plaintiff. The decree is now reversed and remanded, and a petition for rehearing dismissed.

The appellee, F. A. Raynolds, recovered, in 1888, a judgment in a court of law for \$44,941.60 against Cassius B. Hanna and his wife, Hattie L. Hanna. An execution issued, and has been returned nulla bona. Upon this footing this bill was filed to subject an alleged equitable interest arising under certain trusts created by the will of Robert Hanna, father of Cassius. The executor, J. Twing Brooks, denies that Cassius Hanna has any estate or interest under the will of Robert Hanna which may be subjected by his creditors. The circuit court held, on final hearing, that Cassius had an equitable interest, until the final distribution of the estate of Robert Hanna, in an undivided one-fourth of the net income thereof, which might be subjected to the payment of the complainant's judgment. Both parties appealed; the complainant contending that Cassius has an undivided half interest in the income which may be subjected by his creditors; the executor insisting that he has no interest under the bill which can be subjected by complainant.

The clauses of the will which bear upon the questions for consideration are these:

"Item 4. Excepting the household articles devised to my wife in foregoing item three, I devise and bequeath to my executor hereinafter named, in trust to be disposed of by him as hereinafter provided, all my property, real and personal, of any and every description, wherever the same may be situated, and however my interest or title in the same evidenced; I hereby giving my said executor full, ample, and complete power to manage, direct, and control the same, and every part thereof, according to his own best judgment and discretion; also, to rent, sell, or improve the whole, or any part, of my real estate, and in such manner, and upon such terms and conditions, as he may think best, and, in case of sale, either at public or at private sale, as he may deem best, and to make, execute, and deliver deed or deeds in fee for the same. I also hereby authorize and empower him to dispose of, whenever, in his judgment, it will be best for my estate so to do, any and all

of my personal property, stocks, bonds, chattels of every kind, either at public or private sale, and to invest, and from time to time reinvest, in such manner, and in such property, whether real or personal, as he may deem best, the proceeds arising from the rent or sale of my real, and the income or sale of my personal, estate; and, in case of purchase of real estate by him as aforesaid, I direct that the title to the same be taken to himself as executor and trustee of my estate,—it being my wish and purpose to invest my executor hereinafter named with power to manage and control my entire estate according to his own judgment and discretion, the same as I could do myself, if living, and subject only to, and be restrained by, the special limitations herein imposed and expressed by me.”

“Item 7. I hereby authorize and direct my executor, as soon as convenient after my death, and in case my son, Cassius, shall so request, to purchase a home for him at a cost not to exceed twelve thousand dollars, taking title to himself as executor and trustee as aforesaid, the same to be kept as and for a home for Cassius, free of rent, so long as he desires so to occupy the same; but in the final settlement of my estate, as hereinafter provided, I direct that the money expended by my executor in insurance, taxes, and assessments on the home so occupied by Cassius, together with six per cent. interest per annum on the cost of said home for the time it shall be so occupied by him, shall be deducted from the amount that is to be paid to Cassius or his children, as is hereinafter provided, or, if my said executor shall deem it best to deduct the amount of said annual insurance, taxes, assessments, and interest from the annual income that is to be paid to Cassius or his children, as hereinafter provided, he is hereby authorized and directed so to do.

“Item 8. So far as the same is practical, in conformity with the other provisions of this will, I desire the income of my estate each year to be applied as follows: First, to the payment of taxes, insurance, assessments, and repairs that may be levied or become necessary to be made on any part of my estate, together with the necessary expenses of the administration of the same, including the compensation hereinafter provided to be paid to my executor. Secondly, to the payment of the annuity of two thousand dollars hereinbefore provided for my wife, Harriet A. Hanna. Thirdly, after the payment of the items hereinbefore mentioned, I desire the remainder of the yearly income or increase of my estate that shall be collected or received to be divided into two equal parts, one part to be expended by my said executor for the benefit of my son, Cassius, and his family, so long as he (Cassius) shall live; or, in case my said executor deem it proper and best, but in no event otherwise, he may pay the whole or any part of such portion of the yearly income of my estate (subject, however, to the deduction hereinbefore provided to be made of insurance, taxes, assessments, and interest on the cost of the home to be provided for him as mentioned in item 7) to my son, Cassius, in cash. The other of the said equal parts of which the net yearly income of my estate is to be divided as provided in this section I direct my executor to expend for the benefit of the children of my deceased daughter, Arrial T. Whitaker, in such manner that each of the children shall have an equal and the same portion of said part with the other. In case any of said children of my daughter, Arrial, should die without issue before the final division of my estate, then the share of the income of my estate of such child or children so dying shall be divided between the other children of my daughter, Arrial, or the issue of them, they in such to take per stirpes and not per capita; and in such case any of the said children of my daughter, Arrial, should die before the final distribution of my estate, leaving issue, I direct that the share of the income of my estate which should be coming to such child of Arrial if living shall be paid to the issue of such child, share and share alike; and I hereby authorize my executor to pay in cash, if he shall deem best, the whole or any part of such share of the income of my estate as may be due to each of the children of my daughter, Arrial, as aforesaid, he to take, in such case, the receipt of the guardian or such other person who, for the time being, may be charged with the care or custody of said children, or either of them, for any payment so made; and in the expenditure of income for the benefit of my son, Cassius,

and his family, as well as for the children of my daughter, Arrial, I desire my executor to have in view the maintenance and education of my grandchildren on a scale comporting with their condition and rank in life; and, if, in the judgment of my said executor, the net annual income of my estate, as above described, cannot all be properly and judiciously expended or advanced to Cassius and his family and to the children of Arrial, as hereinbefore described, I authorize and direct my executor to invest such surplus as may remain after what he deems a reasonable expenditure has been made for the benefit of the child or grandchild who would be entitled to it under the foregoing plan of distribution.

"Item 9. I will and direct that my executor shall continue to control and manage my estate, and distribute and invest the annual income of my estate, as hereinbefore provided, from year to year, until the youngest child of my daughter, Arrial, then living, shall come of age, or until such further period as, in his opinion, the welfare of my son, Cassius, or of my grandchildren, will be thereby promoted, and whenever it shall so seem prudent to my executor, but in no event until then. I authorize and direct him to divide and distribute the whole of my estate among my grandchildren, share and share alike, to each that may be living at the time of such distribution, or if, before such final distribution, any of my said grandchildren shall have died leaving issue, the issue of such deceased grandchild shall take the share that would be due to such grandchild if he or she were living, share and share alike. And I hereby authorize my executor, if at any time it shall seem suitable and prudent to him, to advance any portion of the final share of my estate to either of my grandchildren that would be due to them under the plan of distribution herein provided, and in such final settlement I direct my said executor to invest a portion of the share hereinbefore provided for each of my grandchildren in a home for such grandchild, in which said child shall have a life estate, with the remainder to his or her heirs, it being my wish and purpose that each of my said grandchildren shall be secured in a home beyond any contingency during the period of his or her life; provided, however, that such final distribution of my estate shall in no event be made during the lifetime of my wife, Harriet A. Hanna, nor shall advances be made to my grandchildren, as hereinbefore provided, to such an extent as to impair the annuity of two thousand dollars which is to be paid to my wife as aforesaid: and provided, further, that before any such advances are made, or before any advances are made as hereinafter provided may be made, to my son, Cassius, for the benefit of himself and his children, and in any event before the final distribution of the principal of my estate, as aforesaid, shall be made, I wish and direct my executor to ascertain the amount of advances of money I shall have made during my lifetime to my son, Cassius, in excess of what I shall have made to my daughter, Arrial, or to her and to her children together, and deduct the amount of such excess as it may exist at the time of my death (interest at the rate of six per cent. per annum being added thereto from the time of my death) from the sum total of my estate, which amount so deducted shall be divided equally between the children of my daughter, Arrial, and their issue, per stirpes, it being my wish thus to equalize, between my children and the descendants of each of them, the benefits of my estate.

"Item 10. In order to encourage my son, Cassius, to habits of business and economy, and to acquire a proper regard for property and its value, I hereby authorize my executor, in case he shall deem it prudent and proper so to do, but in no event otherwise, to make advances from the principal of my estate to my son, Cassius, for the benefit of himself and his family, in such amounts and at such times as to him, my said executor, shall deem it prudent and safe; but in no event shall such advances be made to such an extent as to impair the annuity herein provided for my wife, nor shall they be so great in amount as, combined with the excess of advances made to him during my lifetime over those made by me to my daughter, Arrial, or to her and her children together, (interest from the time of my death being added thereto at six per cent. per annum,) would amount to one-half the principal sum of my estate, and provided that the amount of any advances, as aforesaid, that may be made to my son, Cassius, by my said executor, shall be

deducted by my said executor from the amount that would be due to the children of my son, Cassius, under the foregoing plan of the final distribution of my estate mentioned in item nine of this, my will."

Also the following items of the codicil to said will:

"Item 1. Believing it to be for the best interest of my estate, and of all those who are, or may be, interested in the same, I do hereby revoke, cancel, and annul the whole of item 10 in said will, beginning with the words, 'In order to encourage;' and ending with the words, 'item nine of this, my will;' and I hereby declare said item ten, (10,) and every part thereof, to be no longer any part of my said last will and testament.

"Item 2. In order to settle definitely, and make forever free from dispute, that portion of item eight (8) of my said last will which relates to the division and distribution of the annual net income of my estate, I hereby declare it to be my wish and will, and I do hereby accordingly direct, that the one-half of said yearly net income which is to be expended for the benefit of my son, Cassius, and his family, is to be so expended for his benefit only until the time arrives for the final distribution of my estate which shall be made under the provisions of said will; and to this extent are the words in said will directing said portion of income to be expended for his benefit, 'so long as he (Cassius) shall live,' to be modified and controlled; also, that the one-half of the said annual income which is to be expended for the benefit of Cassius, as aforesaid, shall, until expended or otherwise disposed of, as provided in said item, be held and kept by my said executor in his possession in trust, to the end that the same may be applied as my said executor shall deem best, and not otherwise, for the benefit of my son, Cassius, and his family; also, that any portion of said share of income which may be invested for the benefit of Cassius shall likewise be held and kept in his possession in trust by my said executor, the same to be expended for Cassius' benefit, or paid to him at such time, and in such amounts, as he (my said executor) may deem best, and not otherwise.

"Item 3. Unless my executor shall have sooner made a final distribution of my estate under the powers granted in my said will, I hereby will and direct that such final distribution be made as soon as may be after the death of my son, Cassius, provided at that time the youngest child of my daughter, Arrial, then living, shall have reached the age of majority."

"Item 5. In event that my son, Cassius, should have no children living, nor grandchildren living, at the time of the final distribution of my estate, as provided in my said will, I direct my executor to retain in his own custody and possession one-half of the whole estate as it may then exist, and hold the same in trust so long as Cassius may live, giving to Cassius so much of the annual net income of said one-half as he may deem best, and at the death of Cassius said one-half of my estate so retained and held to be by said executor distributed per stirpes among the children and grandchildren of my daughter, Arrial; the other half of my estate, in the event spoken of in this item, to be divided between the children of, and grandchildren of, my deceased daughter, Arrial, in the manner set forth in my will, whenever such final settlement shall take place."

There was evidence submitted from which it appeared that the testator's family, at the making of his will in 1876, and of the codicil in 1881, consisted of his wife, his son, Cassius, and three children of a deceased daughter, Arrial. Cassius was himself a man of family, consisting of a wife and two children. The testator's widow was amply provided for by provisions of the will unnecessary to be stated. Before the institution of this suit she died. Cassius, his wife and two children, are living, as is also the case with the three children of Arrial. At the date of the will, Cassius was a man of spendthrift habits, and hopelessly involved in debt. Item 10 of the will, when read in connection with Item 1 of the codicil, made five years later, and shortly before the death of testator, indicates the habits and financial condition of Cassius, and that at the later date his father had despaired of his reformation. The large debt due to complainant, Raynolds, had been incurred when the codicil was drawn. There was evidence, independent of the intimations found in the will and codicil, that the testator was fully aware of the bankrupt condition of Cassius and his want of business habits.

Francis J. Wing and J. Wm. Ball, for plaintiff.
Estep, Dickey, Carr & Goff and Lawrence Maxwell, Jr., for de-
fendants.

Before TAFT and LURTON, Circuit Judges, and SEVERENS,
District Judge.

After stating the facts, the opinion of the court was delivered by LURTON, Circuit Judge:

The character of the interest which the judgment debtor, Cassius Hanna, has in the trust founded by his father, depends upon the true construction of his will. That he has no interest whatever in the corpus of the estate is conceded. Whatever interest he has is limited to the one-half of the income of the fund devised to the executor, Brooks. The other half of the income is wholly devoted to the children of the testator's deceased daughter, Arrial. Whether Arrial's children take vested interests in their half of the income, or merely a support and maintenance out of the income, is wholly unimportant. The trusts in behalf of Cassius and the children of Arrial are distinct. The one in no way depends upon the other. The terms of the will creating them are not identical. The conditions surrounding the testator when he made his will, calculated to aid in the interpretation of his intent as to Cassius, were so different from those bearing upon his purpose as to the children of Arrial, that the character of the one trust would not materially aid in the interpretation of the other. Two views are presented by the learned counsel for the creditor as to the true construction of so much of the will as relates to the interest of Cassius in the income:

The first is that raised by the error assigned by complainant, Raynolds, on his cross appeal, to wit, that the interest of Cassius extends to the whole of one-half of the income, and not one-fourth, as ruled by the circuit court. This position excludes the "family" of Cassius from all status as beneficiaries. Such a construction would operate to make for the testator a new will. "Cassius and his family" are distinctly made the beneficiaries as to one-half of the income. There is just as much authority for excluding Cassius as a beneficiary as there is for excluding those who are designated as "his family." This is not a bequest to Cassius for the benefit of his family, or to him as a parent for the purpose of educating and maintaining his children. It does not fall within the principle of *Hadow v. Hadow*, 9 Sim. 438, or *Browne v. Paull*, 1 Sim. (N. S.) 92. Those cases involved legacies to a parent for the purpose of maintaining and educating children. They were decided upon the ground, as stated by the vice chancellor in *Browne v. Paull*, "that when, during the minority of a child, the interest of such child's legacy is directed to be paid to the parent, to be applied for or towards its maintenance, there the direction as to the application is a mere charge for the benefit on what is substantially a gift to the parent subject to such charge." See, also, *Perry, Trusts*, §§ 117, 118, and cases cited.

In those cases the parent was held bound to furnish reasonable

maintenance and support, but was held entitled to any surplus of income. Neither furnishes the slightest authority for supposing that, even in regard to trusts of that kind, the parent could have appropriated, or, a fortiori, a creditor of the parent, the fund to his own use and purposes, without maintaining the children. The wife and children could, in equity, enforce its proper appropriation. *Chase v. Chase*, 2 Allen, 101; *Raikes v. Ward*, 1 Hare, 445.

In this case we are dealing with a devise, not to Cassius, charged with a trust, but to the defendant Brooks, who is to apply and expend the income for the benefit of "Cassius and his family." The intent of the testator with respect to the children of the "family" is most plainly impressed as a trust, to be executed by the trustee, by the clause of the fourth item where, in regard to the expenditure of the income, the testator declares that "in the expenditure of income for the benefit of my son, Cassius, and his family, as well as for the children of my daughter, Arrial, I desire my executor to have in view the maintenance and education of my grandchildren on a scale comporting with their condition and rank in life."

The power, at the discretion of the executor, to pay over the income in cash to Cassius, would, if exercised, have made him a sub-trustee, and accountable certainly for the maintenance and support of the others who composed his family. That power has, however, never been exercised. The discretion of the executor as to whether he will do so, or himself expend the fund, is not subject to judicial control.

But it has been pressed upon us that the second item of the codicil, in express terms, declares that this income is to be expended for the "benefit of Cassius only," and that this change was made, "as announced by the testator himself, to settle definitely what might otherwise be a ground of dispute between beneficiaries." If the whole of the item is read together, it will be most apparent that the testator was dealing with the question as to the duration of the scheme for the distribution and expenditure of the annual income. Item 8 of the will had directed that the one-half of the net income of the estate should "be expended by my said executor for the benefit of my son, Cassius, and his family, so long as he (Cassius) shall live." By item 9 of the will the executor is directed to continue to control and manage the estate, and distribute the income as before directed, "until the youngest child of Arrial then living shall come of age," when he is directed to divide and distribute the whole of the estate among the grandchildren of the testator, share and share alike, etc. The same clause gave to the executor the power to postpone this division "if, in his opinion," the welfare of his son, Cassius, or of his grandchildren, should be thereby promoted, until such time as he should think "prudent," "but in no event until then."

By another provision of the same item a distribution might be hastened by advancing to any grandchild a part, or the whole, of the share to which such grandchild should be entitled, provided such advancement should be deemed suitable and prudent to the executor, and subject to the further provision that the final dis-

tribution should not be hastened so as to occur before the death of the testator's widow, nor advancements made to individual grandchildren during her life which would impair or affect the annuity provided for the widow. Thus, by item 9, the final distribution of the estate might be made, in the discretion of the executor, at any time after the death of the widow, or at the arrival at age of the youngest daughter of Arrial, or any time thereafter, if the executor saw fit to postpone it; but by item 3 of the codicil a final distribution was required at the death of Cassius, provided the youngest child of Arrial was then of age.

When such final distribution should occur it would, of course, terminate the trust for the benefit of "Cassius and his family" out of the income. This distribution might occur before the death of Cassius. Yet, by item 8 the income was to be distributed so long as Cassius should live. This was a contradiction. This is the doubt settled by item 2 of the codicil.

To make clear the duration of this expenditure for the benefit of Cassius and his family, the testator, by the codicil, declared that "in order to settle definitely, and make forever free from dispute, that portion of item eight (8) of my said last will which relates to the division and distribution of the annual net income of my estate, I hereby declare it to be my wish and will, and I do hereby accordingly direct, that the one-half of said yearly net income which is to be expended for the benefit of my son, Cassius, and his family, is to be so expended for his benefit only until the time arrives for the final distribution of my estate shall be made under the provisions of said will; and to this extent are the words in said will directing said portion of income to be expended for his benefit 'so long as he (Cassius) shall live' to be modified and controlled."

The testator obviously meant that this income "is to be so expended for his benefit only until the time arrives for the final distribution," as fixed by item 9 of his will. "Only" qualifies the duration of the expenditure for "his benefit," and should be so punctuated and read. The words "for his benefit," in same clause, refer to him as the head of his family, and are not intended, when read with the context, to limit the benefit of the expenditure to him personally.

We are, upon these considerations, clearly of opinion that the "family" of Cassius are express objects of the testator's bounty, and have the same interest in the income that he has.

The second proposition as to the construction of the will is presented by a most learned and able opinion by the circuit judge who heard the case below. The view taken by the judge is comprehended in his conclusion that "there is nothing to indicate that it was the intention of the testator to limit and confine the application of the trust fund to the personal support of the designated beneficiaries; on the contrary, it clearly appears that the provision was for their general benefit." He also thought that, in a case where the income was applicable to the "general benefit" of the cestui qui trust, the interest of each was separable and appor-

tionable, and was such an interest as could be subjected by creditors of any of the beneficiaries. As to the method of apportionment he said:

"How the trust fund in question should be divided between Cassius and his children is a matter not free from doubt or difficulty. Taking an equitable view of it, the apportionment should be made between them so as to assign or allot one-half thereof to Cassius, and one-half to his children, thus making Cassius' share from the net yearly income of the estate one-fourth of the whole."

We find ourselves unable to adopt these conclusions. If the interest of Cassius is apportionable, and is subject to attachment, then a fortiori it must be one which is alienable. If alienable and attachable, then it must be one which he could anticipate. If an interest of the foregoing character, then what is there to prevent Cassius from demanding his proportion from the trustee in cash, and enforcing his demand by suit? If he has an interest of that kind, then each of those composing "his family" have a like interest, and a like right of anticipation, and a like right to alien, for we have already decided in the foregoing part of this opinion that each person composing his family had an equal interest in the bounty of the testator with Cassius. When this will was made, Cassius was hopelessly in debt. He was financially worthless, a confirmed spendthrift, and unable to appreciate the proper use of property or its value. This state of things was well known to the testator when he made this will. Yet Cassius was his son. He could not ignore his obligation as a father. Cassius had a wife and two sons. These were objects worthy of the testator's bounty, and their condition doubly appealed to his affection and his duty. If he gave to Cassius a child's part of his estate, he threw it to his creditors. Every word and line of the will indicates that it was written with a view to the deplorable situation of his son and the helpless dependency of that son's family. These attending circumstances may, and ought to, be taken into consideration in ascertaining the intent of this testator. "The interpreter may place himself in the position occupied by the testator when he made his will, and from that standpoint discover what was intended." *Blake v. Hawkins*, 98 U. S. 315. That the dominating purpose of the testator in founding this trust was to provide for the support and maintenance of "Cassius and his family" collectively seems to us clear when we read the will by its four corners, in the light of the circumstances under which it was made.

It is hardly necessary to observe that if this was a simple gift of the interest or income of this fund, with no other limitation or qualification than that it was "for the benefit of Cassius," it would give to him a vested interest in the income. A gift "for the benefit of another" would be a mere general expression of the motive of the testator, and would impose no obligatory limitation upon the manner of enjoyment. *Apreece v. Apreece*, 1 Ves. & B. 364; *Dawson v. Hearn*, 1 Russ. & M. 606; *Ford v. Batley*, 17 Beav. 303; *Yates v. Compton*, 2 P. Wms. 308; *In re Skinner's Trust*, 1 Johns.

& H. 102; In re Sanderson's Trust, 3 Kay & J. 497; Henson v. Wright, 88 Tenn. 507, 12 S. W. 1035.

In the case last cited the devise was to a trustee of land. The trustee was directed to hold said lands "for the benefit of said W. A. Hamilton only, and to account to him for the rent or yearly issues of said land," "for the only proper use and benefit of him (the said W. A. Hamilton) for and during his natural life." The trustee and beneficiary united in a conveyance of the lands for the life of said Hamilton, there being a valid devise over to others at his death. This conveyance was sought to be set aside upon the ground that the trust was one for the maintenance and support of the beneficiary, and that the power of alienation was therefore withheld by implication, as repugnant to the purposes of the testator. The Tennessee court said:

"These words do not limit the interest of the cestui que trust to a support and maintenance, or declare the object of the trust to be to make provision for his support. They only operate to declare a distinct trust for the sole and only 'benefit' of Hamilton during his life. A trust may be so created that no interest vests in the beneficiary,—as, when it is limited to the support and maintenance of the beneficiary, and he is prohibited from alienation or anticipation; so, when the income is to be paid over only in the discretion of the trustee, or when it can only be applied for a special use, such as education or support. In all such cases the purposes of the trust would obviously be defeated if the beneficiary could assign or alienate. But whenever the absolute equitable interest is vested in the cestui que trust, and there is no prohibition upon his power of alienation, the incidents of ownership attach, and the interest is assignable." "It is difficult to see," said the court, "how this trust would be breached by an assignment of the rents accrued or to accrue. These rents would, in such case, have been applied to the 'only use and benefit' of the beneficiary, just as effectually as if paid into his hands."

But here we find the words, "for his benefit" qualified, and direction given as to how it should be used "for his benefit,"—how expended and applied. The subsequent limitations which operate, read in the light of the surroundings under which the will was made, to so qualify this gift as to cut it down to one for maintenance and support, are found when we consider these circumstances:

(1) The income was not to be paid into the hands of Cassius, save in the absolute discretion of the trustee, but was to be "expended" by the trustee.

(2) It was not to be expended on Cassius, or for his exclusive benefit, but for "the benefit of Cassius and his family." The "family," as a distinct unit, was in the mind of the testator, and the "family," of which Cassius is a member and the head, as an object of the testator's anxious care, is made the recipient of his bounty. Upon this "family" the income is to be "expended." Looking to the condition of Cassius, the relation he bore to the testator, the natural affection of the grandfather for the children of his son, and their utter helplessness, we can read no other meaning than that, by the requirement that the income shall be expended for the benefit of that son and the family of that son, the testator meant that the expenditure should be for the support and mainte-

nance of that family as a family, and the support and maintenance of that son as a member of that family.

(3) The direction that the children of this family shall be educated and maintained "on a scale comporting with their condition and rank in life" supports this view.

(4) The language of the testator reposes in the executor a discretion as to whether the whole, or only a part, of the income shall be expended for the benefit of Cassius and his family. The will is explicit as to this, and is in these words:

"And if, in the judgment of my said executor, the net annual income of my estate, as above described, cannot all be properly and judiciously expended or advanced to Cassius and his family and to the children of Arrial, as hereinbefore described, I authorize and direct my executor to invest such surplus as may remain, after what he deems a reasonable expenditure has been made, for the benefit of the child or grandchild who would be entitled to it under the foregoing plan of distribution."

As to this surplus a further direction is given in the second item of the codicil, by which it is provided that the one-half of the income to be "expended for Cassius and his family" "shall, until expended or otherwise disposed of, as provided in said item, be held and kept by my said executor in his possession in trust, to the end that the same may be applied as my executor may deem best, and not otherwise, for the benefit of my son Cassius and his family."

This is applicable to any surplus of income in the hands of the executor. It is to be "kept" and applied as the executor may deem "best, and not otherwise," for the benefit of Cassius and his family; that is to say, it is to continue income, and subject to the same trusts. Thus, the larger income of one year will help out the shorter receipts of another. The needs of one year may greatly exceed those of another, and provision is made for this possible condition by giving the executor direction to keep such surplus income for such use and purposes as may require it. Under item 8 of the will the executor had been required to invest any surplus "for the benefit of the child or grandchild who would be entitled to it under the foregoing plan of distribution." Counsel for complainant, Raynolds, read this as if it were a direction that unexpected income should become the exclusive property of Cassius, and that this interest was to be invested for Cassius, and that this, at least, they might reach as subject to his debts. The better opinion, looking alone to that item, would seem to be that the testator had no such meaning; that the phrase, "for the benefit of the child or grandchild," entitled to such income "under the foregoing plan of distribution," was a mere direction that the half which was intended for the children of Arrial should be invested for their benefit, while the other should be invested for the like benefit of those entitled to it. But, however this may be, there has been no such investment. There has been, and is, an unexpended balance of income. This the executor holds in trust, as directed by item 2 of the codicil, already quoted.

By the concluding clause of this last referred to item the executor is given power, if he shall so choose, to invest the surplus in-

come "for the benefit of Cassius," to likewise hold and keep such invested balance in trust, "the same to be expended for Cassius' benefit, or paid to him at such times, and in such amounts, as he (my said executor) may deem best, and not otherwise."

Until he has exercised this discretion, and invested the excess for the benefit of Cassius, no interest has vested in him under this power.

Looking to both item 8 of the will and item 2 of the codicil, we conclude:

(1) That the executor may use his reasonable discretion as to whether the whole of the income shall be annually expended.

(2) That, if he does not deem it judicious to expend the whole, he may retain in trust such surplus as unexpended income, to be used afterwards by him as income for the maintenance and support of Cassius and his family.

(3) That in his discretion he may invest such surplus income for the "benefit of Cassius," thus devoting it exclusively to his benefit. This power to direct surplus to the exclusive benefit of Cassius is not an imperative trust, is purely discretionary, and cannot be controlled.

(4) No such power has been exercised, and there is no fund invested exclusively for the benefit of Cassius, and therefore no question before us as to the rights of his creditors in such an event.

We have, then, a case where the trust is for the maintenance and support of Cassius as one of the "family," collectively the objects of the testator's bounty. Under such a trust, Cassius has no such vested separable interest as can be reached by his creditors. That which is given to him is not the income of the fund, or any separable part of the income. The trust, apart from the absolutely discretionary powers of the executor, is for his maintenance and support. This is all that he can compel the executor to furnish. Neither can he, as a matter of absolute right, demand this separate and apart from his family. In the discretion of the executor he might be separately provided for, but he has no strict legal right to demand it. Neither is the executor obliged to use the whole income if a less sum, in his discretion, is abundant. He may provide for unexpected deficiencies in the income by economy, when it is not essential to use all. He may provide against unusual demands by an accumulation. If he thinks best, he may invest the whole, or any part, of this accumulation for the benefit of Cassius. His judgment as to this cannot be controlled so long as he acts in good faith. If he makes no such appropriation of surplus, and does not afterwards use it, this surplus would follow the principal at distribution, and must go as the capital goes.

This is upon the principle, as stated in *Hanson v. Graham*, 6 Ves. 249, "that nothing more than a maintenance can be called for,—what can be shown to be necessary for maintenance,—however large the interest may be; and therefore what is not taken out of the fund for maintenance must follow the fate of the principal, whatever that may be." To the same effect is the opinion in *Re Sanderson's Trust*, 3 Kay & J. 497. The circuit judge thought

that there was neither an express nor implied direction that any part of the income should follow the corpus. As to the excess, he said "that the trustee was undoubtedly invested with a discretion as to the amount of the income he would pay over in cash or expend for the beneficiaries," and that "this discretion, so long as honestly and reasonably exercised, a court of equity could not, or would not, control, but that the surplus or residue of the income not so distributed was required to be invested for the benefit of the cestui que trust entitled." We think the learned judge did not give due weight to the effect of item 2 of the codicil in modifying item 8 as to this surplus. If he is not under obligation to invest for the benefit of Cassius, and is not under obligation to spend the whole of the interest, and if the beneficiaries can call only for maintenance, support, and education, then, on the principle above stated, there is an implied direction that the unexpended and uninvested income shall follow the fate of the corpus.

It is also to be noted that there was no imperative requirement, after the widow's death, as to the continuance of this trust for maintenance. After her death the executor could terminate the trust by advancing the grandchildren their respective shares if he thought it fit and best; or he could wait until the youngest child of Arrial should reach her majority, and then distribute. The trust is not to continue for the life of Cassius, save in the discretion of the executor.

In the view we have taken of this trust, it is one under which no interest in the income has vested in Cassius. He has, therefore, by necessary implication, no power to anticipate it, and none of alienation. The trust is one for a specific purpose, and is such a one as, under the weight of authority, neither the cestui que trust nor his creditors nor his assignees can defeat or divert from the appointed purposes. The case of *Godden v. Crowhurst*, 10 Sim. 643, is much in point. In brief, that case was this: The testator bequeathed his residuary estate to trustees, with direction that the interest upon it should be paid to his son for life, and, after the son's death, to his wife and children. The will then directed that, if the son should assign or charge the interest to which he was entitled for life, or attempt or agree to do or commit any act whereby the same, or any part thereof, might, if the absolute property thereof was vested in him, be forfeited to, or become vested in, any person or persons, then the trustees should pay and apply the said interest for the maintenance and support of his son, and any wife or child or children he might have, and for the education of such issue as the trustees should, in their discretion, think fit. Some years after the testator's death the son became a bankrupt. The assignee sought to recover the interest upon the fund. It was held that the trust for the benefit of the son, his wife and children, was valid, and that the assignee was not entitled to any part of the provision.

The vice chancellor, among other things, said:

"That this fund, if it be given at all, is given collectively, and not distributively, for the maintenance and support of the son, and any wife and

child or children he may have. The word 'or,' there, is merely addressed to children, collectively, as the substitutes for a single child. It is not a word of distribution which separates the son from the wife, or the wife from the child. I so express myself because, according to my apprehension, this is a clause in which whatever benefit is intended is given, collectively, to the son and the wife and the children; and it appears to me that that is the grammatical construction, for the reason I have stated. Then the property is given 'for the maintenance and support of my said son, and any wife and child or children he may have, and for the education of such issue, or any of them, as they, (my said trustees,) for the time being, shall in their discretion think fit.' Now, there is nothing in point of law to invalidate such a gift, that I am aware of. It does not follow that anything was, of necessity, to be paid; but the property was to be applied, and there might have been a maintenance of the son and of the wife and of the children without their receiving any money at all. For instance, the trustees might take a house for their lodging, and they might give directions to tradesmen to supply the son and the wife and the children with all that was necessary for maintenance; and therefore my opinion is that I am not at liberty to take this as a mere gift for the benefit of the son simply, but it is a gift for his benefit in the shape of maintenance and support of himself jointly with his wife and children; and, if that is the true construction of the gift in question, the result is that the assignees are not entitled to anything."

Mr. Perry on Trusts, in section 386a, expresses the principle upon which we have proceeded. That learned author, after expressing certain views as to trusts in restraint of alienation and anticipation not necessarily involved here, says:

"But a trust may be so created that no interest vests in the cestui que trust; consequently, such interest cannot be alienated, as where property is given to trustees to be applied, in their discretion, to the use of a third person, no interest goes to the third person until the trustees have exercised this discretion; so, if property is given to trustees to be applied by them to the support of the cestui que trust and his family, or to be paid over to the cestui que trust for the support of himself and the education and maintenance of his children, in short, if a trust is created for a specific purpose, and is so limited that it is not repugnant to the rule against perpetuities, and is in other respects legal, neither the trustees nor the cestui que trust nor his creditors or assignees can divest the property from the appointed purposes. Any conveyance, whether by operation of law or by the act of any of the parties, which disappoints the purposes of the settler by divesting the property or the income from the purposes named, would be a breach of the trust. Therefore, it may be said that the power to create a trust for specific purposes does, in some sort, impair the power to alienate property."

The supreme court of the United States have, in the clearest terms, upheld trusts for the support and maintenance of a beneficiary. The case of *Nichols v. Eaton*, 91 U. S. 716, is an instructive one. By the will of Mrs. Eaton she devised her estate to trustees, upon trusts to pay the rents, profits, and income to her four children equally during life. There was a provision against alienation and insolvency by which, upon bankruptcy or insolvency, or an attempted alienation, the trust should terminate, and the income go over to the wife and children of the beneficiary. That a devise of income, to cease upon insolvency or alienation, with a limitation over, was good, was not a question of serious contest. Under the well-settled rule of the English courts of equity such cesser and limitation over had been always held valid. *Brandon v. Robinson*, 18

Ves. 429. The controversy was over another provision, by which, in case of the bankruptcy of one of the sons without wife or children, (which was the case with respect to the bankrupt whose interest was in controversy,) it was provided that "it shall be lawful, but not obligatory, on her trustees, to pay to said bankrupt or insolvent son, or to apply to the use of his family, such and so much of said income as said son would have been entitled to in case the forfeiture had not happened."

The contention was that this provision was designed to evade the policy of the law which made void any arrangement by which the beneficial enjoyment was to be secured to one, free from liability for debts. It was insisted that the discretion vested in the trustees is equivalent to a direction, and that it was well known that it would be exercised in favor of the bankrupt. The court, through Mr. Justice Miller, after stating that the doctrine relied upon by the assignees who sought to reach the income as an asset of the bankrupt was opposed by the case of *Twopeny v. Peyton*, 10 Sim. 487, and *Godden v. Crowhurst*, Id. 642, said:

"No case is cited, none is known to us, which goes so far as to hold that an absolute discretion in the trustee—a discretion which, by the express language of the will, he is under no obligation to exercise in favor of the bankrupt—confers such an interest on the latter that he or his assignee in bankruptcy can successfully assert it in a court of equity or any other court. As a proposition, then, unsupported by any adjudged case, it does not commend itself to our judgment on principle. Conceding, to its fullest extent, the doctrine of the English courts, their decisions are all founded upon the proposition that there is somewhere in the instrument which creates the trust a substantial right—a right which the appropriate court would enforce—left in the bankrupt after his insolvency, and after the cesser of the original and more absolute interest conferred by the earlier clauses of the will. This constitutes the dividing line in the cases which are apparently in conflict. Applying this test to the will before us, it falls short, in our opinion, of conferring any such right upon the bankrupt. Neither of the clauses of the provisos contains anything more than a grant to the trustees of the purest discretion to exercise their power in favor of testatrix's sons. It would be a sufficient answer to any attempt on the part of the son, in any court, to enforce the exercise of that discretion in his favor, that the testatrix has in express terms said that such exercise of this discretion is not 'in any manner obligatory upon them,'—words repeated in both these clauses. To compel them to pay any of this income to a son after bankruptcy, or to his assignee, is to make a will for the testatrix which she never made, and to do it by a decree of a court is to substitute the discretion of the chancellor for the discretion of the trustees, in whom alone she reposed it. When trustees are in existence and capable of acting, a court of equity will not interfere to control them in the exercise of a discretion vested in them by the instrument under which they act, (*Hill, Trustees*, 486; *Lewin, Trusts*, 538; *Boss v. Godsall*, 1 *Younge & C. Ch.* 617; *Maddison v. Andrew*, 1 *Ves. Sr.* 60;) and certainly they would not do so in violation of the wishes of the testator."

The case of *Holmes v. Penney*, 3 *Kay & J.* 90, may be cited as fully supporting the proposition that, under a trust for the maintenance of a number of persons as a family, the trust is valid, and no one of the beneficiaries has a separable interest. There are many American cases holding like views. Among them may be cited *Rife v. Geyer*, 59 *Pa. St.* 393; *Wells v. McCall*, 64 *Pa. St.* 207; *Holdship v. Patterson*, 7 *Watts*, 547; *Chase v. Chase*, 2 *Allen*, 101; *Leavitt v.*

Beirne, 21 Conn. 1; Nickell v. Handly, 10 Grat. 336; Perkins v. Dickinson, 3 Grat. 335; Davidson v. Kemper, 79 Ky. 5; Hall v. Williams, 120 Mass. 344; Slattery v. Wason, 151 Mass. 266, 23 N. E. 843; Jourolmon v. Massengill, 86 Tenn. 88, 5 S. W. 719; State v. Hicks, 92 Mo. 439, 4 S. W. 742; Smith v. Towers, 69 Md. 77, 14 Atl. 497, and 15 Atl. 92.

The decision has been rested upon a construction of the will which brings the trust within the extremest doctrine of the English courts as to bequests for the maintenance and support of more than one cestui que trust. We do not thereby intend to be understood as assenting to the proposition maintained by those courts, that the power of alienation is a necessary incident to a life estate in rents, dividends, or income. That doctrine is not necessarily involved. The great weight of American authority seems to be against the extreme view of the English courts. See the cases cited above.

The decree must be reversed and remanded, that the bill may be dismissed, in accordance with the views herein expressed.

On Rehearing.

(February 5, 1894.)

LURTON, Circuit Judge. A petition for rehearing has been presented and fully considered. The points made are four in number: The first calls attention to section 5464, Rev. St. Ohio, and insists that, under that section, any interest of Cassius Hanna in the trust created by his father's will, though such an interest be nothing more than a support and maintenance, is subject to the demands of his creditors. That section is in these words:

"When a judgment debtor has not personal or real property subject to levy on execution sufficient to satisfy the judgment, any equitable interest which he has in real estate, as mortgagor, mortgagee, or otherwise, or any interest he has in any banking, turnpike, bridge, or other joint stock company, or in any money contract, claim or chose in action, due or to become due to him, or in any judgment or order, or any money, goods or effects which he has in the possession of any person, or body politic or corporate, shall be subject to the payment of the judgment, by action."

This statute was not deemed to have any application to a trust where the beneficiary had no right to demand any distributive part of the income, and under which the trustee was to apply and personally expend the income in the maintenance and support of the debtor as one of a family collectively to be maintained. The trustee, in his discretion, might pay over the income in whole or in part. That discretion could not be controlled. The trust, as we construed it, gave the trustee the right to refuse to Cassius a separate support, and it gave him the absolute and uncontrolled right to refuse to pay over a dollar of the income in money. If we were right in the construction we placed upon this trust, it is within the principle of *Godden v. Crowhurst*, 10 Sim. 648; *Holmes v. Penney*, 3 Kay & J. 90; *Hill v. McRae*, 27 Ala. 175; *Hall v. Williams*, 120 Mass. 344; and *Nichols v. Eaton*, 91 U. S. 716. In *Godden v. Crowhurst*, supra,

the vice chancellor said, concerning a trust in this respect like the one under consideration:

"Now, there is nothing, in point of law, to invalidate such a gift, that I am aware of. It does not follow that anything was, of necessity, to be paid; but the property was to be applied, and there might have been a maintenance of the son and of the wife and of the children without their receiving any money at all. For instance, the trustees might take a house for their lodgings, and they might give directions to tradesmen to supply the son and the wife and the children with all that was necessary for maintenance; and therefore my opinion is that I am not at liberty to take this as a mere gift for the benefit of the son simply, but it is a gift for his benefit in the shape of maintenance and support of himself jointly with his wife and children; and, if that is the true construction of the gift in question, the result is that the assignees are not entitled to anything."

The right to acquire and receive a support in kind, as one of a household or family, is not an interest which is capable of severance or valuation, and is not such an equitable estate or interest in property as can be subjected. In no view of the Ohio statute can a creditor be benefited. But this Ohio statute ought not to be construed as relating to, or dealing with, the substantive laws of property. It is found in the Code of Civil Procedure, and it should be regarded as extending the remedy of creditors to property and property interests not subject to seizure by execution at common law on account of the narrowness of the common-law writ. At common law, the writ of execution was limited in its operation, and was, in addition, confined to those estates recognized by the law as legal estates. Choses in action and equitable interests were not subject to common-law writs. On account of this, the jurisdiction of equity to entertain suits in aid of a creditor had its origin. 3 Pom. Eq. Jur. § 1415. Statutes have been enacted in many states extending common-law remedies, and enlarging equitable jurisdiction in creditors' suits. This Ohio statute is one of this class.

The interest which Cassius has under this trust is not enlarged or otherwise affected by the Ohio statute. The interest which the debtor, Cassius, has in the trust, is not one which can be reached and subjected by a creditor, either at law or at equity.

Another point made in the application for rehearing deserves consideration. The insistence is that income at the end of each year remaining unexpended is absolutely required to be invested for the benefit of Cassius, and that surplus is absolutely the property of Cassius, and therefore subject to his creditors. The view expressed in the opinion was that the executor had a discretion as to whether he would hold such surplus for the common benefit, or invest the same under the provisions of the eighth item of the will; that, having made no such investment, he could not be coerced. The disobedience of the executor to a positive direction to invest such surplus would not operate to diminish the rights of Cassius or his creditors in the fund. If there was a surplus, and it was the duty of the executor to invest it, then the share of Cassius in the surplus is just as much subject to the claims of his creditors as if it had been invested. Thus far we agree with the counsel for petitioner. Did

the executor have any discretion as to when and how much of such surplus income he would invest?

(1) It is too clear for argument that the executor had the power to have expended the whole of such income as it came to hand, and thus have prevented the accumulation of a surplus.

(2) He might have advanced to Cassius or his family, if he saw fit, such unexpended current income.

(3) Under item 9 the executor was given power to advance, at any time, "any portion of the final share of my estate to either of my grandchildren that would be due to them under the plan of distribution herein provided," subject only to the provisions made affecting the testator's wife. "In other words," quoting brief of counsel for the executor, "the executor may, in his discretion, at any time after the death of the widow, advance the entire estate to the grandchildren, and, at any time prior to her death, advance to them all, except sufficient to raise her annuity." This provision, whereby the executor, in his discretion, might turn over to others the whole of the estate out of which the income of Cassius was to arise, was not only inconsistent with the suggestion that the interest of Cassius in the income was a vested one, but serves to establish the proposition that the power to invest surplus income was a discretionary power. If we confine ourselves to the closing paragraph of item 8 of the will, it might well be contended that the executor had no discretion as to such surplus; but if we look at the will as a whole, and endeavor to ascertain the intent of the testator, we are led to the conclusion that the testator did not arbitrarily require the unexpended income to be invested for the benefit of Cassius, or Cassius and the members of his family. No power is anywhere given by the eighth item to trench upon such investments. If, however, we turn to item 2 of the codicil, we see that unexpended income is to be held in trust "until expended or otherwise disposed of, as provided in said item," "to the end that the same may be applied as my said executor shall deem best, and not otherwise, for the benefit of my son, Cassius, and his family." Speaking of the investment authorized by item 8, the testator continues by adding:

"Also, any portion of said share of income which may be invested for the benefit of Cassius shall likewise be held and kept in his own possession in trust by my said executor, the same to be expended for Cassius' benefit, or paid to him at such time, and in such amounts, as he (my said executor) may deem best; and not otherwise."

The interest of Cassius in such investment is that "portion of said share of income which may be invested for the benefit of Cassius." What is that portion? It is clearly not the whole of the unexpended income of one-half of the estate. The family of Cassius had interests in the income; each member an interest equal to that of Cassius. The testator did not contemplate that the whole of such surplus income should be invested for the exclusive benefit of Cassius. He speaks of the interest of Cassius "as any portion of said share." The share he refers to is the one-half of the net income set apart as a fund out of which the executor was to expend

the whole, or as much as he deemed judicious, for the support of Cassius and his family. The interest of Cassius is to be that "portion" of the surplus of that share which the executor shall invest for the benefit of Cassius exclusively. How is the portion of Cassius to be ascertained and separated from the portion to be held for the benefit of the others who compose his family? Looking to the whole scope of the will, we must conclude that this is, as is everything else beyond maintenance, left to the sound and uncontrolled discretion of the executor. He may pay over to Cassius, if he see fit, the whole of the share of income out of which he and his family are to be supported. This discretion is, as we have already seen, personal, and beyond legal coercion. It is easy, therefore, to gather that the executor has a discretion as to what shall be set off for investment exclusively for the benefit of Cassius. What shall be the fate of the portion invested for Cassius?

(1) It is to be observed that the executor is given the evident discretion as to the manner in which such fund shall be used.

(a) He may expend it for his benefit.

(b) Or he may pay it over to him in such sums, and at such times, as he may deem best, "but not otherwise."

(c) If it be neither expended nor paid over, then what? Will it pass to the distributees of Cassius, or under his will? Not one word occurs giving Cassius any further or other interest than such as the executor chose to give. The fund is to remain in the hands of the executor until he pays it over to Cassius or expends it for his benefit, or until the day of final distribution. It will then constitute unexpended income, and, as such, pass with the corpus of the estate. The beneficiaries, having no other interest in the income than a right to maintenance, have not a vested interest in the income. They are to be supported out of the income. The executor may spend so much as he deems proper. The rest, not being given to the testator, is *per necessitate*, when the trust ceases, to be held and distributed as part of the corpus. This is what the testator understood when in the ninth item of the will, and the fifth item of the codicil, he directs, upon the termination of the trust, a distribution of the "whole of my estate," or the "whole of my estate as it may then exist." The fair and rational interpretation of item 8, so far as it refers to the duty of investment, when construed in the light of the purpose of this testator as manifested by surrounding circumstances, and in the light of the whole scope of the will, particularly the second item of the codicil, was to make the investment of surplus income a matter of discretion not to be controlled by the court.

The other points suggested in the application for a rehearing have all been heretofore passed upon, and are covered by the opinion. Rule 29 provides that a petition for rehearing shall briefly and distinctly state its grounds, "and will not be granted or permitted unless a judge who concurred in the judgment desires it, and a majority of the court so determines." It may be added that, when such reargument is desired, it will be ordered without waiting for the application of counsel. *Public Schools v. Walker*, 9

Wall. 603. In the case above cited the chief justice said, as to such petition, that:

"When the court does not, of its own motion, order a rehearing, it will be proper for counsel to submit, without argument, as has been done in the present instance, a brief written or printed petition or suggestion of the point or points thought important. If, upon such suggestion, any judge who concurred in the decision thinks proper to move for a rehearing, the motion will be considered. If not so moved, the rehearing will be denied as of course."

That practice has been followed in the present case. The points upon which counsel have suggested a reargument have been considered. In view of the fact that each point was fully presented, both in oral and printed arguments, we are of opinion that no benefit would result from further argument.

Petition dismissed.

WENHAM v. SWITZER.

(Circuit Court of Appeals, Ninth Circuit. January 15, 1894.)

No. 96.

1. SPECIFIC PERFORMANCE—CONTRACTS ENFORCEABLE—ACCEPTANCE OF OFFER.

Defendant, owning a half interest in a lode mining claim, wrote plaintiff that the other half was for sale, but that it could not be bought for less than a certain sum, and that, if plaintiff wished to buy, he had better send defendant such sum. Plaintiff, in answer, sent part of the amount, and gave defendant authority to telegraph for the balance. Defendant paid more than the amount named, purchasing in his own name. *Held*, that the correspondence created no contract, agency, or trust, binding on the parties, enforceable in equity. 51 Fed. 351, affirmed.

2. SAME—DILIGENCE OF PLAINTIFF.

After defendant had purchased, he wrote plaintiff, offering to convey a half interest in the claim for a certain sum, on plaintiff's sending enough money to amount, with his deposit on hand, to such sum. Plaintiff did not answer for 10 months, and then did not send the amount named. *Held*, that there was no contract enforceable in equity. 51 Fed. 351, affirmed.

Appeal from the Circuit Court of the United States for the District of Montana.

In Equity. Suit by A. A. Wenham against William S. Switzer to compel specific performance of a contract. Bill dismissed. 51 Fed. 351. Plaintiff appeals. Affirmed.

This is a suit in equity to compel the specific performance of a contract. It is alleged in the bill that appellant, Wenham, who is a resident and citizen of Cleveland, Ohio, and respondent, Switzer, who is a resident and citizen of Butte, Mont., in April, 1888, entered into a contract to purchase the Burner lode mining claim, situate in Summit Valley mining district, Silver Bow county, Mont.; that respondent had the sole management of the negotiations for the purchase of the property, and agreed to purchase the same for the joint benefit of appellant and respondent, each to have an undivided half interest therein; that, at the time the agreement was made, it was not known for what price the property could be obtained; that appellant advanced and paid to respondent, on account of said purchase, the sum of \$500, which was to be applied for the purchase; that afterwards, in the month of May, 1888, appellant represented to respondent that the property

could be bought for \$3,000, and that appellant paid respondent the further sum of \$1,000 for the purchase of the property; that in June, 1888, the respondent purchased the property, and represented to appellant that he had paid \$4,000 therefor, and that there was a balance due from appellant of \$500; that respondent purchased the property, and took a deed therefor in his own name; that appellant, prior to bringing this suit, tendered to respondent the further sum of \$500, with interest, and requested and demanded a deed for the undivided one-half interest of said property, which respondent refused to make.

Respondent, in his answer, admits that he received the \$500 and the \$1,000, but denies that he received the same on account of the purchase of the Burner lode, or that he used the same in making that purchase. The other essential averments of the bill as to the agreement to purchase the property for the joint benefit of the parties are denied in the answer. The evidence relied upon to support the averments of the bill consists of extracts taken from general letters, written at various times by the respective parties, principally relating to the condition of certain mining properties in which both parties had an interest.

Respondent, on the 20th day of October, 1887, being then the owner of an undivided one-half interest in the Burner lode, wrote a letter to appellant, wherein he referred to this property as follows: "Mr. Wenham: If you have a friend who desires one-half of a good claim lying alongside of the Alta lode, which I think can be got for fifteen hundred dollars, I wish you would let me know. Some time ago I bought one-half of it. It cost him about two thousand dollars. He is not a miner. * * * It slopes north to our south line of the Alta, while our ground slopes south; so sloping together. It's cheap, I think. Two large veins run lengthwise through it east and west,—same course as ours. And please let me know. From now until spring is the time to pick up property cheap. If you think a sale can be effected, I will send you a copy or a plat of it, as it lays adjoining our grounds,—the Alta lode claim. Then any one can come out. Or I will get a deed of it in the bank, and the exchange can be made either way; and I will get it cheap, as any price can be had for it."

Appellant answered this letter, making inquiries as to the property. March 7, 1888, respondent wrote to appellant: "I think you will do well to secure the interest I spoke of joining the Alta claim." In reply to this letter, appellant, on March 15th, wrote to respondent: "Now, about the claim adjoining the Alta, I want to go in with you. Could the interest be bought for one thousand dollars?" On April 5th appellant wrote as follows: "How about the claim adjoining the Alta claim? Can you secure the $\frac{1}{2}$ you spoke of? Let me hear from you as soon as practicable." On April 13th respondent wrote to complainant in reply, as follows: "In relation to the interest nearest the Alta, it can't be had for less than about fifteen hundred dollars, if it can be bought at any price; but I shall know in about twenty days, and I will write you as soon as I can get to know what I can let you have it for. He may get excited, and ask more. * * * One thing more: If you conclude to take the interest, you had better send fifteen hundred dollars to the First National Bank of Butte, as, if you wait, it may slip into other hands. I am good for all you send me." On April 23d, appellant replied: "Yours of the 13th at hand, and contents noted. According to your wishes, I inclose you five hundred dollars payable to your order. * * * Now, if you go quietly to work, and not let the party who wants to sell get excited, when he agrees to sell, give him the five hundred dollars to bind the bargain, and you can telegraph me for the other one thousand dollars, which I will send immediately on receipt of notice, and, if you can't buy all of his interest, buy half of it. * * * In regard to the claim next to the Alta, please keep it confidential until something is done; and, by the way, what is the name of the claim? * * * P. S. If you did not want to use the money immediately, you could make a special deposit in the bank till you needed it." On April 28th respondent replied: "Yours of the 23d, '88, is received, with one check of five hundred dollars on the First National Bank of Cleveland, Ohio. The mining lode claim is known as the Ontario or Burner lode mining claim. Soon as I can hear from the party, the matter

will be concluded. The money is in bank." On June 4th appellant wrote respondent: "Mr. C. C. Frost * * * wants five hundred dollars. * * * Now, friend Switzer, if you think Mr. Frost can give a good deed as security, and you think best and safe to loan him the money, you can give him the five hundred dollars I have in your care, and I will send you more to take its place." This money was not loaned to Frost.

On June 5th, respondent wrote appellant: "In relation to the Burner mining property, I have got it all and paid for it, and surveyed it for patent, but am doing one hundred dollars' worth of work, so as to have over six hundred dollars' worth of work, which will be a necessary improvement. I am sure of two veins on the ground. But it cost more than fifteen hundred dollars; it cost me about four thousand dollars, all told; but I was determined to have it if it cost more. It will pay to hold when patented. Property is rising in Park canyon. Under the circumstances, I had to take a deed in my own name, and of course had to pay for it on delivery of the deed, and came near losing it at that. Others would have taken it at higher figures. Now, friend A. A. Wenham, send me fifteen hundred dollars, and I will make you a deed of one undivided one-half of the entire Burner property, free of all work excepting the one hundred which I am now doing, which work will be over six hundred dollars,—sufficient to get the patent. Then you will have to stand one-half the expenses of the patent, which only is the regular price in this district and territory. As I have received five hundred dollars of you, so the balance, fifteen hundred dollars, will make the purchase money of your part two thousand dollars. I will [write] you more in detail next letter." Appellant testified upon the trial that he answered this letter, asking Mr. Switzer for full description and plat and other particulars. No such letter was produced, and respondent testified that he had never received any such letter. Respondent testified that, after his letter of June 5th, he wrote to Mr. Wenham "that this money must be paid within thirty days." Appellant testified that he never received the letter. The next letter that appears in evidence is written April 6, 1889, by appellant to respondent,—10 months after the letter of June 5, 1888,—and reads as follows: "Not having heard from you since some time last April or May, I have felt as though you had rather neglected my last letter, written to you some time in the early part of June last. However, as you are the senior, I accept the situation. I inclose check on N. Y. for one thousand dollars. Please let me know how much you figured to be the balance. You now have fifteen hundred dollars in total from me. I have thought it quite strange that I had not heard from you. However, I suppose you would write when you were ready; but, as it was a matter of business, I thought it my duty to write to you now, as time was drawing close."

On May 20, 1889, appellant wrote as follows: "On Apr. 6th I sent you by registered letter one thousand dollars, to apply on my half of the Burner lode claim, together with the five hundred dollars I advanced you some time ago. Please let me know if you received the draft all right, and the amount due you still, and I will remit you so you can mail me deed of same. Please let me hear soon as possible, so I may know that the draft arrived safely." On May 30, 1889, respondent wrote to appellant: "Your note of April 6, '89, containing one check of one thousand, which I deposited in the First National Bank for safe-keeping until you call for it; also your five hundred check is in bank subject to your order. Now, the best investment I can make with the money for you is in the Monitor property, which I think will be safe. By your request, and Mr. C. W. Pomeroy's request, I will make you a deed for fifteen hundred shares of the Monitor, shares at one dollar per share. I can't make you any deed to or in the Burner ground."

Upon this evidence the circuit court dismissed the bill, and entered judgment in favor of respondent for his costs.

R. L. Word and Robert B. Smith, for appellant.

Aaron H. Nelson, for appellee.

Before McKENNA and GILBERT, Circuit Judges, and HAWLEY, District Judge.

HAWLEY, District Judge, (after stating the facts.) It will readily be seen from the facts that the proofs made do not correspond with the allegations of the bill to the effect that respondent agreed to purchase the Burner lode for the joint benefit of the parties. Respondent was the owner of an undivided one-half interest of the Burner lode claim at the time of the commencement of the correspondence between the parties in relation thereto, and the negotiations had reference only to the purchase of the other undivided one-half interest. But, notwithstanding this variance between the pleadings and the proofs, we shall consider the case upon its merits.

What was the contract, if any was made, between the parties? Are any facts shown that entitle appellant to a decree? The voluntary offer or suggestion of respondent, which constitutes the basis or origin of any agreement between the parties, is contained in the first letter, informing appellant that respondent knew of an interest in a mine (not naming it) which he thought could be bought for \$1,500, and wanted to know if appellant knew of any friend that would like to buy it. Subsequently, in March, respondent suggests that appellant would do well to secure the interest mentioned in the former letter. Appellant replied, expressing a desire to obtain the interest, and wished to know if it could be bought for \$1,000. Then comes the reply that the interest could not be had for less than \$1,500, if it could be bought for any price, with the suggestion that, if appellant should conclude to take the interest, he had better send \$1,500, because, if delay was made, the interest might slip into other hands. Instead of sending this amount of money, appellant sent a draft for \$500, and suggested to respondent that he should give the owner, when he agreed to sell, the \$500 to bind the bargain, and then telegraph for the other \$1,000; and upon the receipt of this letter the respondent said that, as soon as the party could be heard from, the matter would be concluded. This, in substance, was the extent of the negotiations prior to the time respondent purchased the property. There was no contract created by any or all of the letters up to this time. The minds of the parties had never met upon any mutual understanding as to the price which was to be paid for the undivided one-half interest in the Burner lode. The respondent had stated that it could not be bought for less than \$1,500, but he never stated that it could be bought for that sum. Respondent had never agreed to advance any money to appellant in making the purchase. On the other hand, he informed appellant that, if he wished to buy, he had better send \$1,500. This suggestion was answered by sending only \$500, with authority for respondent to telegraph for \$1,000 more, and, if he could not buy the interest for that, to buy half of it, without stating what sum should be given for the half. If, up to this time, any contract could be inferred, it would only be to purchase the undivided one-half interest in the Burner lode for \$1,500. Appellant had never authorized the respondent to pay any more. The minds of the parties had never mutually come together

on any other proposition. The parties had never assented to the same thing, in the same sense, in any other way or manner. If respondent paid more than \$1,500 for the interest, he could not, under any agreement or contract then existing between the parties, have compelled appellant to pay more than \$1,500, and it would have been optional upon the part of appellant to take the interest, or refuse to take it, if any greater sum had been paid. Respondent had never agreed to advance any money to make the purchase. He had \$500 of appellant's money that could be applied for the purchase of the interest, and he was only authorized to telegraph for \$1,000 more. If he paid more, the purchase would be on his own account. Unless both parties were bound by the contract, it could not be enforced in a court of equity.

"To entitle a party to specific performance, there must not only be a valid and binding agreement, but, as a rule, the contract, at the time it was entered into, must have been capable of being enforced by either of the parties against the other." Wat. Spec. Perf. Cont. § 196; Bish. Cont. § 78. There was no contract, agency, or trust created by the acts or conduct of the parties prior to the purchase which would bind both parties, unless the purchase was made for \$1,500.

Is it not equally clear that there was no binding contract made between the parties after the purchase of the interest by the respondent? The letter of respondent of June 5, 1888, contains the first and only direct offer that was made. This letter is clear, plain, positive, and certain in all of its proposals, terms, and conditions. It is open, frank, and friendly. There is nothing ambiguous, equivocal, or evasive about it. It is easily understood, and it called for a direct and positive answer. It was a voluntary offer on the part of respondent to convey to appellant an undivided one-half interest in the Burner lode for the sum of \$2,000, with a statement of about what the other expenses in doing necessary work and procuring a patent would be. Respondent had in his hands \$500 of appellant's money. This letter gave to appellant an option to purchase the interest by accepting respondent's offer, and sending \$1,500 to complete his part of the purchase money. "Now, friend Wenham, send me fifteen hundred dollars, and I will make you a deed of one undivided half of the entire Burner property." This was the offer that was made. In order to avail himself of this offer, the law, in the absence of any specified agreement as to time, would require appellant to send the money within a reasonable time. This was not done. There could be no acceptance of the offer without sending the \$1,500. This was the consideration upon which the offer was made. The offer was made by letter sent by mail. It was duly received by appellant. No answer was made to it for a period of 10 months, and then the offer was not directly accepted, and the conditions of the offer were not complied with.

The letters of the appellant written on the 6th of April and 20th of May, 1889, ignore any reference to the offer that was made by respondent in his letter of June 5, 1888. The language of these let-

ters, in the light of the previous correspondence of the parties, is very remarkable, equivocal, ambiguous, and uncertain. "Not having heard from you since some time last April or May." This was certainly a mistake, for appellant admitted upon the trial that he had received respondent's letter of June 5th. "I have felt as though you had neglected my last letter, written some time in the early part of June last." What letter? Was it the one about loaning the \$500 belonging to appellant, in the hands of respondent, to C. C. Frost? Or is it the one which appellant testified as having written in reply to respondent's letter of June 5th, asking for plats and specifications? Then appellant inclosed a check for \$1,000, and said: "Please let me know how much you figured the balance to be." Did not appellant know just how much money was required to be sent, if he accepted respondent's offer, to obtain the deed for an undivided one-half interest in the Burner lode? There is no statement even that he accepted the offer or asked for further time to pay the money. There is no pretense that respondent, for or without a consideration, ever promised or agreed to extend the time for the payment of the money. There is no claim that respondent made any misrepresentation, or that he was guilty of any fraud in the premises.

The evidence fails, in every essential particular, to support the allegations of the bill. No case is made out that would justify a court of equity to compel respondent to execute the deed as prayed for. The rule is fundamental that a party seeking the remedy of specific performance must show himself to have been "ready, desirous, prompt, and eager" to comply with the contract on his part. 3 Pom. Eq. Jur. § 1408, and authorities there cited; Penn v. McCullough, (Md.) 24 Atl. 424. If appellant was ready, anxious, and desirous of availing himself of the voluntary offer of respondent, he should have been eager and prompt to perform his part by sending the money—\$1,500—upon the receipt of respondent's letter. In Mix v. Baldue, 78 Ill. 215, the court held that, where the purchaser of land delays offering payment of the purchase money for five months after the stipulated time for payment, without any excuse therefor, his right to call for a specific performance will be thereby precluded, unless the stipulated time for payment has been waived.

Specific performance of a contract is not a matter of absolute right, but rests entirely in sound judicial discretion, to be exercised according to the settled principles of equity with reference to the facts of each particular case. The facts in this case fail to show any consideration for the contract. Appellant was lacking in the exercise of good faith, and did not comply with the offer made to him with reasonable diligence. There is no clear and satisfactory evidence of any such acceptance or compliance with the terms of respondent's voluntary offer, or of the existence of any agency, trust, or contract between the parties, as would justify a court of equity in granting a decree of specific performance. Colson v. Thompson, 2 Wheat. 336; Purcell v. Miner, 4 Wall. 513, 519; Williams v. Morris, 95 U. S. 456; Hennessey v. Woolworth, 128 U. S. 438, 9 Sup. Ct. 109; Walcott v. Watson, 53 Fed. 429; Evans v. Lee, 12 Nev.

399; *Agard v. Valencia*, 39 Cal. 301; *Magee v. McManus*, 70 Cal. 553, 12 Pac. 451; *Strange v. Crowley*, 91 Mo. 287, 2 S. W. 421; *Durant v. Comegys*, (Idaho,) 28 Pac. 425; 1 Chit. Cont. 11; Bish. Cont. § 327; 1 Story, Eq. Jur. §§ 764, 767; Wat. Spec. Perf. §§ 135, 138, 186, 196; 3 Pom. Eq. Jur. § 1405; 5 Lawson, Rights, Rem. & Pr. § 2607.

The judgment of the circuit court is affirmed, with costs.

LONG v. MAXWELL.

(Circuit Court of Appeals, Fourth Circuit. February 7, 1894.)

No. 49.

1. APPEAL—FINAL DECREE.

A decree for specific performance, concluding all the rights of the parties, is a final decree, notwithstanding that a conveyance which it directs to be made is to be afterwards presented to the judges for their approval of its form and terms.

2. SAME—REVIEW—DECRETAL ORDER.

On appeal from a decretal order which, in effect, merely directs the execution of a former final decree, which has been temporarily suspended on motion of the losing party, the court cannot consider alleged errors relating to matters embraced in the original decree, from which no appeal has been taken.

Appeal from the Circuit Court of the United States for the Western District of North Carolina.

Bill for specific performance by W. D. Maxwell against Noah Long. Complainant obtained a decree, whereupon the defendant, Long, appealed.

This was a bill filed by W. D. Maxwell against Noah Long, in the circuit court of the United States for the western district of North Carolina, for the specific performance of the following contract:

"State of North Carolina, Alleghany County.

"Know all men by these presents, that I, Noah Long, of the county of Grayson and state of Virginia, am held and firmly bound unto W. D. Maxwell, of the county of Alleghany and state of North Carolina, in the sum of twenty thousand dollars, lawful money of the United States, to be paid to the said W. D. Maxwell, his executors and administrators or legal representatives, for which payment, well and truly to be made, I bind myself, my heirs, executors, and administrators, and every of them, firmly by these presents. Sealed with my seal, and dated this 10th day of February, 1873.

"The conditions of this obligation is such that whereas I, the said Long, hold a bond against the said Maxwell for the sum of five thousand dollars, dated the 4th of January, 1865, and also a deed from the sheriff of Alleghany county for the lands upon which the said Maxwell and his mother now live, dated the 12th day of August, 1870, sold to satisfy some executions, as will more fully appear by reference to said deed. Now, I, the said Long, do agree to reconvey to the said Maxwell or his legal representatives, when called upon so to do, all the lands mentioned in said deed, and all the minerals in said lands, except one-twelfth of said minerals, instead of one-fifteenth, as was the former agreement, upon the following conditions, to wit: That I, the said Long, am to have the above-mentioned mineral interest, to wit, one-twelfth, and also the debts for the land sold to C. H. Doughton for his son, J. A. Doughton, and the debt from D. C. Jones, upon a compromise in the Austin lands suit, all of which mineral interest and debts I am to have in consideration for the reconveyance of the said lands and

minerals, and the money I have expended for the said Maxwell, and otherwise expended in the said premises, except enough out of said debts to pay what the said Maxwell owes A. M. Long and B. H. Thipps, which debts I, the said Long, am to pay. I agree with the said Maxwell to aid him in effecting a sale of the minerals in said land, and, in any legal way I can, to help perfect the title to said minerals, if deficient in any particular, that said minerals may be placed upon the market, and a good and sufficient title may be made to the purchaser thereof; and if I shall expend any money, by the written consent of the said W. D. Maxwell, in the development of the said minerals, I am to have the same amount refunded to me out of said mineral interest when sold. Now, if the above is complied with, then this instrument to be void; otherwise, to remain in full force and virtue in law.

"Given under my hand and seal the day and date first written above.

"Noah Long. [Seal]"

Among the averments of the bill was that complainant, "to induce said defendant to execute said contract, agreed to allow said defendant to retain the land debts therein enumerated, and also to retain a one-twelfth mineral interest in said lands contained, with all of which your orator has always been ready, and is now ready, to comply."

The defendant denied the execution of the contract, and in his answer, among other things, further said "that this defendant has expended some moneys in the development of the minerals, and otherwise, by the written consent of the complainant. But he admits that the complainant did not, by such writing, intend to confer any power on this defendant to expend such money, but such writing was only such as the complainant drew up or witnessed between this defendant and other parties recognizing and admitting this defendant's ownership of the property." Voluminous evidence was taken, and the cause, having been duly heard in the circuit court, resulted, on July 20, 1891, in the following decree: "This cause came on to be heard at April term, 1890, of this court, and was argued by counsel; and now, upon consideration thereof, it is ordered, adjudged, and decreed as follows, viz.: That the agreement set forth in the complaint, and proved in the cause, be specifically performed, and that the defendant, Noah Long, on or before the rule day of this court in September, 1891, execute and deliver to the plaintiff a good and sufficient conveyance for the lands mentioned in said agreement, in accordance with the terms of said agreement, the form and terms of the said conveyance to be approved or changed on further directions by one of the judges of this court; and the plaintiff is required to perform, on his part, all the terms of said contract. It is further ordered, adjudged, and decreed that the costs of this cause be taxed against the defendant by the clerk of this court."

On September 7, 1891, the following entry appears of record: "Defendant comes into court by his att'ys, Charles Price and James E. Boyd, and by leave of the court enters his motion for further time to comply on his part with the decree filed in this case on the 20th day of July, 1891, and for an order of the court to ascertain, by reference or otherwise, what amount of money, if any, is due from plaintiff, to be paid before the execution of the deed provided for in the decree, what other acts or obligations are to be performed, on the part of the plaintiff, antecedent to the execution of the said deed. Whereupon, it is ordered by the court that the execution of the deed required by the said decree on the part of the defendant be suspended until the further order of the court, to be made at October term, 1891, upon the further hearing of the case. It is further ordered that a certified copy of this motion and order be served upon the plaintiff, or his attorneys of record."

On October 15, 1892, complainants submitted a motion to the court, "for the execution of the decree heretofore made in this case by the specific performance of the contract set forth in the pleadings," which was transferred to the circuit court at Asheville at the ensuing November term, to be heard and determined by a full bench; and the matter coming on to be heard before GOFF, Circuit Judge, and DICK, District Judge, the following decretal order was entered November 15, 1892: "This cause came on to be

heard at this term, on a motion of the complainant for a decretal order for the execution of the decree heretofore made in this case for the specific performance of the contract set forth in the pleadings, and was argued by counsel: Now, upon consideration thereof, it is ordered, adjudged, and decreed that the defendant, Noah Long, on or before the first Monday in January, 1893, execute and deliver to the complainant, W. D. Maxwell, a good and sufficient conveyance in fee simple, for the land referred to in the agreement dated the 10th day of February, 1873, reserving, however, to himself, one-twelfth of the mineral interests thereof; and the complainant shall accept the same in performance of his said contract. Let this and the former decree be entered of record in the circuit court at Greensborough; and this cause is reserved for any further directions that may become necessary by the failure of either party to comply with the requirements of the decree and decretal order made in this case."

Thereupon, on January 3, 1893, the defendant appealed from the order of November 15, 1892, to this court, and assigned the following errors:

"(1) That the finding of the court that the bond for title bearing date February 10, 1873, was executed by the defendant, and was his deed, was against the weight of evidence.

"(2) That the said bond is so written and worded that it is ambiguous and unintelligible, and incapable of legal or equitable construction, and cannot be carried into effect, and the court should have so declared.

"(3) That the court, after setting up by its finding the bond to have been duly executed, should have proceeded further, and ordered an account to ascertain what amount of money the defendant had paid, by the written assent of the plaintiff, in developing the minerals on the land in controversy, and in efforts to sell the same, and, when the amount was ascertained, made the same a charge on the land.

"(4) That the court should have taken into account the mutual dealings of plaintiff and defendant, and the matters of indebtedness set up by defendant in his answer as owing to him by plaintiff, and should have ascertained what balance, if any, was due defendant, and made such balance, when found, a charge on the land.

"(5) That the decree filed in the cause is not sufficiently full and explicit, and does not set forth definitely the rights, interests, and equities of the parties in the subject-matter of the controversy."

Chas. Price, for appellant.

R. M. Douglas, for appellee.

Before FULLER, Chief Justice, and SIMONTON and SEYMOUR, District Judges.

FULLER, Chief Justice, after stating the facts as above, delivered the opinion of the court.

The decree of July 20, 1891, was, in our opinion, a final decree, terminating the litigation between the parties, and leaving nothing to be done, except to carry it into execution. *Bank v. Sheffey*, 140 U. S. 445, 11 Sup. Ct. 755. The reservation for further directions simply related to such execution, and could not be availed of as rendering the decree less final, or leaving open points expressly decided when it was entered. If the decree was erroneous, the proper mode of correction was by rehearing or appeal. 2 Daniell, Ch. Pr. (4th Am. Ed.) 1368, 1577; *Le Grand v. Whitehead*, 1 Russ. 309; *Lee v. Pindle*, 12 Gill & J. 288.

The motion of September 7, 1891, for further time to the defendant to comply with the decree, and for an order of reference, was not the equivalent of an application for rehearing on the merits, and did not assume to be; and the order of the court thereon

simply suspended the execution of the deed until further order on hearing in reference thereto. The decree of July 20th granted the relief prayed, and directed specific performance, with costs. So far as the motion referred to the ascertainment of what, if any, amount of money was due "from plaintiff, to be paid before the execution of the deed provided for in the decree, and what other acts or obligations are to be performed on the part of the plaintiff antecedent to the execution of said deed," those were matters brought forward by the defendant in his answer, and were disposed of by the conclusion reached. As to the contention over expenditures claimed to have been made by defendant subsequently to the contract, and in accordance therewith, a cross bill might have been necessary to affirmative relief, and none was filed; but, in any view, the decree precluded further question in that respect on this record. It is true that the decree required complainant "to perform on his part all the terms of said contract;" but that, while somewhat obscure in its wording, manifestly referred to allowing the defendant to retain the land debts referred to in the contract, and also one-twelfth mineral interest in the land, which could be secured by the terms of the deed, when approved by the court and accepted by the complainant. And when, after the lapse of more than a year from the time defendant's motion was made, the complainant moved for a decretal order to execute the decree, and that order, after hearing, was entered November 15, 1892, the order, by its very terms, was merely one in execution of the former decree, treating that as final. If an appeal had then been taken from the decree of July 20, 1891, it could not have been sustained, as more than six months had expired from that date. 26 Stat. 826, c. 517, § 11.

The appeal before us, however, was not taken from this decree, but from the decretal order of November 15, 1892; and our attention is not called to, nor do we perceive, any error in the record arising upon the subsequent proceedings. Treating the distinction sometimes adverted to between a decretal order and a decree as unimportant, it may be conceded that, if error intervened in orders entered in the execution of a decree, an appeal would lie. *Hill v. Railroad Co.*, 140 U. S. 52, 11 Sup. Ct. 690. But there is no such state of case here, and the errors assigned relate solely to matters embraced by the decree of July 20th, and that adjudication cannot be reviewed on this appeal. *Bank v. Sheffey*, supra.

The circuit court had itself no power to grant a rehearing at November term, 1892, (Equity Rule 88;) and this appeal cannot be treated as taken from the decree of July 20th, not only because it was not so taken in terms, but because it could not properly have been allowed under the judiciary act of March 3, 1891. Decree affirmed.

MERCANTILE NAT. BANK OF CLEVELAND v. SHIELDS, County Treasurer.

(Circuit Court, N. D. Ohio, E. D. January 3, 1894.)

No. 5,122.

1. NATIONAL BANKS—TAXATION BY STATES—"MONEYED CAPITAL."

Rev. St. U. S. § 5219, provides that taxation by a state of the shares of a national bank situated therein "shall not be at a greater rate than is assessed upon other moneyed capital in the hands of the individual citizens of such state." *Held*, that the term "moneyed capital" means money employed in a business whose object is to make profit by investing such money in securities by way of loan, discount, or otherwise, which from time to time, in the course of business, are reduced again to money, and reinvested.

2. SAME—DISCRIMINATION.

Rev. St. Ohio, § 2730, allows a deduction of legal bona fide debts owing by citizens of the state to be made from credits held by them for purposes of taxation, but the state courts hold that such deduction is not allowable from shares in a national bank. *Held*, that this is a discrimination in favor of "other moneyed capital" of the state, and against national banks, within the prohibition of Rev. St. U. S. § 5219; and it is not less so from the fact that the deduction is also denied in the case of shares of railroads, insurance companies, and manufacturing corporations, for they are not "moneyed capital."

3. SAME—RIGHTS OF NONRESIDENT SHAREHOLDERS.

Under Rev. St. U. S. § 5219, providing "that the shares of any national banking association owned by nonresidents of any state may be taxed where the bank is located," a nonresident shareholder, being compelled to pay the tax at such place, is entitled to all deductions from the value of his shares, on account of debts, that are allowed to resident shareholders.

In Equity. On demurrer. Bill by the Mercantile National Bank of Cleveland against Joseph C. Shields, treasurer of Cuyahoga county. Demurrer overruled.

The complainant files its bill on behalf of its shareholders, asking for a permanent injunction against the defendant, restraining him from collecting taxes levied upon the shares of stock owned by certain persons named in the bill, which taxes complainant avers are illegal and void because imposed in direct violation of section 5219 of the Revised Statutes of the United States, which provides that taxes imposed upon shares of national banks "shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such states." The complainant further avers that a large amount of the moneyed capital in the hands of individual citizens of the state, and of the county of Cuyahoga and city of Cleveland, invested in promissory notes and other obligations and securities, is, by provision of section 2730 of the Revised Statutes of Ohio, (allowing a deduction of legal bona fide debts to be made from "credits,") expressly exempted from taxation, thereby making an unlawful discrimination against moneyed capital invested in national bank shares, as to which no exemption or deduction is provided for by the laws of Ohio, which discrimination is in violation of the provision of the laws of the United States above quoted. The bill further alleges that some 2,489 shares of complainant's stock, owned by the several shareholders named in the bill, were valued by the state board of equalization of Ohio for taxation for the year 1892 at \$149,340, and were certified by said board to the auditor of Cuyahoga county as the taxable value thereof, which value, multiplied by the rate of two and seventy-five hundredths cents on the dollar, fixed for said year as the rate of taxation upon all property situated in said county upon a dollar's valuation, amounted, on said shares, to \$4,106.84. The bill further avers that between the first and second Mondays in May of 1892, when the cashier of said bank made return to the auditor of said

county of the names and residences of the shareholders of said bank, with the numbers and par value of the shares of the capital stock of said bank, each of said shareholders was indebted and owing to others, of legal, bona fide debts, a sum in excess of the "credits" from which, under the laws of Ohio, he was entitled to deduct said debts, to an amount equal to the par value of said shares, which said excess of said debts over credits, as aforesaid, the said shareholders were entitled to have deducted from the assessed value of said shares so severally owned by them. The complainant further avers that the said auditor did deduct and abate said indebtedness of said shareholders from the assessed value of their shares, thereby exempting the same from taxation, and delivered the duplicate, with said deduction, to the defendant as treasurer of said county, and said complainant paid to said treasurer, on December 20, 1892, the half-year taxes so due. The complainant further avers that the auditor of said county, on June 10, 1893, disregarding the deductions allowed as aforesaid, did, without authority of law, add to said duplicate the allowances so aforesaid made, and did assess against the same the rate and percentage of taxation for said city, county, and state for 1892, and now threatens to collect by distraint the said tax on said shares, with said deductions disallowed. Complainant further avers that, in case said taxes are not paid, the defendant threatens to give notice of a tax lien upon said shares to the cashier of said bank, so that, under section 2839 of the Revised Statutes of Ohio, such stock cannot be transferred, and no dividend can be paid thereon. Complainant further avers that, if said stock is permitted to be sold under said provision of law, great and irreparable injury will be done to the business of said bank. It is further alleged that since the tax as levied on said shares on December 20, 1892, was paid, a part of said shares have been sold and delivered. It is further averred that in a prior suit pending in this court between Whitbeck, as treasurer, and complainant, the precise issues now made were heard and adjudicated, and a decree entered, perpetually enjoining the defendant from collecting the tax then assessed, in which decree the right of shareholders to deduct from the value of their shares their bona fide debts was recognized and enforced. Said decree is still in full force; and complainant alleges that said issue so determined was between the same parties, and involved the same subject-matter and legislation. The complainant tenders the amount it claimed to be due, and asks an injunction to restrain the collection of the further amount put on the duplicate as aforesaid, and for the reasons stated. To this bill the defendant interposes a general demurrer.

Boynton & Horr, for complainant.
S. K. Dissette, for defendant.

RICKS, District Judge, (after stating the facts.) The defendant relies upon a recent decision of the supreme court of Ohio, of *Niles v. Shaw*, 50 Ohio St. —, 34 N. E. 162, as justifying the county authorities in refusing to allow shareholders of national banks in the city of Cleveland to deduct from the value of their shares as fixed for taxation their bona fide indebtedness. The syllabus of the Ohio decision reads as follows:

"Our tax laws do not authorize the deduction, from the value of shares in a national bank entered upon the duplicate for taxation, of legal, bona fide debts owing by the holders of such shares of stock."

It is contended that this construction of an Ohio statute relating to the levying and collecting of state taxes by the highest judicial tribunal of the state is controlling upon the federal courts. This proposition would unquestionably be true if the only question for consideration was the application or enforcement of such state statute. If nothing more were here involved, we would feel controlled by the construction of the Ohio statute as given by its

highest court. And such construction is not questioned. Indeed, the supreme court of the United States, in the case of *Whitbeck v. Bank*, 127 U. S. 193, 8 Sup. Ct. 1124, in affirming the decree of this court in a similar suit, seeking the same relief now prayed for, approved the finding of this court that:

"The laws of Ohio make no provision for the deduction of bona fide indebtedness of any shareholder upon the shares of his stock, and provide no means by which said deduction can be secured."

It is for the very reason that the laws of Ohio fail to provide for such right to the shareholders of national banks that the jurisdiction of this court attaches, and enables it to give the relief for which the complainant prays. The laws of Ohio, as construed by its highest courts, fail to give to shareholders of national banks the right to deduct from the value of their shares of stock their bona fide debts. That right is given to individual citizens in the state who have moneyed capital otherwise invested. These laws therefore discriminate against the holders of such bank stock, and conflict with the laws of congress. The contention that there is such a conflict, and that the laws of the United States on this subject are paramount and must prevail, presents the federal question conferring jurisdiction upon the court in this case, which is a controversy between citizens of the same state, not otherwise cognizable in this court. Section 5219 of the Revised Statutes of the United States provides as follows:

"Nothing herein shall prevent all the shares of any association from being included in the valuation of personal property of the owner or holder of such shares in assessing taxes imposed by authority of the state in which the association is located; but the legislature of each state may determine and direct the manner and place of taxing all the shares of national banking associations located within the state, subject only to the two restrictions, that the taxation shall not be at a greater rate than is assessed upon other moneyed capital in the hands of the individual citizens of such state, and that the shares of any national banking association owned by nonresidents of any state shall be taxed in the city or town where the bank is located, and not elsewhere. Nothing herein shall be construed to exempt the real property of associations from either state, county, or municipal taxes to the same extent according to its value as other real property is taxed."

That the foregoing provision was necessary to authorize the states to impose any tax whatever on national bank shares is abundantly established by the cases of *McCulloch v. State*, 4 Wheat. 316; *Osborn v. Bank*, 9 Wheat. 758; *People v. Weaver*, 100 U. S. 539. In the latter case, Mr. Justice Miller, in delivering the opinion of the court, said:

"As congress was conferring a power on the states which they would not otherwise have had to tax these shares, it undertook to impose a restriction on the exercise of that power, manifestly designed to prevent taxation which should discriminate against this class of property as compared with other moneyed capital. In permitting the states to tax these shares it was foreseen—the cases we have cited from our former decisions showed too clearly—that the state authorities might be disposed to tax capital invested in these banks oppressively. This might have been prevented by fixing a precise limit in amount, but congress, with due regard to the dignity of the states, and with a desire to interfere only so far as was necessary to protect the banks from anything beyond their equal share of public burdens, said: 'You

may tax the real estate of banks as other real estate is taxed, and you may tax the shares of the bank, as the personal property of the owner, to the same extent you tax other moneyed capital invested in your state.' It was conceived that, by this qualification of the power of taxation, equality would be secured and injustice prevented."

It is therefore clear that congress intended that the holders of shares in national banks should not be discriminated against by state tax laws.

Do the tax laws of Ohio, as construed and enforced, result in such discrimination? They certainly do if the citizens of that state are allowed to deduct, from "other moneyed capital" in their hands, their bona fide debts, and pay tax only on the balance so ascertained. It is earnestly contended by counsel for the defendant that "moneyed capital" in Ohio is not so favored. It is insisted that shares in railroads, in manufacturing corporations, and in insurance companies are moneyed capital, and that the holders thereof are not allowed to deduct, from the money value of such stock, their bona fide debts. It is important, therefore, to determine what is "moneyed capital," within the meaning of the United States statute, for it must be conceded that it is the construction of a federal statute by the federal courts which must control in this contention. Happily, we need not be confused as to the meaning of these terms in the statute. Mr. Justice Matthews, in his usual luminous and forceful statement of the law in the case of *Mercantile Bank v. City of New York*, 121 U. S. 138, 7 Sup. Ct. 826, says that though a railroad company, a mining company, an insurance company, or any other corporation of that description, may have a large part of its capital invested in securities payable in money, and so may be the owners of moneyed capital, yet the shares of stock in such companies held by individuals are not moneyed capital, because the operations in which such money so invested in such companies is employed is not the business of loaning money for hire, or of discounting bills of exchange, or receiving deposits payable on demand, etc. It is where money is used in such a manner that it becomes moneyed capital, within the meaning of the laws of the United States, for it then becomes capital invested in a business competing with national banks, and it is the duty and policy of congress to protect the business and capital of the latter against unjust discrimination. A share in a bank would, therefore, be moneyed capital, while a share in a railroad or a mining or manufacturing company would not. Therefore, the learned justice said:

"The terms of the act of congress, therefore, include shares of stock, or other interests owned by individuals, in all enterprises in which the capital employed in carrying on its business is money, where the object of the business is the making of profit by its uses. The moneyed capital thus employed is invested for that purpose in securities by way of loan, discount, or otherwise, which are from time to time, according to the rules of business, reduced again to money and reinvested. It includes money in the hands of individuals employed in a similar way, invested in loans or in securities for the payment of money, either as an investment of a permanent character, or temporarily, with a view to sale, or repayment and reinvestment. In this way the moneyed capital in the hands of individuals is distinguished from what is known generally as 'personal property.'"

With the above definition of what is meant by "moneyed capital," it is evident that, under the tax laws of Ohio, that kind of money and capital has exemptions and privileges over and above moneyed capital invested in national bank shares. Money and capital employed in the manner stated in the case above cited, in the hands of individual citizens of Ohio, is not fully taxed when the owner is allowed to deduct therefrom his bona fide debts. Such deductions are made and allowed by the laws of Ohio. It was so found by the supreme court of the United States in the case of *Whitbeck v. Bank*, heretofore cited. In that case the court said: "An owner of moneyed capital other than shares in a national bank has a deduction equal to his bona fide indebtedness made from the amount of the assessment of the value of such moneyed capital." Taxation upon such a basis is therefore a discrimination against owners of shares of national banks in that state, which is prohibited by the laws of the United States. It follows, for these reasons, that the complainant is entitled to the relief prayed for as to all the shareholders set forth in its bill.

Having reached this conclusion, it becomes unnecessary to consider the several averments of the bill which claim relief upon the ground that the same issue has been heretofore adjudicated between these same parties, and that the action of the county auditor in subsequently adding to the tax duplicate the deductions and set-offs theretofore allowed the shareholders of the bank was illegal and inequitable.

The further question presented is whether nonresident stockholders of national bank shares are entitled to the same deduction of bona fide debts allowed resident shareholders. The act of congress granting to the several states the right and power to tax national bank shares provides that the tax shall be assessed at the place where the bank is located. This compels nonresident shareholders to pay on their shares the tax imposed in the state, county, and city where the bank is located. He cannot choose the place of his residence as fixing the rate of his tax upon his bank shares. He must pay the rate fixed at the place where the bank is located. He ought, therefore, to be allowed to pay that tax upon the same conditions, and subject to the same deductions, allowed to resident shareholders. This is simple justice. Article 14 of the constitution of the United States extends equality of protection to all its citizens by the provision that the states shall "not deny to any person the equal protection of the laws." Section 2, art. 4, further provides that "the citizens of each state shall be entitled to all the privileges and immunities of citizens of the several states." In *Ward v. Maryland*, 12 Wall. 418, the supreme court of the United States, in defining the "privileges" and "immunities" secured by the above provision of the constitution, says:

"It will be safe to say that the clause plainly and unmistakably secures and protects the right of any citizen of one state * * * to be exempt from any higher rate of taxation or excises than are imposed by the state upon its own citizens."

It seems plain, therefore, from these constitutional provisions, and the interpretation put upon them by the supreme court of the

United States, that nonresident shareholders of national banks are entitled to the same exemptions and deductions, as against the value of their shares of stock, in ascertaining the taxes due from them, that are granted to resident shareholders, and that, if the latter show a case of discrimination against them by the state which entitles them to relief in this court, nonresident shareholders in the same bank, who have taken the same necessary measures to protect their right of deduction, will be entitled to the same relief. A decree may be prepared accordingly.

FARMERS' LOAN & TRUST CO. v. WINONA & S. W. RY. CO. et al.

(Circuit Court, D. Minnesota, Third Division. November 20, 1893.)

1. RAILROAD COMPANIES—MORTGAGES—FORECLOSURE—DEFAULT.

A railroad mortgage recited that it was given to secure the due and punctual payment of the principal and interest of bonds, both bonds and interest coupons being payable unconditionally at maturity. Article 1 provided that, until default should be made in the payment of interest for six months after written demand of payment by the trustee, the mortgagor should remain in possession and control of the property, but that after such default the trustee might take possession. Article 2 provided that after such default the trustee, after entry or without entry, might sell the mortgaged property, and that this provision "is cumulative to the ordinary remedy by foreclosure in the courts." *Held*, that the first article was a limitation only on the trustee's right to take possession, and not on his general right to file a bill for foreclosure; and hence such bill would lie immediately upon default in payment of interest, without the necessity of giving notice, and waiting six months.

2. SAME—RECEIVERS.

In a suit for the foreclosure of a railroad mortgage and the appointment of a receiver, the allegations of bill and answer were in conflict as to the solvency of the railroad company, the condition and care of its property, and the wisdom and economy of its methods of operation, but it appeared that a majority of its stock was in the hands of a construction company, which had substantially the same officers, and whose interests were adverse to those of the mortgage bondholders, and that the company was unable or unwilling to pay the interest upon its bonds. *Held*, that a receiver should be appointed.

In Equity. Bill filed by the Farmers' Loan & Trust Company against the Winona & Southwestern Railway Company and the Winona & Southwestern Improvement Company.

Lawrence, Truesdale & Corrison, for complainant.

C. W. Bunn, for defendants.

CALDWELL, Circuit Judge. On the 2d day of April, 1888, the Winona & Southwestern Railway Company executed a mortgage on its railroad and property, thereafter to be constructed and acquired, to the plaintiff, as trustee, to secure an issue of first mortgage bonds to the amount of \$18,500 per mile for each mile of the railway completed. The mortgage contemplated the construction of the road from Winona to a point of connection with the Union Pacific Railway Company at Council Bluffs, Iowa, and the ultimate issue of bonds to the amount of \$6,950,000. The

bonds were to be issued in installments, as sections of five or more miles of railway were completed. The railway company entered into a contract with the Winona & Southwestern Improvement Company, by which the improvement company agreed "to build and fully construct and complete and equip" for the railway company its road, from Winona to Council Bluffs, prior to December 1, 1892, for which it was to receive the bonds and stock of the railway company as specified in the contract. Under this contract the improvement company, during the years 1889, 1890, and 1891, constructed the road from Winona to Osage, Iowa, a distance of 117 miles. The road has never been constructed beyond Osage; and on the 30th of June, 1893, the construction contract was, by mutual agreement between the railway company and the improvement company, canceled. To pay for the construction and equipment of the road from Winona to Osage, bonds were issued, from time to time, in the aggregate amount of \$1,000,937. The principal of the bonds is payable in 1928, and they draw interest at the rate of 6 per cent., payable semiannually on the 1st days of April and October of each year, for which interest coupons are attached. The railway company made default in the payment of the interest coupons, amounting, in the aggregate, to the sum of \$58,110, which fell due the 1st day of October, 1893, and the trustee has filed this bill to foreclose the mortgage for this overdue interest, and prays for the appointment of a receiver. The railway company challenges the right of the complainant to file a bill at this time to foreclose the mortgage for the overdue interest coupons. The mortgage provides that it is given "in order to secure the due and punctual payment of the principal and interest of the bonds." The bonds and the interest coupons are payable absolutely and unconditionally on the date of their maturity. Article 1 of the mortgage provides:

"Until default shall be made by the said party of the first part in the payment of principal or interest, or some part of either principal or interest, for six months after demand of such payment in writing by the trustee, the railway company shall be suffered and permitted to possess, manage, operate, use, and enjoy the said property and the said railroad and its equipment, franchises, and appurtenances, and to take and use the rents, incomes, profits, and tolls thereof, as if this indenture had not been made; but, in case default shall be made in the payment of any interest, or any of the aforesaid bonds issued under, and secured by, this instrument, according to the tenor thereof, or of the interest warrants or coupons thereto attached, and if such default shall continue for the period of six months after such demand in writing, it shall be lawful * * *" for the trustee to take possession of the mortgaged property.

Article 2 provides that, when default shall be made as provided in article 1, the trustee after entry, or without entry, may sell the mortgaged property; and it is declared in this article that:

"The above provision is cumulative to the ordinary remedy by foreclosure in the courts; and the trustee herein may at its discretion, and upon the written request of the majority in value of the bonds then unpaid shall, (upon being properly indemnified,) institute proceedings to foreclose in such manner (by sale under the said power or by suit) as the said majority of bondholders may direct. * * *"

The contention of the railway company is that the first clause of article 1 operates as a limitation on the right of the holders of the overdue coupons, or the trustee acting for them, to enforce payment of such coupons by a bill in equity to foreclose the mortgage, and that such a bill will not lie until the interest coupons are six months overdue, and the trustee has demanded their payment in writing. This contention is untenable. The provision of the mortgage quoted is a limitation on the power of the trustee to oust the railway company from the possession of the mortgaged property under the powers granted to the trustee by the mortgage deed. The terms upon which the trustee can enter and take possession of the property are prescribed by this article. But the clause in question does not purport to suspend or postpone payment of the interest coupons for six months after their maturity, or to deny to the holders thereof, or to their trustee, the right to pursue the usual and appropriate remedy in the courts for their collection at any time after their maturity. One or any number of bondholders may prosecute a bill to foreclose the mortgage upon default as to payment of a single coupon, or the trustee may intervene on behalf of all for the same purpose. And to this effect are the controlling authorities in this court. *Guaranty Trust & Safe-Deposit Co. v. Green Cove Springs & M. R. Co.*, 139 U. S. 137, 11 Sup. Ct. 512; *Alexander v. Railroad Co.*, 3 Dill. 487, Fed. Cas. No. 166; *Credit Co. v. Arkansas Cent. R. Co.*, 15 Fed. 46; *Dow v. Railroad Co.*, 20 Fed. 260. And, when such a bill is filed, the equity powers and jurisdiction of the court are precisely what they are in any other suit for the foreclosure of a mortgage after the maturity of the mortgage debt, or some part thereof. In such a suit the court may appoint a receiver for the same reasons that would influence it to make such an appointment in any other case of foreclosure. Such a foreclosure may be defeated by the mortgagor paying the overdue interest at any time before other defaults occur, and are set up in the bill, as they may be, for the decree may require the payment of all interest coupons then due, though some of them matured since the institution of the suit, and of the principal sum also, if, by the terms of the mortgage, it has become due. Undoubtedly, then, the bill is well brought to foreclose the mortgage for the overdue interest coupons. It has come to be common practice to appoint a receiver in suits for the foreclosure of mortgages on railroads for a default in the payment of any part of the mortgage debt. The negotiable bonds and coupons of a railroad company are placed on the footing of commercial paper, and, if such obligations are not promptly met at maturity, the company and its securities are at once discredited in the commercial world. When a company defaults in the payment of its interest coupons, it shares the common fate of all debtors who are unable or unwilling to meet their commercial obligations either by payment or by procuring an extension of time for payment. But the appointment of a receiver of the property of a railroad company is not necessarily one of the consequences of its failure to pay its interest coupons at maturity. The

right to a foreclosure does not necessarily carry with it the right to appoint a receiver. If the security is adequate, and there is no danger of ultimate loss to the mortgagee, the mortgagor's possession should not be disturbed until the final decree and the sale. The appointment of a receiver is not a matter of right, but rests in the sound discretion of the court, and is a power to be exercised sparingly and with great caution. *Farmers' Loan & Trust Co. v. Kansas City, W. & N. W. R. Co.*, 53 Fed. 182.

As additional grounds for the appointment of a receiver, the bill alleges that the mortgaged property is very inadequate security for the mortgage debt; that the railway company is insolvent, and is not keeping the road and rolling stock in proper repair; that it has a large floating debt; and that the Winona & Southwestern Improvement Company owns a majority of the stock of the railway company; and that the officers of the two corporations are substantially the same persons; and that the railway is operated, and the affairs of the railway company are being managed and conducted, in the interest of the improvement company, and to the detriment and prejudice of those who hold the bonds of the railway company. It is alleged that 100 box cars, 34 flat cars, 2 caboose cars, and 3 engines which were placed on the road in October, 1891, as a part of its equipment under the construction contract between the railway company and the improvement company, and which were returned under oath, by the officers of the railway company, in 1892, to the auditor of state as the property of the railway company, were, when it became evident that the railway company would make default in payment of the interest coupons falling due October 1st, turned over to the improvement company, and leased by the railway company at an exorbitant rental. The defendants have filed their answer, in which they deny that the railway company is not keeping its road and rolling stock in good repair; deny that the railway has been operated for the use and benefit of the improvement company, or persons interested in that company; deny that the railway company has any floating indebtedness whatever, other than the sum of \$181,073.66, owing to the improvement company, and for which that company holds the note of the railway company due on demand; and it is averred in the answer that "there is no intention on the part of the improvement company to demand payment presently, or to sue for the same, and the intention of both these defendants is, and always has been, that said indebtedness is, and always shall be, considered subordinate to the lien of the mortgage, both for principal and interest." The railway company admits that it is temporarily unable to pay its coupons which matured October 1st last, but avers that it "fully expects, within a short time, to be able to pay these coupons in default, and thereafter to keep said coupons paid promptly as they fall due," and "denies its insolvency or inability to meet any of its debts and obligations except in the sense that it is at present unable to pay said October 1st coupons or said note to the improvement company." Touching the cars and locomotives placed on the road in 1891, and recently turned over to the improvement company,

and then leased to the railway company, the defendants say that this rolling stock was purchased and placed on the road at the time when it was expected the road would be constructed for some distance beyond Osage, and was intended to equip the road for such additional distance, and was in excess of the equipment required for that portion of the road actually completed under the construction contract; and that it has, for that reason, always been regarded as the property of the improvement company; and that the rental agreed to be paid therefor by the railway company to the improvement company is reasonable.

This is but a brief summary of the allegations of the bill and answer. Both parties have filed numerous supporting affidavits. Upon a preliminary hearing such as this, the court ought not to express an opinion upon material and disputed issues of fact—such, for instance, as the ownership of the cars in question. There is one fact that has an important bearing on the application for a receiver. It is admitted that the improvement company owns a majority of the stock of the railway company, and, as such stockholder, has it in its power to control absolutely the affairs of the railway company, and that the officers of the two companies are substantially the same persons, so that, in the matter of the ownership of the cars and engines mentioned and the rental therefor, as well as in all other matters in which the rights and interests of the railway company or its mortgage bondholders may be adverse to the interests of the improvement company, the railway company is completely at the mercy of the improvement company. It cannot protect itself from any exaction or demand the improvement company has a mind to prefer against it. The honesty of the improvement company and the integrity of its officers is not questioned; but there is high authority for saying that no man can serve two masters, and it is a maxim of the law that no man shall sit as a judge in his own case; and the acts of a trustee, where his private interests conflict with his duty as trustee, when not void, are subjected to the closest scrutiny, and the burden rests upon the trustee to show that his acts were honest, and in no wise prejudicial to his trust. The officers of the company cannot claim immunity from the operation of these rules; and the real question in the case is not whether the property shall be left in the possession of the railway company, but whether it shall be left under the control of the improvement company, whose interests may be quite inimical to those of the railway company or its mortgage bondholders, between whom and the mortgage bondholders an issue involving large amount of property is now actually joined. It is averred in the answer that the railway company fully expects, within a short time, to pay the interest coupons in default. Upon what this expectation is based does not very clearly appear. The answer avers the company has \$23,000 in its treasury,—nearly half the sum required to pay the interest,—and it has been stated at the bar that the owners of this property are wealthy and in good credit. It would seem that, under such conditions, a solvent railway company should be

able to give some better and more binding assurance of its solvency, and its ability and intention to pay the interest, than is found in its answer.

HARMAN et al. v. STEAD et al.¹

(Circuit Court of Appeals, Fourth Circuit. February 7, 1894.)

No. 27.

VENDOR AND VENDEE—BONA FIDE PURCHASERS—TAX SALES.

A bona fide purchaser for full value, without notice, of lands which the vendor had redeemed from a prior tax sale to the state of West Virginia, without paying the taxes for the year in which they were sold, as required by statute, is entitled to hold the same, as against a purchaser at a subsequent sale for the taxes thus omitted, when the want of notice arose from the failure of the county clerk to record the lands as delinquent in a proper book, and the unauthorized issuance by the state auditor of a certificate of redemption, which implied that all taxes due had been paid. 49 Fed. 779, reversed.

On Appeal from the Circuit Court of the District of West Virginia.

In Equity. Bill by Charles H. Harman and William W. Flannagan, trading as C. H. Harman & Co., against Thomas Stead, Alexander F. Matthews, Homer A. Holt, and William M. Tyree. The bill prayed that a certain tax sale and deeds thereunder be declared void, and the deeds canceled. The circuit court dismissed the bill, (49 Fed. 779,) whereupon plaintiffs appealed.

W. D. Dabney and T. S. Martin, for appellants.

Malcolm Jackson, for appellees.

Before FULLER, Chief Justice, GOFF, Circuit Judge, and HUGHES, District Judge.

HUGHES, District Judge. On the 22d December, 1885, a tract of land containing 1,264 acres, in Nicholas county, W. Va., belonging to James T. and T. B. Marshall, was offered for sale by the sheriff of the county for taxes which had been assessed against the land for 1884, for the nonpayment of which it had been returned delinquent. There was no bid for the land, and it was purchased for the state according to law. The tract was omitted from the land books of 1886 according to law. This land was, on the 7th May, 1886, redeemed from the auditor by the Marshalls, and certified by the auditor to the clerk of the county court of Nicholas county for re-entry upon the land books. This redemption was certified on the fact that payment of the taxes for 1884, for which the land was sold, was made; but section 33 of chapter 31 of the Code of West Virginia, then in force, provided that the previous owner of lands sold for taxes and purchased by the state may, within one year from the sale thereof, redeem the same by paying into the state treasury the amount of all taxes due thereon, with the interest due on each class of taxes at the time of purchase, in-

¹ Rehearing denied February 13, 1894.

cluding such taxes as were or should have been assessed thereon for the year in which the same was sold, etc.

It is conceded in this case that the Marshalls did not pay to the auditor the taxes due for the year 1885, in which the land was sold, as required by law, and that the certificate of redemption given to them by that officer was improperly issued. But the certificate was issued, and in pursuance of the auditor's certificate the land was re-entered upon the land books of Nicholas county for the year 1887, and charged with the back taxes of 1886. It is claimed that the redemption from the sheriff's sale of December, 1885, implied that not only the delinquent taxes of 1884 had been paid, but also those of 1885; that is to say, this was an implication of law, whether the fact was so or not. In June, 1887, C. H. Harman purchased the land from the Marshalls and received a conveyance of title from them, which was recorded January 1, 1888. By a subsequent conveyance, recorded on 22d February, 1888, the land passed to C. H. Harman and W. W. Flannagan, partners in the name of C. H. Harman & Co. Some time after the last-mentioned conveyance, the taxes on the land for the years 1886 and 1887 were paid, either by the Marshalls or by Harman & Co. for them. The vendee of the Marshalls, and his vendee, relying on the auditor's certificate and the fact that no record of the delinquency of the land for the taxes of 1885 had been recorded in the clerk's office of the county where the land was situated, as required by law, believed that the taxes for that year had been paid.

On the 16th December, 1887, the land was sold by the sheriff of the county for the taxes of 1885, and was purchased by Thomas Stead, one of the defendants, at the price of \$16.91. No list of real estate delinquent for the taxes of 1885 appears to have been recorded by the clerk of Nicholas county in a well-bound book kept by him for the purpose, or otherwise; no such book having been kept in the clerk's office, and the only lists of land delinquent for taxes of 1885 being the original lists made by the sheriff, returned to the clerk's office, and preserved and filed therein. The plaintiffs, Harman and Flannagan, had no notice or knowledge or intimation from any source, before the conveyance of the Marshalls to Harman, recorded January 31, 1888, or that of Harman to Harman & Co., recorded February 22, 1888, that the land had been returned delinquent for the taxes of 1885, or that it would be offered at a sheriff's sale for such taxes. The plaintiffs had no notice or knowledge of the sale to Stead, or of the proceedings connected with it, until recently before the institution of this suit; nor had they any constructive knowledge of the sale until the deed of the clerk of the county to Stead was recorded, the date of that deed being the 18th day of January, 1889, which was the day on which it was recorded. The clerk's deed, and the surveyor's report preliminary to the sale, describe the land as lying chiefly in Beaver district, but it was sold to Stead as lying in Kentucky district, in Nicholas county.

If the question in this case were between the Marshalls, on one side, and the grantee (Stead) of the state of West Virginia, on the

other, it would be one of some embarrassment; for it was the duty of the Marshalls, in redeeming their land, to pay, not only the taxes due for 1884, for which the land was sold, but also the taxes for 1885, the year of the sale. It was equally the duty of the auditor not to give a certificate of redemption to the Marshalls until the taxes for 1885 were paid. The auditor gave an unauthorized certificate, and so the state and the Marshalls were both at fault. But the question is between bona fide purchasers for full value from the Marshalls and a purchaser from the state at a nominal price at a tax sale, for taxes which the state, by her auditor, had held out to the world to have been paid. By the negligence of the state in the person of her auditor, all the world was given to understand that the title of the Marshalls was free from taxes. Bona fide purchasers, acting on the assurance given by the records of the state and of Nicholas county, purchased the property at full value, and paid all taxes which accrued subsequently to the year 1885. If the law of the state requiring a list of lands delinquent for taxes to be recorded by the clerk of the county in a bound book had been complied with, the overlooking of the unpaid taxes of 1885 by the Marshalls and their assignees could not have happened. The neglect of this requirement of the law operated as a trap to catch innocent purchasers. On the whole case, we think the state of West Virginia, through the illegal acts and omissions of her officers, was not in condition to make a valid sale for the taxes of 1885 on the 16th of December, 1887, when Thomas Stead became the purchaser, and the title which Stead obtained by his purchase was fatally defective as against bona fide purchasers from the Marshalls for full value.

Reversed, and the case remanded for further proceedings in conformity with this opinion.

HUNTER et al. v. RUSSELL.

(Circuit Court, D. Montana. January 31, 1894.)

No. 301.

1. COSTS—WITNESSES—MILEAGE—FAILURE TO TAKE DEPOSITIONS.

Though Rev. St. § 863, provides that in civil cases pending in the federal courts depositions de bene esse may be taken where the witness resides more than 100 miles from the place of trial, it merely gives the option to take evidence in this way; and the failure to exercise this option will not destroy the right of the prevailing party to recover mileage for his witnesses who have traveled more than 100 miles. *Smith v. Railway Co.*, 38 Fed. 321, disapproved.

2. SAME—MILEAGE—CHOICE OF ROUTES.

Such mileage, however, will only be allowed upon the basis of the usual route taken by travelers between the points in question, notwithstanding the witnesses pursued a longer route.

3. SAME—ATTENDANCE—DELAY OF TRIAL.

Plaintiff notified defendant that their cause would be tried on a specified day in the event that plaintiff procured a certain deposition in time, as he expected to do, and defendant prepared for trial on that day. The

trial was, however, delayed, by plaintiff's failure to receive the deposition in time. Defendant succeeded at the trial. *Held*, that he should be allowed his witness fees for attendance during the time that the trial was so delayed.

At Law. On motion to retax costs. Action by Duncan Hunter, W. B. Richards, H. G. Pickett, O. C. Dallas, and T. B. Miller against Robert Russell, in which there was judgment for defendant. Motion granted.

McConnell, Clayberg & Gunn, for complainants.
Albert Allen and Cullen & Toole, for defendant.

KNOWLES, District Judge. This cause now comes before this court on a motion to retax the costs of the defendant, in whose favor the suit was decided. It appears that the witnesses for defendant claimed fees for traveling from their place of residence, Troy, Mont., to Helena, in the same state, the latter being the place the suit was tried. Said witnesses also claim that they were required to travel, in coming from Troy to Helena, 565 miles. Counsel for plaintiffs urge that said witnesses should not be allowed for more than 100 miles' travel, and at all events the distance by the usually traveled route from said Troy to Helena does not exceed 380 miles. The said witnesses also claim fees for 13 days' attendance in said court; while plaintiffs claim they should not be entitled to more than 6 days' attendance on the same. It is urged that the cause was set down only conditionally on the 5th day of January, 1894, and was not reached before the 11th day of said month. The facts as they appear to the court in regard to this point will be stated when the point is considered. In support of the claim that the prevailing party should not be allowed for his witnesses for traveling more than 100 miles from the place where the cause is tried, the case of *Smith v. Railway Co.*, 38 Fed. 321, is cited. The distinguished jurist who made the ruling in that case based his ruling upon the ground that by section 861, Rev. St., it was provided that in an action at law there might be other evidence than oral introduced; that in section 863 of said Statutes it was provided:

"The testimony of any witness may be taken in any civil cause depending in a district or circuit court by deposition *de bene esse*, when the witness lives at a greater distance from the place of trial than one hundred miles," etc.

Having the right, then, by law, to take a deposition of a witness residing at a distance more than 100 miles from the place of trial, the court lays down the rule that this should be done, and expresses this rule:

"It is the duty of the prevailing party, as in cases of damages, to so conduct himself that the amount of the costs or damages shall not be unnecessarily increased."

This presupposes that the taking of the deposition of a witness living more than 100 miles from the place of trial would cost less than the traveling fees of such witness. This cannot be main-

tained in every case, especially in a newly-settled country, where those competent to take a deposition in an important case do not reside. A court ought not to assume that in any case the cost of taking the deposition of any witness who lives more than 100 miles from the place of trial would be less than the traveling fees of such a witness. It might be that a proper person to take such a deposition, and the attorney called upon to examine the witness, would be compelled to travel that distance in a country settled as Montana is; and I hardly think that a court should be called upon to determine in every case which would have been the less expensive mode of taking evidence in cases to be tried in this state. The determination of such a question would involve many considerations.

That a writ of subpoena runs throughout the territorial jurisdiction of a circuit court of the United States is a familiar doctrine. *Dreskill v. Parish*, 5 McLean, 241, Fed. Cas. No. 4,076. The territorial jurisdiction in such a case as this is the district of Montana. In the case of *Smith v. Railway Co.*, supra, it is admitted that a witness could be compelled to attend from any part of the district when subpoenaed, but that the party subpoenaing him could not tax his opponent for more than 100 miles' travel. In the case of *Prouty v. Draper*, 2 Story, 199, Fed. Cas. No. 11,447, this section 863 came up for consideration. It was then section 30 of chapter 20 of the judicial act of 1789. In this the distinguished Justice Story held that the taking of a deposition under that section was a privilege to be exercised at the option of the party desiring the evidence of a witness living more than 100 miles from the place of trial, and that the opposite party had no right to demand that, under such circumstances, a deposition should be taken. Having, then, the right to compel the attendance of a witness from any point within the district, and having the option to take a deposition if living at the distance named, it does not seem to me to be going too far to hold that, if the litigant does not exercise the option to take the evidence of his witness by deposition, he can recover for what he is compelled to pay his witness by law as traveling fees. In the following cases it was held that fees should be allowed a prevailing party for his witnesses who have traveled more than 100 miles from the place of trial: *Prouty v. Draper*, supra; *Anderson v. Moe*, 1 Abb. (U. S.) 299, Fed. Cas. No. 359; *Dreskill v. Parish*, 5 McLean, 241, Fed. Cas. No. 4,076; *Whipple v. Cotton Co.*, 3 Story, 84, Fed. Cas. No. 17,515; *Holmes v. Sheridan*, 1 Dill 351, note, Fed. Cas. No. 6,644. This was undoubtedly the view entertained by the distinguished judges who decided the Anonymous Case in 5 Blatchf. 134, Fed. Cas. No. 432. The reasons upon which these decisions are based commend themselves to me more than those upon which the case of *Smith v. Railway Co.* was grounded, and I shall adopt them.

This cause was considered by the attorneys upon both sides as a law case, and the arguments upon this question of costs are based upon the ground that it is such. A jury was expressly waived in writing, and about all the evidence was oral, and given without

question as to the propriety of so giving it. I was not advised as to the nature of the cause until the pleadings were read in court. I should think there should be some doubt about its being a law case. It is true the suit was commenced in pursuance to the provisions of section 2326 of the Revised Statutes, to determine the right to the possession of the mining premises described in the bill of complaint. The bill alleges that plaintiffs were in possession of the premises in dispute; that defendant laid claim to the same, and asks that plaintiffs be declared entitled to the possession of the same, and that the claim of defendants be declared void. I think this should be declared an equitable proceeding. Both parties, however, seem to have classed it as a special proceeding at law; and of course I am not now called upon to decide this point, although it was suggested at the argument of this motion that it was an equitable case. But, if this should be classed as an equitable proceeding, I do not think the rule as to costs would be different. Equity rule 78 provides:

"That witnesses who live within the district may, upon due notice to the opposite party, be summoned to appear before the commissioner appointed to take testimony, or before the master or examiner appointed in any cause, by subpoena in the usual form," etc.

The time and place are to be specified in the subpoena. A court, in its discretion, may allow the evidence to be given before it in open court, upon the trial of a cause in equity. When a court consents to hear the evidence orally, it ought to have the same right to bring a witness from any part of its judicial district as its master in chancery. When the witnesses attend in person in such a case, the prevailing party should be allowed his fees the same as in an action at law. There is no reason for any different rule. The witness is compelled to travel and attend court by virtue of its command.

There are two affidavits on file, made by competent persons, showing that the usual route traveled from Troy to Helena is only 380 miles. Although the witnesses named in the bill of costs may have taken a longer route, they should not be allowed to charge for traveling fees more than that distance. The same rule also applies to the marshal subpoenaing the same. The clerk of the court is therefore directed to retax the costs, and allow for the witnesses and marshal fees for traveling to Helena from Troy and back at the rate of 380 miles each way. As to the attendance in court by the witnesses, there is nothing in the record to show that there was any conditional setting of this cause for trial. The condition which plaintiffs claim is this: That the cause should be tried on the 5th day of January, provided they obtained a deposition from a witness residing in New York. There was at the time a reasonable expectation that such deposition would be obtained. The notice given defendant subsequently conveyed the impression that the same would reach here in time. There was nothing for the defendant then to do but to prepare for trial, which he did. Under such circumstances, defendant should be allowed his witness fees for attendance in court during the time the trial of the cause

was delayed because of the nonarrival of said deposition as expected. These views are sustained by the case of *Whipple v. Cotton Co.*, *supra*. Costs should be retaxed as directed.

TUCKER v. BALTIMORE & O. R. CO.

(Circuit Court of Appeals, Fourth Circuit. February 7, 1894.)

No. 50.

1. TRIAL—DIRECTING VERDICT—CONTRIBUTORY NEGLIGENCE.

A court may withdraw a case involving questions of negligence from the jury, and direct a verdict, when the evidence is undisputed, or is of such a conclusive character that the court would, in the exercise of a sound discretion, be compelled to set aside a verdict returned in opposition to it.

2. RAILROAD COMPANIES—NEGLECT.

It is negligence which will justify the withdrawal of a case from the jury for a licensee to walk on or near a track in a railroad yard when, in the exercise of due care, it is admitted that he could have walked safely by the side of such track.

In Error to the Circuit Court of the United States for the District of West Virginia.

Action by Josephus Tucker against the Baltimore & Ohio Railroad Company for injuries sustained by plaintiff while walking in the yard of the defendant. The judge instructed the jury to find for defendant, and this ruling is now assigned as error.

V. B. Archer, for plaintiff in error.

John A. Hutchinson, for defendant in error.

Before GOFF, Circuit Judge, and SEYMOUR and SIMONTON, District Judges.

SIMONTON, District Judge. This case comes up by writ of error to the circuit court from West Virginia. The plaintiff in error, plaintiff below, brought his action in the state court against the Baltimore & Ohio Railroad Company for injuries incurred on one of its tracks in the railroad yard. The cause was removed into the circuit court of the United States, and was tried with a jury. At the close of the testimony for the plaintiff, the judge presiding withdrew the testimony from the jury, and instructed them to find for the defendant. Of the four assignments of error set out in the brief, but one was pressed at the hearing. The others were practically abandoned. The plaintiff in error insists that the court erred in directing the jury to find for the defendant.

The rule upon this question has been frequently stated and is well settled. "It is the settled law of this court," says the supreme court in *Randall v. Railroad Co.*, 109 U. S. 482, 3 Sup. Ct. 322, "that when the evidence given at the trial, with all the inferences that the jury could justifiably draw from it, is insufficient to support a verdict for the plaintiff, so that such a verdict, if returned, must be set aside; the court is not bound to submit the case to the jury, but may direct a verdict for the defendant." The court

then quotes with approval the case of *Railway Co. v. Jackson*, 3 App. Cas. 193, deciding that it is for the judge to say whether any facts have been established by sufficient evidence from which negligence can be reasonably and legitimately inferred; and it is for the jury to say whether, from those facts, when submitted to them, negligence ought to be inferred. The rule is again stated in *Railroad Co. v. Converse*, 139 U. S. 473, 11 Sup. Ct. 569:

"It is contended that the court erred in not submitting to the jury the issue as to the defendant's negligence. Undoubtedly, questions of negligence in actions like the present one are ordinarily for the jury, under proper directions as to the principles of law by which they should be controlled; but it is well settled that the court may withdraw a case from the jury altogether, and direct a verdict for plaintiff or defendant, as the one or the other may be proper, when the evidence is undisputed, or is of such conclusive character that the court, in the exercise of a sound judicial discretion, would be compelled to set aside a verdict returned in opposition to it."

In *Kane v. Railway Co.*, 128 U. S. 94, 9 Sup. Ct. 16, this rule was held applicable to a case like the present one, in which the defendant introduced no evidence. In *Mitchell v. Railroad Co.*, 146 U. S. 513, 13 Sup. Ct. 259, the court directed a verdict, on the ground that the evidence showed contributory negligence on part of plaintiff. The whole question is discussed in *Central Transp. Co. v. Pullman's Palace Car Co.*, 139 U. S. 40, 11 Sup. Ct. 478.

The exception in question is accompanied by all the testimony in the case. This testimony was produced on the part of the plaintiff. It was not contradicted or answered by any evidence on the part of the defendant. If there were any discrepancies in it, the plaintiff must accept the consequences. Such discrepancies do not present, technically, an issue of fact, as between plaintiff and defendant, which must be submitted to a jury. The motion that the court instruct the jury to find for the defendant is, in effect, a demurrer to the evidence. Was the course of the court below within the rule stated?

The plaintiff was occasionally employed by shippers to assist in caring for cattle transported on lines of the defendant. He was perfectly familiar with the yard of the defendant, with the tracks running through it, and knew that locomotives and trains constantly passed to and fro on the tracks. On the morning of the accident complained of, about 10 or 11 o'clock, having been instructed by one Tyson to take charge of some stock shipped by him, he went to a cattle train, made up of 12 cars with a caboose at the end and lying on track No. 4 in the yard of the defendant at Parkersburg, and not at a public crossing. Track No. 4 is a siding, coming out on a little curve with the main track, which is No. 3. The distance between these two tracks at that point was from 3 to 6 feet,—room enough, as plaintiff says in his testimony, for a man to walk while trains were passing, if he walked carefully. The plaintiff went in front of the train, which was heading east, and met the train dispatcher, who told him that the train was about to start, and that he had better get back to the caboose. He turned and spoke to a brakeman, who gave him the same information. Going towards the caboose, he met the conductor about the

middle of the train, who told him to get on the caboose at once, as he had orders to run right out. A brakeman showed him the caboose. In order to reach the caboose, he was not compelled to get on a track or to cross a track. He had only to walk alongside the train between the tracks 3 and 4, the space between them being sufficiently great to enable him to do so safely. When plaintiff was on his way to it, a locomotive came up behind him on the main track, struck him, knocked him down, and ran over his arm. The witnesses called by him vary in some particulars, but they all agree in saying that the locomotive came up with cylinder cocks open, steam escaping, and making a great noise. They differ as to the question whether a bell was ringing or not. It is agreed on all hands that, if plaintiff had been standing between the tracks, he could not have been hurt. Plaintiff does not know where he was standing. The clear inference is that he was either on the main track, or dangerously close to it, unnecessarily. Upon this review of the testimony, we concur with the court below. Apart from the fact that there is no evidence of contract relation between the plaintiff and the defendant, as passenger or otherwise, it is clear that the plaintiff, perfectly familiar with the locality, in a place of known danger, a railroad yard, in which locomotives were constantly passing, walked on or dangerously near to a track, the main track, where, by his own admission, a man could pass safely between the tracks if he walked carefully. His injuries were the result of his own act. *Bancroft v. Railroad Co.*, 97 Mass. 278. He cannot hold the defendant responsible for them. See *Railroad Co. v. Depew*, 12 Am. & Eng. Ry. Cas. 66; *Railroad Co. v. Houston*, 95 U. S. 702; *Railroad Co. v. Aspell*, 23 Pa. St. 147. When it is shown that an injury would not have happened except for the culpable negligence of the party injured, there can be no recovery, even though there be concurring negligence on the other party. The track of a railroad over which frequent trains are passing is a place of danger. A person who goes upon it unnecessarily, or without valid cause, voluntarily incurs a risk for the consequences of which he cannot hold other persons responsible; certainly not without adequate proof that he took active measures of precaution to guard against accident. *Bancroft v. Railroad Co.*, supra.

The judgment of the circuit court is affirmed, with costs.

SIPE et al. v. COPWELL.

(Circuit Court of Appeals, Sixth Circuit. January 2, 1894.)

No. 82.

JUDGMENTS—COLLATERAL ATTACK—STATE AND FEDERAL COURTS.

A decision by a state court, sustaining personal service while defendants were attending court as parties, is binding on the federal courts, and the judgment founded upon it cannot be collaterally attacked therein on the ground that such service was void. 51 Fed. 667, affirmed.

In Error to the Circuit Court of the United States for the Northern District of Ohio.

This was an action by Roger F. Copwell against John F. Sipe and Carl C. Sigler on a judgment in favor of the plaintiff, Copwell, against the defendants, Sipe and Sigler, rendered by the supreme court of Rhode Island. A demurrer to the answer was sustained. 51 Fed. 667. A judgment having been rendered for the plaintiff in default of further defense, the defendants bring error.

Ong & Hamilton, for plaintiffs in error.

Hutchins & Campbell, for defendant in error.

Before LURTON, Circuit Judge, and BARR and SEVERENS, District Judges.

LURTON, Circuit Judge. This is a suit upon a judgment rendered by the supreme court of Rhode Island against the appellants, Sipe and Sigler, and in favor of the appellee, Copwell. 23 Atl. 14. The defense interposed by the answer was that the judgment was void because jurisdiction was obtained by the service of process upon the defendants thereto when they were in attendance upon the supreme court of Rhode Island, as parties defendant to a suit then pending for trial. A demurrer to the answer was sustained, (51 Fed. 667,) and judgment rendered for the plaintiff in default of further defense. The judgment of the circuit court upon the demurrer filed by the appellants is now assigned as error.

Is the judgment of the Rhode Island court void? We think it is not. That court had jurisdiction of the subject-matter. This is not contested. It had jurisdiction of the defendants by personal service of the writ of summons. The defendants pleaded in abatement the circumstances under which they had been summoned, and insisted that they were exempt from summons while in attendance as parties to another suit then and there pending against them in the same court. This presented an issue for adjudication. It was decided adversely to the contention then and now urged by appellants. The determination of that question was clearly within the jurisdiction of the Rhode Island court. Its solution depended upon the statute or common law of that state. It decided that the Rhode Island statute, exempting witnesses from arrest or summons while in attendance as witnesses, did not apply to any other than witnesses. It further decided that there was nothing in the public policy of that state which exempted parties to pending suits from service of process in new suits.

Whether these questions were rightly or wrongly decided is a matter of no importance in the present aspect of the question. The court had jurisdiction to determine these issues. The soundness of the adjudication cannot be questioned in a collateral attack. *Cooper v. Reynolds*, 10 Wall. 308; *Trust Co. v. Seasongood*, 130 U. S. 482, 9 Sup. Ct. 575; *Chicago & A. R. Co. v. Wiggins Ferry Co.*, 108 U. S. 18, 1 Sup. Ct. 614, 617.

It is not a question as to the effect of constructive or substituted service, as in *Pennoyer v. Neff*, 95 U. S. 714. There was actual serv-

ice of process. Whether there was an abuse of the process of the court was a question for the determination of the court whose process is complained of. *Construction Co. v. Fitzgerald*, 137 U. S. 98-105, 11 Sup. Ct. 36. The decision of the Rhode Island court, at most, would be erroneous, and in no view of the case is the judgment void. Having jurisdiction of the subject-matter, and of the person by actual service of process, it had the power to determine for itself that its process had not been abused, nor the jurisdiction acquired fraudulently. Its judgment is entitled to full respect, and cannot be reviewed by the circuit court. It is accordingly ordered that the judgment of the circuit court be affirmed.

MERCHANTS' EXCH. BANK v. McGRAW.

(Circuit Court of Appeals, Ninth Circuit. January 15, 1894.)

No. 110.

1. SALE—DELIVERY—WHEN TITLE PASSES.

By agreement for a sale of goods the sellers were not to part with possession until payment should be made by cashing their draft on the purchasers, with bill of lading attached. The purchasers' bank agreed with them to guaranty payment of the draft on the understanding that the goods and bill of lading were to be its property as security, and wired the sellers' bank that the draft, with bill of lading attached, would be paid, whereupon the latter bank cashed it. *Held*, that the delivery by the sellers of the goods to the railroad company consigned to the purchasers, and taking a bill of lading to that effect, did not pass title to the purchasers, and that the sellers' bank acted as the agent of the purchasers' bank in receiving and transmitting the bill of lading.

2. JUDICIAL NOTICE—STATE STATUTES.

The courts of the United States take judicial notice of the public statutes of the several states.

In Error to the Circuit Court of the United States for the Northern Division of the District of Washington.

At Law. Action by the Merchants' Exchange Bank of Milwaukee, Wis., against John H. McGraw for conversion. Judgment of dismissal. Plaintiff brings error. Reversed.

Lichtenberg, Shepard, Lyon & Denny, (Charles E. Shepard and Sylvester & Scheiber, on the brief,) for plaintiff in error.

Fishback, Elder & Hardin and Henry F. McClure, for defendant in error.

Before McKENNA and GILBERT, Circuit Judges, and HAWLEY, District Judge.

GILBERT, Circuit Judge. The plaintiff in error, a banking corporation of Milwaukee, Wis., brought an action for damages against the defendant in error for wrongful conversion of 100 bales of hops. On the 2d day of December, 1890, A. F. Luening & Co., hop dealers of Milwaukee, Wis., had an account with their bank, the plaintiff in error, which account was at that date overdrawn. A. F. Luening, a member of the firm, stated to the cashier of the bank that

his firm had purchased 100 bales of hops, through Kuehn, Metzler & Co., commission dealers at Seattle, Wash., at about 32 cents per pound; that his firm had not the money to pay for the hops, but that the First National Bank of Seattle would advance the purchase money therefor if the plaintiff in error would guaranty the payment of a draft to be drawn by Kuehn, Metzler & Co. on A. F. Luening & Co. for the sum. The bank agreed so to guaranty the draft on the understanding that the hops and the bill of lading thereof should be the property of the bank as security for the guaranty. Thereupon the plaintiff telegraphed on the same day to the First National Bank of Seattle as follows:

"Draft Kuehn, Metzler & Co. on A. F. Luening & Co. for 100 bales hops at 32 cents per pound. Bill of lading and value bill attached will be paid.

"Merchants' Exchange Bank."

On December 8, 1890, Kuehn, Metzler & Co. shipped to A. F. Luening & Co., Milwaukee, as consignees, 100 bales of hops, and took the bill of lading of the same to the First National Bank of Seattle, and there attached it to a draft on A. F. Luening & Co. for the purchase price of the hops, which included the commission of Kuehn, Metzler & Co. The draft was discounted by the First National Bank of Seattle, and was then sent for collection through the bank of the plaintiff in error. On the 8th day of December, however, the hops were attached by the defendant in error, as sheriff, in an action against A. F. Luening & Co., after they had been delivered into the custody of the railroad company at Seattle. Both the plaintiff in error and Luening & Co. were advised of this fact by telegraph after the draft was discounted at Seattle. It was admitted by the plaintiff in error in open court upon the trial that the attachment was levied after the bill of lading was issued, and that it does not appear from the testimony whether the levy was made before or after the negotiation of the draft at the Seattle bank. On December 15, 1890, the draft reached Milwaukee, and was presented to A. F. Luening & Co., but was protested for non-acceptance, the reason for the nonacceptance being that the draft was drawn for more than the agreed price. Upon remitting the overcharge, a second draft in lieu of the first was issued from the Seattle bank on the same day, and was paid on December 20, 1890, by the plaintiff in error, pursuant to its guaranty, but the plaintiff in error has not been reimbursed by A. F. Luening & Co. for the money so paid. Demand was made by the plaintiff in error upon the sheriff for the delivery of the hops, and, upon his refusal, this action was brought. Upon the trial the facts above recited were proven. The court below, upon the motion of defendant, granted a nonsuit at the close of the plaintiff's testimony, and entered a judgment of dismissal, upon the ground that the plaintiff had failed to prove that the attachment was not levied before the draft was cashed at the Seattle bank.

There are two principal questions presented by the record in this case: First. Was there evidence to go to the jury in support of the plaintiff's claim of title to the hops? Second. Was there proof of the incorporation of the plaintiff?

The answer to the first question must depend upon whether or not the title to the hops passed to A. F. Luening & Co. by the delivery of the hops to the railroad company at Seattle, so that between that point of time and the cashing of the draft at the Seattle bank on the same day they were the property of the firm to which they were consigned. It appears from the bill of exceptions that the terms and conditions of the sale had been agreed upon prior to that date, and that the hops had been bought, but were not paid for, and were not yet delivered. The terms of the sale are testified to by A. F. Luening as follows:

"About the 1st or 2d of December, 1890, I duly purchased by wire of Kuehn, Metzler & Co., 100 bales of hops, with the understanding that they were to draw on me at sight, with bill of lading and value bill attached to the draft. They desired the draft cashed at Seattle for some reason."

J. J. Metzler, of the firm of Kuehn, Metzler & Co., testified:

"We had a deal in the month of December, 1890, with A. F. Luening & Co., of Milwaukee, relative to a hundred bales of hops. We bought them on an order from A. F. Luening & Co., and shipped the hops to them. As regards payment, they usually wired us credit from Milwaukee to the First National Bank here,—wired credit to pay for the hops. * * * Our arrangement was made on December 2d by wire, but we did not get the bill of lading out until the 8th. * * * We secured the hops for the purpose of shipment before that arrangement was made, and then we shipped them, and took out that bill of lading."

So far as this evidence goes, (and there was no evidence to contradict it,) it was clearly a part of the agreement and understanding between the vendors and the vendees that the former should not part with their possession of the hops until they should have received payment therefor. In order to obtain payment, arrangement was made for the cashing of a draft to be drawn by the vendors upon the vendees. The draft was to be cashed at the First National Bank of Seattle whenever it should be presented by the vendors with the bill of lading of the hops attached. In order to procure the bill of lading for this purpose, it was necessary to place the hops in charge of the railroad company at Seattle, consigned to A. F. Luening & Co. at Milwaukee. The bill of lading was procured, and presented at the Seattle bank with the draft, and the draft was cashed. Thereby Kuehn, Metzler & Co. were paid. Did the title at any time vest in A. F. Luening & Co.?

The precise point of time at which the title passes upon a sale of goods, such as is disclosed in the record of this case, depends upon the intention of the parties. "The general rule is that, if it is a part of the contract of sale that the seller shall deliver the property sold at some place specified, and receive payment on delivery, title will not pass until such delivery." 1 Benj. Sales, § 325. In *Sneathen v. Grubbs*, 88 Pa. St. 147, the vendor, a coal dealer, had agreed to load coal upon two of the vendee's barges, and to deliver the coal, with the barges, at Pittsburgh, and receive his pay on delivery. The coal was placed upon the barges, but in transit to Pittsburgh the coal was attached by creditors of the vendor. The vendee brought replevin. The court held that delivery of the coal had not taken place, notwithstanding the loading of the vendee's

barges, since payment had not been made for the coal. In *Copland v. Bosquet*, 4 Wash. C. C. 588, Washington, J., said:

"Upon the completion of the contract of sale, and before delivery, the property of the thing sold is changed, and passes to the vendee; but, if the sale be for money to be immediately paid or to be paid upon delivery, payment of the price is a condition precedent of the sale, which suspends the completion of the contract until the condition is performed, and prevents the right of the property from passing to the vendee unless the vendor chooses to trust to the personal credit of the vendee."

In *Russell v. Minor*, 22 Wend. 659, goods had been sold to be paid for by the vendee's note. The goods were delivered, and the note demanded, but refused. The vendor brought replevin. After a review of all the cases, the court held that the delivery was conditional, and that no title passed. To the same effect is *Harris v. Smith*, 3 Serg. & R. 20. In *Leven v. Smith*, 1 Denio, 571, the terms of the sale were cash on delivery. Delivery was made, but it was held that no title passed until payment was made by the vendee, or waived by the vendor. To the same effect is *Hammett v. Linne-man*, 48 N. Y. 399. In *Stone v. Perry*, 60 Me. 48, the court said:

"To establish that the delivery was conditional it is not necessary that the vendor should declare the conditions in express terms at the time of delivery. It is sufficient if the intent of the parties can be inferred from their acts, or the circumstances of the case."

In *Paul v. Reed*, 52 N. H. 136, the court said:

"The proof tends to show that the sale was for cash, and not on credit; and this is just what would have been intended had no time of payment been stipulated. The case then stands before us as a contract of sale for cash on delivery. In such case the delivery and payment are to be concurrent acts, and therefore, if the goods are put into the possession of the buyer in the expectation that he will immediately pay the price, and he does not do it, the seller is at liberty to regard the delivery as conditional, and may at once reclaim the goods. In such a case the contract of sale is not consummated, and the title does not vest in the buyer."

In *Cole v. Berry*, 42 N. J. Law, 308, it was said:

"Payment of the contract price is one of the most usual conditions on which the transfer of title depends. It is generally a condition to be performed simultaneously with delivery."

These decisions establish the doctrine that whether or not the title to goods passes upon delivery depends upon the intention of the parties, and that the intent may be inferred from the terms of the sale and the circumstances surrounding the same.

The question of the intention is one of fact, to be ascertained, not by inquiring what was the secret purpose of the vendor, but by considering his acts and declarations. *Wigton v. Bowley*, 130 Mass. 252; *Comer v. Cunningham*, 77 N. Y. 391. As said by the court in *Bank v. Bangs*, 102 Mass. 291:

"It is properly a question of fact for the jury, and must be submitted to them, unless it is plain, as a matter of law, that the evidence will justify a finding but one way."

In the case before the court there is nothing from which it may be inferred that there was an intention that the title to the hops should pass to the purchaser before payment of the purchase price,

save and except the fact that they were delivered by the consignors to the carrier for transportation, consigned to A. F. Luening & Co., and that a bill of lading was made out to that effect. These facts alone would amount to proof prima facie that the consignees were the owners. Their effect as evidence, however, is overcome by the other facts in the case,—by the fact that the goods were to be paid for before delivery, that the purchase money was to be procured by pledge of the goods upon a draft with the bill of lading attached, and by the further fact that the possession of the bill of lading was to be retained by Kuehn, Metzler & Co. until they should receive payment. *Bank v. Jones*, 4 N. Y. 497; *Bank v. Daniels*, 47 N. Y. 631; *Emery v. Bank*, 25 Ohio St. 360; *Stollenwerck v. Thacher*, 115 Mass. 224.

In *Bank v. Jones*, supra, the owner of flour at Rochester consigned the same to Jones, in Albany, to whom he was indebted, and obtained a bill of lading of the same. On the same day he discounted at the Bank of Rochester a draft on the consignee, and delivered the bill of lading to the bank as security. The bank forwarded the draft and the bill of lading to its agent at Albany, but the consignee refused to accept the draft, but subsequently obtained possession of the flour, and sold it. The bank brought trover against him, and it was held that the bank was the pledgee, and could maintain the action.

In *Emery v. Bank*, supra, a produce broker in New York consigned goods to a firm in Cincinnati, and drew upon the consignees against the goods, and discounted the drafts, at the same time pledging with the bank the bill of lading, which had been drawn in favor of the consignees. The consignees received the goods, but refused to accept the drafts, or pay the same, for the reason that the consignor was indebted to them. Upon an action brought by the bank for the proceeds of the goods it was held that it was entitled to recover, notwithstanding that the bill of lading had not been indorsed to it by the consignees.

But it is contended on the part of the defendant that the bill of lading was not in fact delivered to the plaintiff, and that the plaintiff acquired no right or interest in the same, or in the hops represented thereby, until A. F. Luening & Co. made the indorsement to the plaintiff, upon December 20, 1890. There can be no question that the delivery of the bill of lading to the Seattle bank was a delivery to the plaintiff. In paying the draft the Seattle bank obviously relied upon the guaranty of the plaintiff, but it was one of the conditions upon which the guaranty was given that the bill of lading should be delivered with the draft. In receiving the bill of lading from the drawers of the draft, and transmitting the same to the plaintiff, the Seattle bank was acting as the agent of the latter. It was not necessary that the bill of lading should have been indorsed or assigned to the plaintiff. A bill of lading may be transferred in pledge by mere delivery alone, wherever it is the intention of the parties so to transfer it. *Railroad Co. v. Phillips*, 60 Ill. 190; *Peters v. Elliott*, 78 Ill. 321; *Bank v. Dearborn*, 115 Mass. 219; *Holmes v. Bailey*, 92 Pa. St. 57. It follows from these con-

siderations, and from the authorities above cited, that there was evidence to go to the jury tending to prove that up to the time of the delivery of the bill of lading to the bank at Seattle the title to the hops remained in Kuehn, Metzler & Co., and that by the cashing of the draft, and the delivery of the bill of lading to that bank as the plaintiff's agent, the title passed to the plaintiff.

It is further contended that the nonsuit was properly granted, for the reason that there was no legal proof of the incorporation of the plaintiff. The allegation of the complaint that the plaintiff was incorporated was denied in the answer. The plaintiff offered in evidence a certificate of incorporation, and undertook to prove the competency and sufficiency of the same by reference to the statutes of Wisconsin, but by oversight referred to the wrong sections of the statutes. The reference was intended to be to section 2024, which provides that a certificate, such as that offered in evidence, shall constitute due proof of incorporation. It is sufficient to say in answer to this that it was not necessary to introduce proof of the statutes of Wisconsin. The courts of the United States take judicial notice of all public statutes of the several states of the Union. *Owings v. Hull*, 9 Pet. 625; *Bank v. Franclyn*, 120 U. S. 747, 7 Sup. Ct. 757; *Lamar v. Micou*, 114 U. S. 218, 5 Sup. Ct. 857; *Gormley v. Bunyan*, 138 U. S. 623, 11 Sup. Ct. 453.

The judgment is reversed, and the cause is remanded for a new trial, with costs to the plaintiff in error.

McDONALD v. HANNAH et al.

(Circuit Court of Appeals, Ninth Circuit. February 5, 1894.)

No. 95.

1. EJECTMENT—PLEADING AND PROOF.

Plaintiff may rely upon the admission in the answer that defendant claims from a certain grantor, and need not prove title in such grantor if he is the common grantor; and, where he offers insufficient proof of title in the common grantor, it must be disregarded, as being proof of a title not in issue. 51 Fed. 73, reversed.

2. TAX TITLES.

Under the laws of Washington requiring realty assessed for taxes to be listed in the name of the owner, and making the taxes levied a debt due from the owner, to be collected by sale of the land only in case personal property cannot be found, a purchaser at a tax sale acquires only the title of the person assessed. 51 Fed. 73, affirmed.

In Error to the Circuit Court of the United States for the Western Division of the District of Washington.

At Law. Ejectment by F. V. McDonald against Dolphus B. Hannah, Kate E. Hannah, and others. Judgment for defendants. 51 Fed. 73. Plaintiff brings error. Reversed.

W. Lair Hill and W. Scott Beebe, (J. C. Stallcup and C. R. Holcomb, on the brief,) for plaintiff in error.

W. C. Sharpstein, for defendants in error.

Before McKENNA and GILBERT, Circuit Judges, and HAWLEY, District Judge.

GILBERT, Circuit Judge. The plaintiff in error brought ejectment against the defendants in error to recover possession of certain land in the city of Tacoma, state of Washington. The answer set up ownership and possession in the defendants by virtue of a tax title. Trial was had before the court, without a jury. On the trial, plaintiff offered in evidence a conveyance of the premises from Mary A. Givens, the common grantor of both plaintiff and defendants. Instead of resting upon the rule which renders it unnecessary for the plaintiff to prove title in the common grantor, the plaintiff then introduced what he claimed to be a chain of conveyances from the United States down to Mary A. Givens. These were held by the court to be not only insufficient to show title in Mary A. Givens, but to show affirmatively that she had no title whatever, and no interest in the land upon which ejectment could be maintained. The court, therefore, without entering into the consideration of defendant's title or right of possession, rendered judgment against the plaintiff, for want of proof of title in himself. The question is presented whether this ruling upon the evidence was error.

Where the answer, as in this case, contains a distinct admission that the defendant claims his title and right of possession through a certain grantor, the authorities uniformly hold that the plaintiff has the right to rely upon the admissions thus made, and that he does not waive his right by introducing evidence by which he attempts to prove title in the common source. The evidence thus introduced, no matter what its purport or effect, is deemed immaterial, whether objected to or not, and will not be considered. Many of the decisions go to the extent of holding, irrespective of the admissions of the answer, that neither party will be permitted to dispute the title of the common grantor. In *Horning v. Sweet*, 27 Minn. 277, 6 N. W. 782, the action had been dismissed in the court below, upon the ground that the conveyances offered in evidence by the plaintiff to prove the title of the common grantor were insufficient for the purpose. On the appeal, the court disregarded the conveyances thus offered, and held that proof of title from the common grantor was sufficient, and that the action was improperly dismissed. In the case of *Orton v. Noonan*, 19 Wis. 356, there was defective proof of the dedication and plat of a town, but there was proof of the conveyance of a block in the town to the plaintiff from the common source of title admitted in the answer. The plaintiff was nonsuited in the trial court, but, on appeal, it was held that he had the undoubted right to avail himself of the admission in the answer. In *Mickey v. Stratton*, 5 Sawy. 475, the plaintiff offered in evidence a chain of title to himself from the United States. Objection was made to the validity of one of the early conveyances in the chain. The court held it to be a conclusive answer to this objection that the plaintiff and defendant both claimed under a subsequent grantor. In *Ames v. Beckley*, 48 Vt. 395, the court held that all the objections urged by the defendant to the

introduction of deeds prior to the conveyances from the common grantor were immaterial, since the defendant was precluded from questioning the title derived from the common source. The recent case of *Cox v. Hart*, 145 U. S. 385, 12 Sup. Ct. 962, arose under a statute of Texas which enacted simply the rule of evidence that elsewhere obtains without enactment,—that, in an action to try title, it shall be unnecessary for either party to offer proof of title prior to the common grantor. On the trial, question was made of the validity and execution of a conveyance to the common grantor. The supreme court held that it was unnecessary to consider that conveyance.

The principle upon which these decisions are based is that the plaintiff is not required to be prepared with proof of the common grantor's title, and that such evidence, if offered, is presented upon an immaterial question, not in issue in the case. Applying that principle to the case at bar, it would appear that the plaintiff, when he had introduced evidence of his conveyance from Mary A. Givens, had the right to rely upon the admission of the defendants' answer, and to decline to offer further proof of his title; and that, by offering such proof, he did not waive that right; and that the prior conveyances so offered by him must be regarded simply as defective proof, insufficient to establish a title that was not in controversy, and was not an issue in the case, and not as positive evidence to disprove his title, or to destroy the effect of the defendants' admission.

The decision in *Blight's Lessee v. Rochester*, 7 Wheat. 535, relied upon by the defendants in error, is not perceived to be in conflict with these views. In that case the plaintiffs sued claiming as heirs of their father, John Dunlap, who had claimed as the heir of his brother, James Dunlap. James was a British subject, who had died in 1794, before the treaty of that year was signed, and was therefore incapable of transmitting land to his heirs. After his death, his brother, John, claiming to own the land, sold, but did not convey it, to one Hunter, and Hunter conveyed it to the defendant. The defendant entered into possession in 1794. The question considered in the supreme court was whether the defendant, in possession, was estopped to deny the title of John Dunlap. The court said:

"The plaintiffs show no title in themselves, but allege and prove that the title under which the defendant claims is derived from their ancestor. They therefore insist that the defendant is bound in good faith to admit this title, and surrender the premises to them. But the sole principle on which this claim is founded is that the defendant must trace his title up to their ancestor, and is bound, therefore, to admit it. But if the deed of the defendant does not refer to their ancestor, and the record does not convey this information, the defendant holds in opposition to the title of John Dunlap, or claims to have acquired that title. If he holds under an adversary title, his right to contest that of Dunlap is admitted. If he claims under a sale from Dunlap, and Dunlap himself is compelled to aver that he does, then the plaintiffs themselves assert a title against this contract. Unless they show that it was conditional, and that the condition is broken, they cannot, in the very act of disregarding it themselves, insist that it binds the defendant in good faith to acknowledge a title which has no real existence."

It is contended that the principle of the decisions above referred to is inapplicable to this case, for the reason that the defendants' title is a tax title, and that they have acquired thereby the land itself, and not the interest of any particular person therein. Under the laws of Washington in force at and since the time this tax title had its inception, property assessed for taxes was required to be listed against the name of the owner, if known. The taxes so levied constituted a debt due from the owner. The law made provision for its collection by distraint of personal property, and finally, in case personal property could not be found, by sale of the land. The defendants' answer in this case recites the fact that the tax sale in question was made for the unpaid taxes assessed against Mary A. Givens. The tax deed contains the recital that the taxes due from Mary A. Givens, assessed on the land therein conveyed, had not been paid, and that no personal property belonging to her could be found. The title acquired by the defendants was therefore a derivative one, partaking of the nature and incidents of a title obtained upon sale under judicial process, and it was such title only as the said Mary A. Givens had in and to the land in controversy. "Where the law requires the land to be listed in the name of the owner of the fee or of any other interest in the estate, provides for a personal demand of the tax, and, in case of default, authorizes the seizure of the body or goods of the delinquent in satisfaction of the tax, and, in terms or upon a fair construction of the law, permits a sale of the land only when all other remedies have been exhausted, then the sale and conveyance by the officer passes only the interest of him in whose name it was listed, upon whom the demand was made, who had notice of the proceedings, and who alone can be regarded as legally delinquent. In such cases the title is a derivative one, and the tax purchaser can recover in ejectment only such interest as he may prove to have been vested in the defaulter at the time of the assessment." Blackw. Tax Titles, p. 548.

The judgment is reversed, at the cost of the defendants in error, and the cause is remanded for a new trial.

MITCHELL v. SHARON.

(Circuit Court of Appeals, Ninth Circuit. February 5, 1894.)

No. 124.

LIBEL AND SLANDER—WHAT ACTIONABLE—CHARGING CRIMINAL INTENT MERELY.

Words charging another with the formation of a scheme to blackmail, and the request for money as a preliminary step in carrying out the scheme, and an intent to follow up its denial with threats, but not with the actual making of threats, are not actionable per se, the use of a threat being a necessary ingredient of the crime of extortion or the attempt to commit the same, under Pen. Code Cal. § 518.

In Error to the Circuit Court of the United States for the Northern District of California.

At Law. Action by Sarah Mitchell against Frederick W. Sharon

for slander. A demurrer to the complaint was sustained, (51 Fed. 424,) and thereupon the complaint was amended, and a demurrer to the amended complaint was sustained. Plaintiff brings error.

Henry H. Davis, for plaintiff in error.

Wm. F. Herrin, J. M. Allen, and Isaac Frohman, (Hall McAllister, on the brief,) for defendant in error.

Before GILBERT, Circuit Judge, and ROSS and HANFORD, District Judges.

GILBERT, Circuit Judge. An action was brought by the plaintiff in error to recover damages suffered by her by reason of slanderous words alleged to have been uttered concerning her by the defendant in error. It is alleged in the complaint that the defendant, being asked whether he had ever seen the plaintiff, answered as follows:

"Never, and I know very little about her. From what I do know, I can only regard her proposition for money for the letters as a blackmailing scheme, pure and simple. I have never received any communication from her, but from what I hear I suppose she has made demands upon the estate for money. Those demands have not been regarded as anything more than mere talk, the rapid emanations from an idle mind. She will wait a long time before she gets anything out of the Sharon estate for suppressing such information as she may possess. I am often approached by people who talk mysteriously about revealing matters that would be detrimental to the Sharon estate if made public, but I always send them away as soon as they begin to make blackmailing demands."

This language was sued upon as slanderous per se. The last amended complaint contains no allegation of special damage, and no innuendo. A demurrer to the complaint was sustained upon the ground that the words used are not actionable, and the plaintiff in error seeks to review that decision upon this writ of error.

By section 46 of the Civil Code of California slanderous words are actionable per se if they charge any person with crime, or with having been indicted, convicted, or punished for crime. The words in question convey no imputation of criminal indictment, conviction, or punishment, and the only question for consideration is whether they charge the plaintiff with the commission of crime. It is contended by the plaintiff in error that the words impute the crime of blackmailing, or, as it is designated in the Penal Code of California, the crime of extortion, or attempting to extort money.

Extortion is defined by section 518 of the Penal Code of California to be "the obtaining of property from another with his consent induced by a wrongful use of force or fear, or under color of official right." By section 519 it is declared that the fear referred to in the preceding section may be such as is induced by threats concerning the person or property of the individual threatened, or his relative or a member of his family,—such, among other things, as a threat "to expose any secret affecting him or them." Section 520 of the Penal Code provides:

"Every person who extorts any money or other property from another under circumstances not amounting to robbery, by means of force or any threat, such as is mentioned in the preceding section, is punishable," etc.

Section 524 provides as follows:

"Every person who unsuccessfully attempts by means of any verbal threat, such as is specified in section 519, to extort money or other property from another is guilty of a misdemeanor."

The action may be maintained, therefore, if the words used by the defendant charge the plaintiff with committing or attempting to commit extortion.

It is a fundamental principle, applicable to all cases of slander, that in determining whether the words declared upon import a charge of crime all of the language used by the defendant is to be considered. The rule is thus expressed in *Townshend on Libel and Slander*, (section 137:)

"The construction to be put upon any language spoken or written must be that which is consistent with the whole of the speech or writing. * * * The language of any part of an oral discourse is to be construed with reference to the entire discourse. Hence words which standing alone would be actionable may not be actionable when taken in connection with their context."

It is, as we have seen, a necessary ingredient of the crime of extortion, or the attempt to commit the same, that a threat should have been used. We may fairly infer from the first sentences of the defendant's words that the impression he intended to convey was that the plaintiff had made a proposition to part with the possession of certain letters for a money consideration. He does not say or intimate that the proposition has been accompanied by a threat. On the contrary, the words which follow indicate that as yet no threat had been made. He says he regards her proposition as "a blackmailing scheme, pure and simple,"—that is to say, that he believes the plaintiff to have made the proposition as part of a plan to blackmail; that the proposition for money is but the preliminary step, and that he expects more to come; that he expects the plaintiff to follow up the rejection of her proposition with threats,—threats of the publication of the letters,—and that that was her intention and plan from the first; that she will not let the matter rest with the rejection of her proposition, but will proceed with the prosecution of her scheme to blackmail. The words which immediately follow are in harmony with this interpretation:

"I have never received any communication from her, but from what I hear I suppose she has made demands upon the estate for money, [in exchange for the letters.] Those demands have not been regarded as anything more than mere talk, the rapid emanations from an idle mind."

The words which then follow were uttered evidently for the purpose of anticipating and answering any further demands from plaintiff, or demands accompanied with the threat of publication, and for the purpose of advising her or the person spoken to of his attitude in such a case:

"She will wait a long time before she gets anything out of the Sharon estate for suppressing such information as she may possess. I am often approached by people who talk mysteriously about revealing matters that would be detrimental to the Sharon estate if made public, but I always send them away as soon as they begin to make blackmailing demands."

It is contended by the plaintiff in error that in using the words last quoted the defendant intended to class the plaintiff with persons who had made blackmailing demands upon the Sharon estate, and by implication to say that she was also a blackmailer. We find no warrant for holding that the words were so meant by the speaker, or could have been so understood by the auditor. The words are to be taken in their obvious sense and import. It is plain that the whole purport of the reference so made to others who have demanded money from the estate is to advise the person to whom the words were spoken that, if the plaintiff should persist in her scheme, and should threaten to publish the letters unless her demands for money should be complied with, her success would be no greater than that of others who had preceded her in like schemes; that she would be sent away as soon as she began to make blackmailing demands; for he says, "I always send them away as soon as they begin to make blackmailing demands." Upon the consideration of all the defendant's words, it is impossible to find in them the charge that the plaintiff has made a blackmailing demand upon the Sharon estate, or that she has made a threat to publish the letters. It is evident that the defendant meant to say no more than that it was the plaintiff's intention to attempt to extort money from the estate by means of threats; in other words, that she intended to commit the offense made punishable by section 524 of the Penal Code, not that she had done so. The law applicable to such a case is expressed in 13 Am. & Eng. Enc. Law, 353, as follows:

"Words which merely impute a criminal intention, not yet put into action, are not actionable. Guilty thoughts are not a crime."

In *Townshend on Libel and Slander* (section 161) it is said:

"A purpose or intent to do an unlawful act, without any act being done, is not punishable criminally. * * * It is not actionable orally to charge one with a mere intent to commit an offense."

The defendant has not charged the plaintiff with the commission of any act which, coupled with the criminal intent to blackmail, would, if true, render the plaintiff liable to indictment. The act of proffering the letters for sale is not such an act. That act is not unlawful in itself, and it has no necessary connection with an unlawful purpose. The test to be applied is whether the act is such that, taken together with the intent, an offense against the criminal statutes has been committed. The plaintiff could not have been prosecuted criminally for demanding money for the letters even if she cherished at the same time the purpose to threaten the defendant with the publication of the same.

In the case of *Fanning v. Chace*, 17 R. I. 388, 22 Atl. 275, the words declared upon were, "He is going to start a house of ill fame, so sign a protest against him." The court said:

"The main question raised by the demurrer is this, viz.: Are words actionable which merely impute a criminal intention to another? We think this question must be answered in the negative. Words which falsely charge a person with the commission of a criminal offense are actionable upon the familiar ground that they may endanger him by subjecting him to the penal-

ties of the law, and render him infamous in the community. But the charge, in order to be obnoxious to the law, must be of an offense actually committed or attempted; a punishable offense, and not of an offense existing in contemplation or intention merely."

In *Bays v. Hunt*, 60 Iowa, 251, 14 N. W. 785, the defendant had said to the plaintiff: "I believe you will steal. You are religiously and politically dishonest." The court said:

"But the expression 'you will steal' is not to be regarded as an allegation that defendant did steal or has stolen. It expresses the thought that in the future he will commit the crime; that he possesses the qualities of heart which will lead to the crime, and the purpose to commit it, when opportunity therefor arises. It is plain that the words do not imply a charge of the crime committed in the past."

The same principle was held applicable in *McKee v. Ingalls*, 4 Scam. 30, where the words declared upon were: "You are a damned thief. If you have got money, you stole it. I believe you are a damned thief. I believe you will steal."

The judgment is affirmed, with costs to the defendant in error.

NORWICH UNION FIRE INS. SOC. v. STANDARD OIL CO. et al.

(Circuit Court of Appeals, Eighth Circuit. January 29, 1894.)

No. 317.

INSURANCE—SUBROGATION—PARTIES.

An insurance company subrogated to the rights of the assured by paying a loss caused by the wrong of a third person cannot maintain an action against the latter in its own name, if the loss exceeds the amount of the insurance paid, but in such case the action must be brought in the name of the insured.

In *Error to the Circuit Court of the United States for the District of Kansas*.

This was an action by the Norwich Union Fire Insurance Society, of Norwich, England, against the Standard Oil Company and the Goodlander Mill Company, to recover the amount of certain insurance paid by the plaintiff to the defendant mill company, upon the ground that the property was burned through the culpable negligence of the defendant oil company. A demurrer to the complaint was sustained, the court (June 6, 1892) rendering the following opinion:

RINER, District Judge. "This case is before the court on demurrer to the plaintiff's petition. It is alleged in the petition that in the year 1887 the Norwich Fire Insurance Society issued a policy of insurance, in the sum of \$3,000, to the Goodlander Mill Company,—a corporation organized under the laws of Kansas, and doing business at Ft. Scott; that the insurance was upon certain wheat owned by the mill company. The petition further shows that the German Fire Insurance Company had also issued a policy of insurance in the same amount—\$3,000—to the mill company, upon wheat. The last-mentioned policy having been assigned to the plaintiff in this case, plaintiff brings this suit to recover the amount of both policies,—\$6,000. The petition further shows that after the issuance of the policies of insurance the wheat was destroyed by fire, and that these insurance companies paid the loss in the amount of their respective policies, \$3,000 each, and took an assignment in writing of whatever claim the mill company might have

against the defendant because of the loss to the amount of their policies. It is further alleged that the fire occurred by reason of the negligence of the defendant the Standard Oil Company. The facts stated in the petition are to the effect that the defendant shipped a tank car of petroleum from Lima, Ohio, consigned to the gas company at Ft. Scott, which car was placed upon a side track near the mill and elevator of the Goodlander Mill Company, and that the employees of the gas company attempted to unload the car, but, because of the defective construction of the car, the oil escaped, took fire, and the mill and its contents were destroyed. It appears upon the face of the petition that the wheat destroyed by fire was of the value of \$20,000, and that there were other policies of insurance upon the wheat, in addition to those upon which this suit is based. The written assignment given by the Goodlander Mill Company to the plaintiff in this case and to the German Fire Insurance Company fixes the value of the wheat destroyed at \$40,000. While this assignment is not in the body of the petition, a copy of it is attached to, and made a part of, the petition. Hence, it is clearly shown by the petition that the amount here sued for is but a small part of the loss actually sustained by the Goodlander Mill Company in the destruction of its property by the fire alleged to have been caused by the defendant's negligence.

"The question, therefore, raised by the demurrer, is whether or not the plaintiff can maintain an action in its own name against the party through whose negligence the fire is alleged to have occurred, when the petition shows that the whole loss was far in excess of the amount covered by the policies of insurance which are made the basis of this action. In other words, the Goodlander Mill Company having sustained the loss of its property by and through the negligence of the defendant, and the insurance companies having paid the amount of their policies, thereby becoming subrogated to the rights of the Goodlander Mill Company, to the value of their policies, can they maintain an action in their own name, when it appears upon the face of the petition that their claim is but a small part of the loss for which the Standard Oil Company is liable to the Goodlander Mill Company, if liable at all? I think it must be conceded that but one wrong is shown by the petition in this case, and that that wrong is done to and suffered by but one party,—the Goodlander Mill Company,—and that, if the mill company had brought the suit, it would have been required to include its entire claim in one cause of action. The mill company having but one cause of action against the defendant, can that cause of action be divided among the parties who, by payment of policies of insurance, become subrogated to its rights to the extent of their policies, and a number of causes of action be thus made out of the one cause originally existing in favor of the mill company? The wrong complained of is the destruction of the mill company's property, and the right of action exists, if at all, because of the negligence of the defendants in using a defective car. Thus, originally, there was but one cause of action and but one liability. The defendant was liable for but one thing, namely, its act of negligence. Its act was but one wrong, but one tort, and for that wrong the mill company had its cause of action, but was obliged to embrace its entire claim in one action. While it is true that the plaintiff is subrogated to the rights of the mill company against the wrongdoer, to the extent of the money paid upon its policies, yet it can have no greater rights than the mill company originally had. The mill company could not have divided its cause of action, and brought a dozen suits for the purpose of recovering for the one wrong; and I think, within all of the cases, that the parties cannot, by taking the course pursued in this case, divide a single cause of action, and bring a dozen or more suits to recover on a single cause of action. If the plaintiff is allowed to maintain this action, then each insurance company holding a policy on this property could maintain a separate action for the amount of its policy, and if the policies, altogether, did not amount to the value of the property, the mill company could still maintain an additional action for the balance; thus dividing the single cause of action existing in favor of the mill company into a dozen or more suits, and requiring the defendant to defend in a dozen or more suits, to have the one question determined, namely, whether

or not its negligence caused the loss, for upon this question alone depends the right of recovery in favor of any of the parties in interest, whether their interest be by way of subrogation or otherwise. The supreme court of Illinois, in discussing this question, say: 'The wrongdoer is liable to the owner of the property for the injury he has done him, and, although a wrongdoer, it is still his right to have the loss adjusted in a single suit.' This, I think, is a clear statement of the rule. By taking this course the question of the liability of the defendant can be determined in a single suit; and if, in the trial of that action, it shall be determined that liability exists, then, when the judgment is obtained, the court can direct how the proceeds of that judgment shall be divided among the parties claiming an interest in it, thus avoiding a multiplicity of suits. This rule, it seems to me, is reasonably and fully supported by authority both in England and this country. See *Aetna Ins. Co. v. Hannibal & St. J. R. Co.*, 3 Dill. 1, Fed. Cas. No. 96; *Hall v. Railroad Co.*, 13 Wall. 367; *Insurance Co. v. Frost*, 37 Ill. 334; *Hart v. Railroad Corp.*, 13 Metc. (Mass.) 99; *Baird v. U. S.*, 96 U. S. 430; *Marine Ins. Co. v. St. Louis, I. M. & S. Ry. Co.*, 41 Fed. 643. In the case last cited, Judge Caldwell states the rule as follows: 'Where the value of the property exceeds the insurance money paid, then the suit must be brought in the name of the assured,'—and cites cases in 3 Dill. as authority upon that question.

"I do not deem it necessary to discuss the second proposition suggested at the argument, viz. that the action must be brought in the name of the real party in interest. This question was disposed of in the case of *Aetna Ins. Co. v. Hannibal & St. J. R. Co.*, 3 Dill. 1, Fed. Cas. No. 96. The demurrer will be sustained."

Plaintiff sued out a writ of error, and the judgment of the circuit court is now affirmed.

The Goodlander Mill Company owned a mill at Ft. Scott, Kan., which, together with its contents, including \$60,000 worth of wheat, was destroyed by fire on the 19th day of November, 1887. The plaintiff in error had issued to the mill company a policy of insurance for \$3,000 on the wheat in the mill. This policy was in force when the wheat was burned, and the plaintiff paid the amount thereof to the mill company, and brings this action against the Standard Oil Company to recover the amount paid to the mill company, upon the ground that the wheat was burned through the culpable negligence of the oil company. The complaint avers that the value of the wheat burned was \$60,000, and that, "in addition to the policy taken out in the plaintiff company, there were ten other concurrent fire insurance policies taken out in other companies, equaling three-fourths of the value of the wheat, and also other policies on the buildings in which the said wheat was contained." It is further averred in the complaint that the plaintiff requested the mill company to join it as a party plaintiff in this suit, which it refused to do, whereupon the plaintiff made it a defendant, and that prior to the commencement of this suit the mill company brought an action against the Standard Oil Company, which was then pending, to recover the value of the mill and its contents, upon the ground that the negligence of the oil company occasioned the loss, but that the mill company did not, in that action, seek to recover the amount paid to it by the plaintiff in satisfaction of its policy. There was a demurrer to the complaint, which was sustained, and the plaintiff sued out this writ of error. Judge Riner's opinion sustaining the demurrer is reported *supra*.

E. F. Ware, (Charles S. Gleed, James Willis Gleed, D. E. Palmer, and C. Hamilton, on brief,) for plaintiff in error.

A. A. Harris and Oliver H. Dean, (William Warner, William D. McLeod, and Henry E. Harris, on brief,) for Standard Oil Company, defendant in error.

Before CALDWELL and SANBORN, Circuit Judges, and THAYER, District Judge.

CALDWELL, Circuit Judge, after stating the facts as above, delivered the opinion of the court.

The circuit court sustained the demurrer to the complaint on the ground that the plaintiff could not maintain the action in its own name, and the correctness of this ruling is the only question we find it necessary to consider.

When an insurance company pays to the assured the amount of a loss of the property insured, it is subrogated, in a corresponding amount, to the assured's right of action against any other person responsible for the loss. This right of the insurer against such other person is derived from the assured alone, and can be enforced in his right only. At common law it must be asserted in the name of the assured. In a court of equity or of admiralty, or under the modern codes of practice, it may be asserted by the insurance company in its own name, when it has paid the insured the full value of the property destroyed. *St. Louis, I. M. & S. Ry. Co. v. Commercial Union Ins. Co.*, 139 U. S. 223, 235, 11 Sup. Ct. 554, and cases cited; *Marine Ins. Co. v. St. Louis, I. M. & S. Ry. Co.*, 41 Fed. 643. But the rule seems to be well settled that, when the value of the property exceeds the insurance money paid, the suit must be brought in the name of the assured. *Aetna Ins. Co. v. Hannibal & St. J. R. Co.*, 3 Dill. 1, Fed. Cas. No. 96; *Assurance Co. v. Sainsbury*, 3 Doug. 245; *Insurance Co. v. Boshier*, 39 Me. 253; *Hart v. Railroad Corp.*, 13 Metc. (Mass.) 99; *Connecticut, etc., Ins. Co. v. New York, etc., R. Co.*, 25 Conn. 265, 278; *Insurance Co. v. Frost*, 37 Ill. 333; *Fland. Ins.* pp. 360, 481, 591; *Marine Ins. Co. v. St. Louis, I. M. & S. Ry. Co.*, *supra*. In such an action the assured may recover the full value of the property from the wrongdoer, but as to the amount paid him by the insurance company he becomes a trustee; and the defendant will not be permitted to plead a release of the cause of action from the assured, or to set up as a defense the insurance company's payment of its part of the loss. *Hart v. Railroad Corp.*, *supra*; *Hall v. Railroad Co.*, 13 Wall. 367. In support of this rule it is commonly said that the wrongful act is single and indivisible and can give rise to but one liability. "If," says Judge Dillon in *Aetna Ins. Co. v. Hannibal & St. J. R. Co.*, *supra*, "one insurer may sue, then, if there are a dozen, each may sue; and, if the aggregate amount of all the policies falls short of the actual loss, the owner could sue for the balance. This is not permitted, and so it was held nearly a hundred years ago, in a case whose authority has been recognized ever since both in Great Britain and in this country."

The learned counsel for the plaintiff in error challenges the soundness of this rule, and contends with much force that the rule that a wrongdoer who injures many people by the same act is liable to each person separately for the injury done to each should be applied to this class of cases. It is said, "The convenience of the innocent injured man to sue and get reparation is paramount to the inconvenience of the wrongdoer who suffers from a multiplicity of suitors." It would serve no useful purpose to

repeat here the reasoning of the courts in answer to this contention. The subject is fully gone over in the authorities we have cited.

The rule that, where the property exceeds in value the amount insured, the suit must be in the name of the assured, seems not to rest so much upon the necessity or desirability of exempting the wrongdoer from a multiplicity of suits as upon the peculiar nature of the relation existing between the assured and the insurer. It is held by the supreme judicial court of Massachusetts (*Hart v. Railroad Corp.*, supra) and by the supreme court of the United States (*Hall v. Railroad Co.*, supra) that in respect to the ownership of the property, and the risk incident thereto, the owner and the insurer are considered but one person, having together the beneficial right to the indemnity due from one who is responsible for its loss. When the insurer pays the assured the full value of the property destroyed, the insurer may maintain an action in his own name against one responsible for its loss, because, by operation of law, the whole beneficial right to indemnity from the wrongdoer has been vested in the insurer. He is therefore the real and only party in interest, and, under the Code, the proper party to bring the suit. But, when the value of the property destroyed exceeds the insurance money paid, the beneficial right to indemnity from the wrongdoer remains in the assured, for the whole value of the property,—for the unpaid balance due to himself, as well as for the amount paid by the insurer, as to which last sum he is chargeable as a trustee.

It will be observed that in this case 10 other insurance companies have issued separate policies on the property, and that the aggregate amount of all the policies only equals three-fourths of the value of the property, and that the assured has brought suit against the oil company for the value of the property destroyed. If the contention of the plaintiff in error is sound, then the 11 insurance companies and the assured can each maintain a separate action against the alleged wrongdoer. We are cited to no case which supports this contention, and we do not think one can be found. The allegation of the complaint that the mill company, in its action against the oil company, makes no claim for the amount of insurance paid by the plaintiff, does not alter the case; for, if this was done at the request of the plaintiff, it cannot complain, and if it was done by the mill company on its own motion, and it recovers in the action, it will hold an amount of the recovery equal to the insurance paid as trustee for the plaintiff.

The judgment of the circuit court is affirmed.

AETNA LIFE INS. CO. v. TOWNSHIP OF LAKIN.

(Circuit Court of Appeals, Eighth Circuit. January 29, 1894.)

No. 229.

PRACTICE—NONSUIT.

Plaintiff has a right, in Kansas, by the express terms of the statute, (Code Civ. Proc. Kan. § 397,) to dismiss his action without prejudice at any time before its final submission to the jury, or to the court where the trial is by the court.

In Error to the Circuit Court of the United States for the District of Kansas.

This is an action on certain coupons detached from municipal bonds, by the Aetna Life Insurance Company against the township of Lakin, in the county of Kearney, state of Kansas. The case was dismissed, on motion, and final judgment rendered for defendant. This ruling of the circuit court is now assigned for error.

W. H. Rossington, Charles Blood Smith, and Everett J. Dallas, for plaintiff in error.

F. P. Lindsay, orally, for defendant in error.

Before CALDWELL, Circuit Judge, and THAYER, District Judge.

CALDWELL, Circuit Judge. The record shows that, when this cause was called for trial in the court below, "the plaintiff announced that it was not ready for trial, and could not be ready for trial herein during the present term of this court, and asked permission to dismiss this action, to which the defendant objected for the reason that under the pleadings herein the defendant was entitled to judgment in its favor, which objection of the defendant was by the court sustained." The case was thereupon dismissed, and a final judgment rendered in favor of the defendant. This ruling of the court was duly excepted to, and is here assigned for error.

The suit is founded on interest coupons cut from negotiable bonds which the plaintiff alleges were issued by the township of Lakin, in the county of Kearney, Kan. The answer contains six paragraphs. The plaintiff replied to the first five, and demurred to the sixth, and, upon the demurrer being overruled, filed a reply to that paragraph. The filing of this reply seems not to have been known to the court at the time the action was dismissed. It is contended that the reply is not sufficiently specific in its denials of the averments of the answer. It denies "each and every, all and singular, the allegations and averments therein set forth and contained." If the defendant conceived this reply was not sufficiently specific in its denials, it should have attacked it by motion or demurrer, according as the one or the other of these modes may be proper under the practice that prevails in that state. It could not be treated as a nullity.

Upon the state of the pleadings, the plaintiff had an undoubted right, under the Code of Kansas, to dismiss its action when it was called for trial. That Code provides that "an action may be dismissed without prejudice to a future action: First, by the plain-

tiff before the final submission of the case to the jury, or to the court, where the trial is by the court. * * * Code Civ. Proc. § 397. The supreme court of that state have uniformly held that under this section the plaintiff may dismiss his action at any time before its final submission to the jury or court. *McVey v. Burns*, 14 Kan. 291; *Schafer v. Weaver*, 20 Kan. 294; *Amos v. Association*, 21 Kan. 474. It is unnecessary to inquire what the rule is in the absence of a statute, though we may remark that no case has been cited—and we do not think one can be found—which questions the right of the plaintiff to dismiss his action at the stage at which the plaintiff in error asked leave to dismiss its suit.

The judgment of the circuit court is reversed, and the cause is remanded for further proceedings therein according to law.

REILLY v. CAMPBELL et al.

(Circuit Court of Appeals, Second Circuit. February 27, 1894.)

No. 66.

MASTER AND SERVANT—NEGLIGENCE—DEFECTIVE APPLIANCES—EVIDENCE.

Plaintiff sued for injuries suffered by him, while in defendant's employ, through the breaking of the handle of a ladle in which he and another were carrying molten metal. The ladle had been used for the same purpose for 15 years, but there was no evidence as to its condition at the time of the accident. *Held*, that it was proper to direct a verdict for defendant, in the absence of any showing that there was in the ladle an obvious defect, or one which defendant would have discovered by the exercise of due care.

In Error to the Circuit Court of the United States for the Southern District of New York.

Action by Frank Reilly against Andrew J. Campbell and William H. Van Tassel. The trial court directed a verdict for defendants, and plaintiff brings error. Judgment affirmed.

L. E. Chittenden and John C. Robinson, for plaintiff in error.
Hamilton Wallis, for defendants in error.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

WALLACE, Circuit Judge. The action was for personal injuries received by the plaintiff through the alleged negligence of the defendants. It appeared upon the trial that the plaintiff, while working as a laborer for the defendants, who were iron molders, was severely injured by reason of the breaking of the handle of a ladle containing molten iron which, in the course of his duties, he was assisting to carry from one part of the defendants' premises to another. The only evidence as to the circumstances of the accident was that, while the plaintiff and two other men were carrying the ladle in the customary way, one of the handles suddenly broke, and the molten metal was spilled upon the plaintiff. No evidence was offered in respect to the condition of the ladle at the time of, or previous to, the accident, except proof that the ladle

was made of sheet iron, lined with fire clay, had handles made of wrought iron fastened to a wrought iron band which passed around it, and had been in use 15 years. No evidence was offered for the purpose of showing that the appliance was defective or unsafe. The case for the plaintiff was rested upon the theory that negligence was to be presumed against the defendants from the circumstances of the accident. The trial judge ruled that there was no evidence of negligence, and accordingly directed a verdict for the defendants.

If an employer is liable to an employe, hurt in the course of his duties, whenever it appears that the injury was caused by a defective appliance provided by the employer for the duty, the ruling at the trial was erroneous. The breaking of the ladle while it was being used in the customary way, and for the purpose for which it was provided, could only be accounted for upon the inference that it was infirm. Having been used for many years in the same way, presumably it was originally sufficient. Whether it had become impaired by age and wear and tear, or by some other cause, was, upon the evidence, merely matter of conjecture, and is an immaterial consideration if the only question were whether it was defective at the time. But an employer does not undertake as an insurer with his employes for the safety of his appliances. His obligation towards them is to exercise reasonable and proper care and diligence in that behalf. *Hard v. Railroad Co.*, 32 Vt. 478; *Railroad Co. v. Barber*, 5 Ohio St. 541; *Railroad Co. v. Webb*, 12 Ohio St. 475; *Railroad Co. v. Love*, 10 Ind. 554; *Warner v. Railroad Co.*, 39 N. Y. 468; *Flynn v. Beebe*, 98 Mass. 575; *Armour v. Hahn*, 111 U. S. 313, 4 Sup. Ct. 433. In the absence of any evidence sufficient to authorize the jury to find that the defendants had omitted to exercise reasonable care and diligence in permitting the ladle to be used by which the plaintiff was injured, the plaintiff was not entitled to recover, and it was the duty of the trial judge to direct a verdict accordingly. For all that appeared, it was in apparently suitable condition until the moment when it gave out. In *The France*, (recently decided in this court,) 59 Fed. 479, we had occasion to consider a case quite similar in its legal aspects to the present. In the opinion we said:

"The presumption of negligence is often raised by the circumstances of an accident; and it may be a legitimate presumption that an appliance which gives out while it is being used for its proper purpose in a careful manner is defective or unfit. How far that presumption may go in an action by an employe against an employer, to shift the burden of proof from the former to the latter, must depend upon the circumstances of the particular case. The mere fact that the appliance is shown to have been defective is not enough to do so; it must appear that the defect was an obvious one, or such as to be discoverable by the exercise of reasonable care."

These observations are applicable to the present case. As it did not appear upon the trial that the defect was an obvious one, or discoverable by the exercise of ordinary care, we conclude there was no error in the ruling complained of, and the judgment should be affirmed.

SHIEL v. PATRICK.

(Circuit Court of Appeals, Second Circuit. February 27, 1894.)

No. 74.

ATTACHMENT—EQUITABLE ACTIONS—CORPORATIONS—DISSOLUTION.

The right of action which vests in the shareholder of a dissolved corporation to recover moneys of the corporation which were wrongfully diverted from it by another while it was a going concern is purely equitable, for the assets of a dissolved corporation constitute a trust fund for shareholders and creditors; and therefore such right will not support an attachment under Code Civ. Proc. N. Y. § 635, which authorizes attachments in actions "to recover a sum of money only," but does not extend to those of an equitable nature.

In Error to the Circuit Court of the United States for the Southern District of New York.

This was an action by Dennis R. Shiel against Algernon S. Patrick, in which there was judgment for defendant below, and plaintiff brings error. Judgment affirmed.

Martin J. Keogh, for plaintiff in error.

Geo. W. Wickersham, for defendant in error.

Before WALLACE and SHIPMAN, Circuit Judges.

WALLACE, Circuit Judge. This is a writ of error by the plaintiff in the court below to review an order vacating a writ of attachment issued by the supreme court of the state of New York prior to the removal of the suit. It is conceded that the order was practically a final decision of the action, because, by vacating the attachment, which was the only process by which the suit was commenced, the court lost jurisdiction, the defendant having appeared only for the special purpose of moving to vacate the writ. The decision of the circuit judge proceeded upon the ground that the action, being one for equitable relief, was not one in which the state court was authorized to issue an attachment. It is entirely clear that the action is one for equitable relief. The cause of action disclosed in the affidavits upon which the attachment was obtained is in brief as follows: The plaintiff is the owner of certain shares of stock in a corporation which has been wound up and dissolved by a decree of an English chancery court; that, while the corporation was a going concern, the defendant, conspiring with another person, defrauded the corporation out of certain sums of money, and thereby caused it to become insolvent; that, in consequence of the acts of the defendant, the shares of stock owned by the plaintiff and the other shareholders in the corporation are much less valuable than they would have been otherwise, and the plaintiff brings the action for himself and all other shareholders who may choose to come in to recover the amount of the moneys of the corporation thus wrongfully diverted from it by the defendant. The affidavits do not disclose when the plaintiff acquired his shares of stock, nor how many shares he owns, and, so far as appears, all the wrongs complained of were committed by the defend-

ant before the plaintiff had any interest in the affairs of the corporation. Irrespective of the question whether the facts alleged constitute a cause of action in favor of the plaintiff of any sort, at best they show that he is entitled to a certain share of a trust fund, which is to be realized and distributed by a trustee. The assets of a dissolved corporation constitute a trust fund belonging to the shareholders, subject to the rights of its creditors; and a court of equity, which never allows a trust to fail for want of a trustee, will lay hold of this fund, wherever it may be found, and apply it to the purposes of the trust. The authority of the state court to grant a warrant of attachment is found in section 635 of the Code of Civil Procedure, and by that section is limited to actions brought "to recover a sum of money only." It has repeatedly been decided by the state courts in construction of that section, and has also been decided by the highest court of the state, in the only case in which the question seems to have been before it, that an attachment is not authorized in an action of an equitable nature. *Thorington v. Merrick*, 101 N. Y. 5, 3 N. E. 794; *Ketchum v. Ketchum*, 1 Abb. Pr. (N. S.) 157, 46 Barb. 43; *Ebner v. Bradford*, 3 Abb. Pr. (N. S.) 248; *Williams v. Freeman*, 12 Civ. Proc. R. 335. The order vacating the attachment was a proper one, and there is no merit in the assignments of error. The order is affirmed.

NORTHERN PAC. R. CO. v. SMITH.

(Circuit Court of Appeals, Ninth Circuit. January 15, 1894.)

No. 105.

1. MASTER AND SERVANT—FELLOW SERVANTS ON RAILROAD.

A laborer on a work train is a fellow servant with the conductor and engineer of a freight train of the same company.

2. SAME.

The engineer and conductor of a work train are fellow servants with a laborer thereon, where it is in charge of a road master, who directs its movements, and has control of all persons employed upon it.

In Error to the Circuit Court of the United States for the Eastern Division of the District of Washington.

At Law. Action by Charles Smith against the Northern Pacific Railroad Company to recover damages for personal injuries. Verdict and judgment for plaintiff. Defendant brings error. Reversed.

Ashton & Chapman and McBride & Allen, for plaintiff in error.

Henry J. Snively and Ralph Kaufman, for defendant in error.

Before McKENNA and GILBERT, Circuit Judges, and HAWLEY, District Judge.

HAWLEY, District Judge. This action was brought by the defendant in error (hereinafter called the plaintiff) against the plaintiff in error (hereinafter called the defendant) to recover damages for injuries received on the 23d day of October, 1890, in a collision
v.59F.no.9—63

between a freight and a working train belonging to defendant. Plaintiff was a laborer employed, with other persons, in cleaning up wrecks and making general improvements and repairs on defendant's railroad, under the control and management of a road master. At a point near Weston, a station in the Cascade mountains, the workmen were told by the road master to get on the work train, to be transferred a short distance, to a point where they were to be put at work. The workmen got onto the train, which consisted of three flat cars and an engine. There was a conductor of this train, but the road master directed its movements. Before leaving with the train, the road master sent a flagman to the next station east of Weston with directions, as some of the witnesses testified, to hold all trains at that point until otherwise ordered. The instructions to this flagman were in writing, and this writing was not produced at the trial, and, its loss not being satisfactorily accounted for, the court refused to allow the road master, who gave the instructions, to testify as to what was contained therein. The flagman was not present at the trial. While the working train was moving slowly up the grade, without any expectation that the road would be occupied, it was met by a heavy freight train coming on a down grade around a sharp curve, and a collision occurred, which demolished the working train, and in this collision the plaintiff was injured. The trial of the case resulted in a verdict in favor of the plaintiff.

The contention of the plaintiff in support of the verdict is that, in the absence of any testimony to the contrary, it must be presumed that the flagman performed his duty; that the collision occurred because the persons in charge of the freight train disobeyed the flagman's orders; or that the road master failed to give the proper order to the flagman; or because the road master neglected his duty to put out another flagman when he moved the working train; or that the superintendent or train dispatcher, who had charge of the movements of the freight train, failed to give any directions with reference to the work train, which they should have known was occupying the track. The contention of the defendant is that the collision was brought about by the neglect either of the flagman, who was directed to stop the freight train, failing to perform his duty, or that the conductor and engineer of the freight train did not perform their duty by obeying the flagman's orders, and that none of the persons in charge of the working train were in any manner at fault. There was no testimony tending to show any negligence whatever upon the part of the plaintiff.

The court, of its own motion, among other things charged the jury as follows:

"The flagman referred to in the evidence, from the position which he held, and the position which the plaintiff was performing or filling, would be a fellow servant with him in the same common employment, within the meaning of the rule I have laid down. The conductors and engineers running these trains—the work train and the freight train—were not fellow servants of the plaintiff. The road master was not a fellow servant with the plaintiff. So, in determining these questions of negligence, it will be for you to find from the evidence, considering all the circumstances in which the trains

were placed, and in which the men were placed; the character of the road, being a mountain road on a mountain division, with numerous curves, (a wreck having occurred there, which was being cleared away;) the freight train being behind time; and all the circumstances which are shown and not disputed in the case; and consider from all these circumstances where the responsibility may be placed, in accordance with the evidence,—whether upon the train dispatcher, the conductor of either of the trains, the engineer of either of the locomotives employed there, the road master, or this flagman,—or whether it was one of those casualties which cannot be ascribed to the fault of any one. If there was nobody to blame in this, the plaintiff has no case against the defendant. If the flagman was to blame, in the sense that his fault caused the collision to occur, then plaintiff has no claim against this defendant. If this injury, however, was caused by the fault and culpability of an officer or agent of the road, or one of the persons having control of the running of the trains at the time, as I have stated, then he does have a claim, unless you can find that this injury was in some degree caused by acts of negligence on his part, or at least that his negligence contributed to it in any way which would bar him from recovering, even if the defendant was in fault.”

Did the court err in giving this instruction? The flagman was a fellow servant with the plaintiff, and, if his negligence caused the collision, then plaintiff was not entitled to recover. This portion of the charge is not objected to. The testimony in the case is that the road master had charge of the movements of the working train. It is not claimed that the court committed any error in charging the jury that the road master and train dispatcher were not fellow servants with the plaintiff. There is no testimony in the record tending, in the remotest degree, to show that either the conductor or the engineer of the working train was guilty of any negligence, and there was no necessity of referring to them in the charge in the manner mentioned. The testimony in relation to the acts of the conductor and engineers of the freight train was to the effect that the flagman flagged the train before it reached Cole station; that the train stopped, and the flagman stated that the work train was working in shed 26; that he did not give any other orders or make any other statement; that, when the freight train came to shed 26, the work train was not there; that it is the common custom, in such cases, for the freight train to move on, proceeding with care, until it should meet the working train; that, in pursuance of this custom, the conductor and engineers continued moving the freight train slowly at such a rate as, they claimed, would enable them to safely stop the train in case they were flagged again; that they were moving a heavy freight train, with two locomotive engines, at about eight miles an hour, going on a down grade; that the whistle was blown about 1,500 feet before striking the working train around the curve. The entire testimony was of such a character as to leave a doubt as to whose fault, if any, the negligence which caused the collision should be charged. The jury may have, however, inferred from the testimony that it was the fault of the conductor and engineers upon the freight train in not moving it with greater care and caution, and at a less speed, after being informed that the work train was on the road. It will be observed that the charge of the court makes the defendant liable if the jury should find as a fact that the cause of the collision was

the neglect of the conductor or engineers of the freight train. It is this portion of the charge that is specially claimed to be erroneous.

In *Randall v. Railroad Co.*, 109 U. S. 478, 3 Sup. Ct. 322, it was held that a brakeman working a switch for his train on one of the tracks of the railroad was a fellow servant with the engineer of another train of the same railroad corporation upon an adjacent track, and that he could not maintain an action against the railroad corporation for an injury caused by the negligence of the engineman in driving his engine too fast, and not giving due notice of its approach. In the course of the opinion the court said:

"Persons standing in such a relation to one another as did this plaintiff and the engineman of the other train are fellow servants, according to the very great preponderance of judicial authority in this country, as well as the uniform course of decision in the house of lords and in the English and Irish courts, as is clearly shown by the cases cited in the margin. They are employed and paid by the same master. The duties of the two bring them to work at the same place at the same time, so that the negligence of the one in doing his work may injure the other in doing his work. Their separate services have an immediate common object,—the moving of the trains. Neither works under the orders or control of the other. Each, by entering into his contract of service, takes the risk of the negligence of the other in performing his service, and neither can maintain an action for an injury caused by such negligence against the corporation, their common master."

In *Railroad Co. v. Andrews*, 1 C. C. A. 636, 50 Fed. 728, the circuit court of appeals, sixth circuit, following the principles announced in the *Randall Case*, and distinguishing the case under consideration from that of *Railroad Co. v. Ross*, 112 U. S. 377, 5 Sup. Ct. 184, and referring to numerous decisions of the supreme court, held that a brakeman on one train is a coservant of the conductor and engineer of another train, and, if injured or killed in a collision caused entirely by the negligence of the latter, the company would not be liable. In the discussion of the case the court quotes with approval from *Railway Co. v. Devinney*, 17 Ohio St. 198, as follows:

"A railway company is not liable in damages to a brakeman on one of its trains for injuries sustained by him in a collision of his train with another train of the same company, where the collision occurred by means of the negligence of the conductor or engineer, or both, of such other train, unless it appear that the company was guilty of a want of ordinary care in the selection and employment of an incompetent conductor or engineer, through whose negligence the collision occurred."

See, also, *Railroad Co. v. Clark*, 6 C. C. A. 281, 57 Fed. 129; *Mase v. Railroad Co.*, 57 Fed. 286.

Under the principles announced in these decisions, it is apparent that the portion of the charge of the court which is specially objected to is clearly erroneous, and that the error is of such a character as to compel a reversal of the case.

In *Railroad Co. v. Baugh*, 149 U. S. 368, 13 Sup. Ct. 914, which contains the latest exposition of the supreme court of the United States touching the question as to who are, or are not, vice principals or fellow servants of a railroad corporation, there is an able and exhaustive discussion of the question that is well worthy of a careful perusal. This decision explains the *Ross Case*, to a certain

extent it limits the doctrines therein announced, and points out with great clearness the character of cases that should be distinguished from it. In the Ross Case it was decided that—

"A conductor of a railroad train, who has the right to command the movements of a train and control the persons employed upon it, represents the company while performing those duties, and does not bear the relation of fellow servant to the engineer and other employees of the train."

In the Baugh Case the court declared that the argument in support of this rule "gives a potency to the rule of the company it does not possess," and in this connection said:

"The inquiry must always be directed to the real powers and duties of the official, and not simply to the name given to the office. The regulations of a company cannot make the conductor a fellow servant with his subordinates, and thus overrule the law announced in the Ross Case. Neither can it, by calling some one else a conductor, bring a case within the scope of the rule there laid down. In other words, the law is not shifted backwards and forwards by the mere regulations of the company, but applies generally, irrespectively of all such regulations. There is a principle underlying the decision in that case, and the question always is as to the applicability of that principle to the given state of facts."

After further discussion as to what was really decided in the Ross Case, it is said:

"The court, therefore, did not hold that it was universally true that, when one servant has control over another, they cease to be fellow servants, within the rule of the master's exemption from liability, but did hold that an instruction couched in such general language was not erroneous when applied to the case of a conductor having exclusive control of a train, in relation to other employees of the company acting under him on the same train. The conductor was, in the language of the opinion, 'clothed with the control and management of a distinct department;' he was 'a superintending officer,' as described by Mr. Wheaton, (Neg. § 232a; he had 'the superintendence of a department,' as suggested by the New York court of appeals. *Malone v. Hathaway*, (64 N. Y. 12.) And this rule is one frequently recognized. Indeed, where the master is a corporation, there can be no negligence on the part of the master except it also be that of some agent or servant, for a corporation only acts through agents. The directors are the managing agents. Their negligence must be adjudged the negligence of the corporation, although they are simply agents. So, when they place the entire management of the corporation in the hands of a general superintendent, such general superintendent, though himself only an agent, is almost universally recognized as the representative of the corporation,—the master,—and his negligence as that of the master. And it is only carrying the same principle a little further, and with reasonable application, when it is held that, if the business of the master and employer becomes so vast and diversified that it naturally separates itself into departments of service, the individuals placed by him in charge of those separate branches and departments of service, and given entire and absolute control therein, are properly to be considered, with respect to employees under them, vice principals,—representatives of the master,—as fully and as completely as if the entire business of the master was by him placed under charge of one superintendent. It was this proposition which the court applied in the Ross Case, holding that the conductor of a train has the control and management of a distinct department. But this rule can only be applied when the branches or departments of service are, in and of themselves, separate and distinct."

After making several illustrations as to the branches or departments of the railroad service that are clearly separate and distinct, the court says that "from this natural separation flows the rule that

he who is placed in charge of such separate branch of the service, who alone superintends and has control of it, is, as to it, in the place of the master."

In applying the principles of that decision to the facts of this case, it necessarily results in the conclusion that the court erred in charging the jury that the conductor and engineer of the work train "were not fellow servants of the plaintiff," because neither of them had the right to command the movements of the train, or had any control of the persons employed upon it. They were, under the decision in the Baugh Case, fellow servants with the plaintiff, and for their negligence, if any, he could not recover. The road master was in charge of the working train, directed its movements, and had control of all the persons employed upon it, including the conductor and engineer. He was a vice principal, and for any negligence on his part, if any, that caused the collision, the corporation would be liable.

We deem it unnecessary to discuss the question as to whether the court erred in charging the jury that the burden of proof would rest upon the defendant, by a fair preponderance of evidence, to establish the fact of contributory negligence upon the part of plaintiff or his fellow servants, "by affirmative proof brought here in favor of the defense." The objections raised to this charge will be readily obviated upon another trial by following the principles announced, in *Railroad Co. v. Novak*.¹

The judgment of the circuit court is reversed, and the cause is remanded for a new trial.

H. B. CLAFLIN CO. v. DACUS et al.

HURST et al. v. SAME.

(Circuit Court, D. South Carolina. February 23, 1894.)

ASSIGNMENT FOR BENEFIT OF CREDITORS—RELEASE—EFFECT.

A general assignment by insolvent debtors provided for payment in full of such creditors as should accept its terms and execute releases within 60 days of its date, and for distribution of the balance of the assets among the other creditors. On the sixtieth day after the execution of the assignment, plaintiff, a creditor, voluntarily notified the assignee that he accepted the terms of the assignment, and 10 days thereafter he executed a release under seal. Upon a contest by the creditors, it was adjudged that he had not complied with the requirements of the assignment. *Held*, that the release was none the less effectual to defeat his right of action on the original debt, even though it was expressed to be executed in consideration of his having priority over the general creditors.

At Law. Actions by the H. B. Claflin Company against Dacus & Jordan, and by Hurst, Purnell & Co. against the same defendants. Judgment for defendants.

Perry & Heyward, for plaintiffs.

Haynsworth & Parker, for defendants.

¹Opinion not yet handed down.

SIMONTON, Circuit Judge. These two cases, presenting precisely the same questions, were tried together, under stipulation, by the court without a jury. Each action was upon promises to pay money due on notes and open accounts for goods sold and delivered. The defense in each case was a release in full of all demands. The facts are Dacus & Jordan, the defendants, being in insolvent circumstances, executed an assignment for the benefit of creditors on 27th November, 1891, to J. C. Rogers. The assignment provided for the realization of the assets, and the payment of all debts due the public, and the debts of such creditors of the said Dacus & Jordan as may, within 60 days from the date thereof, accept the terms of the assignment, and execute a release of their claims against Dacus & Jordan; after such accepting and releasing creditors are paid, the remainder to be divided among all other creditors of this firm. The plaintiffs in each of these cases, on the sixtieth day after the execution of the assignment, by their attorneys notified the assignee, in writing, that they did thereby accept the terms of the assignment made by Dacus & Jordan, as copartners and individually, and offered releases of their claims, respectively, as required by the assignment. Within 10 days thereafter, formal releases were executed and filed with the assignee by these plaintiffs. Those creditors who had released, as well as those accepted, within the 60 days, resisted the right of these plaintiffs to rank as among the preferred creditors; and the question being made in the cause of *Armstrong v. Hurst*, 18 S. E. 150, it was decided by the court of South Carolina that these plaintiffs had not so complied with the conditions of the assignment as to rank as preferred creditors. They had allotted to them, and received, dividends, as among the general creditors. They now bring suit against Dacus & Jordan on the original debt. The question in the case is as to the release. It is in these words:

State of South Carolina, Greenville County.

In consideration of the amount to be received by us, and our having priority over nonreleasing creditors in the distribution of the assets of the firm of Dacus & Jordan, we hereby release the said Dacus & Jordan from further liability on account of our claim against them, a statement of which is hereto annexed. [L. S.]

This action on the part of the plaintiffs was taken *suo motu*, with no persuasion or inducement held out to them by Dacus & Jordan, and was based entirely upon their own conviction of their rights and interests in the premises. No want of good faith has been suggested, nor is the transaction impeached in any way. We are in a court of law. The motive for the release stated by the creditors as inducing them to execute it cannot, in this court, affect the release in any way, as Dacus & Jordan were in no sense responsible for it. We deal with the operative words in the release. When nothing is shown against the fairness of a release,—that is, when nothing appears showing ignorance upon the part of the releasor, or circumvention by the released,—a release under seal must be held conclusive. *Perkins v. Fourniquet*, 14 How. 313. See, also, *Baker v. Baker*, 75 Am. Dec. 248; *Shepard v. Rhodes*, 84 Am. Dec.

575. In the cases at bar the releases were executed and delivered. They cannot now be avoided simply because the parties executing them have been disappointed with the result. They persuaded themselves that the course they were pursuing secured them priority. They remained of that opinion until the supreme court of South Carolina decided the contrary. It has been held that, a release being once regularly executed and delivered, it could never afterwards be avoided at law by the failure of one of the parties to perform an act, in consideration whereof the release was given. *Fitzsimmons v. Ogden*, 7 Cranch, 2. A fortiori, the releases in this case cannot be avoided at law. A verdict for defendants will be entered in each case.

UNITED STATES v. CUTAJAR et al.

(District Court, S. D. New York. January 4, 1894.)

CUSTOMS REVENUE—BOND FOR VERIFIED INVOICE—DAMAGES.

The defendant Cutajar imported certain invoices of rice from Italy during the month of November, 1891, and entered the merchandise on a pro forma invoice, executing at the same time, with the defendant Gandolfi, a bond to the United States in the penal sum of \$800, conditioned that the obligors, etc., should, within six months from the date of the bond, produce to the collector of customs for the district of New York a duly-authenticated invoice of the said goods, and pay to the collector the amount of duty appearing by such invoice to be due over and above the amount of duties estimated on the appraisement of said goods; the defendants failed to produce a duly-authenticated invoice within the time mentioned in the condition of the bond, although the collector of the port of New York received within such time the triplicate invoices required, by section 2855 of the United States Revised Statutes to be forwarded from the United States consul, where such invoices were verified in Italy. *Held*, that the United States, upon such default by the defendants, were not entitled to recover the full amount named as penalty in the bond, but only such sum as might be proved to be due the United States for duties upon the importation in question.

At Law.

Action upon a bond executed by the defendants as principal and surety to the United States of America in the sum of \$800, dated the 24th day of November, 1891, reciting that the principal in the bond had applied to the collector of customs for the port of New York to make entry of certain goods, wares and merchandise imported in the Fulda from Genoa, and reciting further that, "whereas it is temporarily impracticable for the said principal to produce a proper invoice thereof duly authenticated according to law, by reason whereof, and in pursuance of law, entry of the said goods, wares, and merchandise, is allowed on affidavit and statement on the execution of this bond;" and setting forth the following condition:

"Now, therefore, the condition of this obligation is such that if the above bounden obligors or either of them, or either of their heirs, executors, or administrators shall and do within six months from the date hereof produce to the collector of the customs for the district of New York a duly authenticated invoice of the said goods, wares and merchandise, and shall pay to the said collector the amount of duty to which it shall appear by such invoice the said goods, wares or merchandise are subject, over and above the amount of duties estimated on the appraisement of said goods, wares and merchandise, then the above obligation to be void; otherwise to remain in full force and virtue." There appeared upon the bond as part thereof a memorandum showing the importation to consist of 2 lots of 100 and 50 bags of rice re-

spectively, weighing, according to the pro forma invoice, 19,400 pounds dutiable at 2 cents per pound, making a total of \$388 estimated duties.

This bond was given under the provision of the act of June 10, 1890, (chapter 407, Laws 1890; 26 Stat. 131, § 4,) which provided:

"And when entry of merchandise exceeding \$100 in value is made by a statement in the form of an invoice, the collector shall require a bond for the production of a duly certified invoice;" and under article 326, of the United States treasury regulations of 1884, which provided for the form of a bond with sureties in double the amount of duty apparently due; also article 1056 of said treasury regulations. On the trial the United States attorney proved the execution and delivery of the bond by the defendant Cutajar as principal and the defendant Gandolfi as surety, and breach of the condition thereof.

On cross examination of one of the plaintiffs' witnesses, the defendants offered in evidence, against the objection of the United States attorney, the triplicate invoices of the merchandise taken from the files of the customhouse at the port of New York, and proved to have been received by the collector from the consul and filed November 24, 1891, which triplicate invoices were duly verified before the United States consul at Genoa, Italy; one of which invoices called for 9,900 kilograms, equivalent to 21,829 pounds, of rice, and the other 4,950 kilograms, equivalent to 10,913 pounds, of rice.

The defendants' attorneys, on cross-examination of another of plaintiffs' witnesses, produced from the files of the customhouse and offered in evidence the entry of the merchandise covered by the bond in suit. This paper was objected to by counsel for the government as immaterial and irrelevant, the United States attorney contending that the full penalty of the bond was the measure of damages in the nature of a forfeiture, imposed by law upon the importer and recoverable by the government upon breach by the obligors of the condition of the bond; citing in support of this contention: *Clark v. Barnard*, 108 U. S. 436, 2 Sup. Ct. 878; *U. S. v. Hatch*, 1 Paine, 336, Fed. Cas. No. 15,325; *U. S. v. Montell, Taney*, 47. Fed. Cas. No. 15,798; *Treasurer v. Patten*, 1 Root, 260; *U. S. v. Pingree*, 1 Spr. 339, Fed. Cas. No. 16,050, reversed in circuit court 1 Spr. 342; *Ives v. Bank*, 12 How. 159; *Farrar v. U. S.*, 5 Pet. 373; *U. S. v. Mora*, 97 U. S. 413; *U. S. v. Hodson*, 10 Wall. 395; *Republic of Mexico v. Ockershausen*, 37 Hun, 533; *Willett v. Lassalle*, 19 Abb. Pr. 292; *Hinds v. Doubleday*, 21 Wend. 230; *Harris v. Hardy*, (re exeat bond,) 3 Hill, 393. Also, as to the general power and authority of the secretary of the treasury, U. S. Rev. St. § 251.

The defendants' counsel argued that the entry was admissible to show that no final liquidation had been made, and no further duties were due the United States upon the same; and that consequently nothing was recoverable upon the bond as no actual damage to the government had accrued. After a recess of the court for the night, the following decision upon the question of law was rendered by the court.

Edward Mitchell, U. S. Atty., and J. T. Van Rensselaer, Asst. U. S. Atty.

Hess, Townsend & McClelland, (Charles A. Hess, of counsel,) for defendants.

BROWN, District Judge. I have examined, as far as I was able since last evening, the cases cited to me. I am satisfied that I cannot allow as damages any sum beyond the amount of duties and interest which the United States would lose by a failure to produce the invoices, where, as in a case like this, the proofs leave no question of what that loss is. If there had never been any invoice, or if the means by which the assessment of duties could be fixed and made certain had never come to hand; then, perhaps, the full penalty should be recovered, because the damage could not be shown to be less.

This case is distinguishable from the considerably large class of cases to which the counsel for the government has directed my attention, and which he has so clearly presented; namely, those in which the amount named in the bond is treated as a liquidated sum to be paid in lieu of damages which are incapable of exact estimate. This case does not fall within that class. The context of the bond, the general purpose for which it was given, and the way in which the amount of the bond in such cases is fixed, are such as taken together require the amount named in the bond to be regarded as fixing, not an amount of liquidated damages, but only the extent of the importer's liability.

In the first place, the context shows the general purpose. It is a condition for the production of the invoice, and "for the payment of the additional duties," which upon that invoice may prove to be the proper amount of duties. That sufficiently defines the purpose of the bond, viz. to secure the full payment of the duties. In the next place, the statute does not prescribe the amount of the bond. It leaves it to be regulated by the secretary of the treasury. I think it is hardly consistent with the general purpose of such legislation, or a proper construction of the law, to suppose that the secretary of the treasury was intended to fix, by a mere arbitrary regulation, a positive penalty as liquidated damages which the citizen must pay because an authenticated invoice might not be produced within a specified time. In this case the bond itself is not even in exact compliance with the regulation. Its amount is in excess of the regulation. The bond was made greater than "double of the duties" as estimated, upon the authority of the collector, and as a mere matter of convenience in practice by the clerk who administered this business to take the nearest even hundred. It cannot be that the power to inflict a penalty as such, or to fix liquidated damages in that manner, irrespective of what might be the government's loss, could be sustained. But it is reasonable and consistent enough if the amount thus fixed for the bond is regarded merely as a limit, and for the purpose only of securing to the government the payment of what shall eventually prove to be due to it.

So it seems to me, from the nature of the subject-matter, the context, and the object of the bond, as well as the unreasonableness of the contrary construction as applied to a bond in which the amount is fixed in the way this amount is fixed, require me to treat this bond as admitting a recovery of no more than the damages sustained, since these damages are easily capable of exact determination. They amount, on the proofs in evidence, to the difference between the first liquidation, and the amount of duties recoverable upon the authenticated invoice, or what, in this case, is equivalent to it, the triplicate invoice already in evidence; and accordingly I so rule upon the questions presented.

An exception having been noted by the United States attorney, the defendants withdrew their offer of the entry, and thereafter the paper was offered and proved by the plaintiffs, together with the testimony of an expert from the customhouse showing that

according to the United States weigher's return attached to the entry and part thereof, the government would be entitled to a balance of unpaid duty on a final liquidation of the entry of \$198.60.

At the close of the testimony a motion was made by the United States attorney for a direction of a verdict in favor of the plaintiffs for the full amount of the penalty of the bond, viz. the sum of \$800. The defendants moved for a dismissal of the complaint on the ground that no damage or loss to the United States had been proved under the bond; and that no additional duties could be recovered in this suit. Both motions were denied by the court; and a verdict was thereupon directed in favor of the plaintiffs for the sum of \$198.60, and interest to the date of the trial. Verdict for plaintiffs accordingly.

ELECTRIC GASLIGHTING CO. et al. v. FULLER et al.
(Circuit Court of Appeals, First Circuit. January 9, 1894.)

No. 73.

1. PATENTS—INFRINGEMENT—MECHANICAL DETAILS.

A patent which is limited, both by its language and the prior art, to mere mechanical details, is not infringed by a device which, comparing mechanical details with mechanical details, shows a different result, and methods substantially unlike.

2. SAME—LIMITATION OF CLAIM.

The Tirrell patent, No. 232,661, for an electric gaslighting apparatus, is restricted, in its first claim, to mere mechanical details. 55 Fed. 64, affirmed. *Gordon v. Warder*, 14 Sup. Ct. 32, 150 U. S. 47, and *Knapp v. Morss*, 14 Sup. Ct. 81, 150 U. S. 221, applied.

Appeal from the Circuit Court of the United States for the District of Massachusetts.

In Equity. Bill by the Electric Gaslighting Company and Abraham L. Bogart against Charles E. Fuller and others, copartners as Fuller, Holtzer & Co., for infringement of certain patents for electric gaslighting apparatus. Bill dismissed. 55 Fed. 64. Complainants appeal. Affirmed.

Edward P. Payson and Edwin H. Brown, for appellants.

Frederick P. Fish and William K. Richardson, for appellees.

Before COLT and PUTNAM, Circuit JUDGES, and NELSON, District Judge.

PUTNAM, Circuit Judge. The bill covered a patent issued to Abraham L. Bogart, August 8, 1876, No. 180,832; but no issue seems to be taken upon this, and the bill should be dismissed, so far as that patent is concerned. The controversy relates wholly to the first claim of the patent issued to Jacob P. Tirrell, No. 232,661, September 28, 1880, on an application filed January 8, 1877.

The appellants maintain that, inasmuch as the court below ordered the bill dismissed because of a certain patent of Heyl and Deihl, there is no occasion here to discuss any other defense; but, even if that had been the substance of the decision of that court,

this proposition of the appellants is so clearly erroneous that it does not require discussion.

Tirrell devised something meritorious and novel, although soon superseded, and although it may be doubtful whether it contained anything which the law makes patentable. There can be no doubt that the two principal things involved in Tirrell's patent were old in the state of the art at the date of his invention; that is—First, lighting illuminating gas with an electric spark; and, second, the simultaneous turning out of the gas. William A. Pitt's patent, No. 139,811, issued June 10, 1873, on an application filed February 5, 1873, covered all this.

The appellants, in analyzing their patent, claim, so far as this is concerned, only two new elements: First, the two-armed lever attached to the gas cock, which we take to be the bell-crank lever; and, second, the "actuating device," which is whatever interposes between the two-armed lever and the hand. Pitt's device stopped with the ordinary gas cock, and did not contain Tirrell's mechanism, by which the movement could be actuated by a chain or guard hanging from a chandelier or other light beyond ordinary reach. Yet, in view of the state of the art, Tirrell's patent must be limited to mere mechanical details; and although the device of the respondents below accomplishes, in part, the same result as Tirrell's did, and this with a "bell-crank lever," yet, comparing mechanical details with mechanical details, the result is different in law, and the methods substantially unlike.

This view is confirmed by the fact that Tirrell's specifications state that his invention "consists in certain details of construction" thereafter "more fully set forth and pointed out in the claims." No part of these words appear in the original application of January 8, 1877, but the following, of like effect, did appear there, namely:

"My invention relates especially to that class of gaslights in which the gas is ignited by electricity, and consists in a novel construction and arrangement of the parts, as hereinafter more fully set out and claimed, by which a simpler, cheaper, and more effective device of this character is produced than is now in ordinary use."

Such terms as are found in the latter part of this expression relate, ordinarily, to mere detailed construction. The sentence quoted from the patent itself came in under the following circumstances: Tirrell having amended his claim August 7, 1880, he was notified by the patent office that, upon amending the statement of his invention to harmonize with the claim as then presented, the application would probably receive favorable action, but that, as it then stood, it was rejected. Thereupon Tirrell amended by striking out, and inserting the later phraseology cited.

On the whole, under the circumstances under which this amendment was made, supported also, as it is, by the state of the art as shown by both Pitt's patent and that of Heyl and Deihl, the following expressions in *Knapp v. Morss*, 150 U. S. 221, 14 Sup. Ct. 81, and also in *Gordon v. Warder*, 150 U. S. 47, 14 Sup. Ct. 32, have very appropriate application. In *Knapp v. Morss*, the court said, pages 228 and 229, 150 U. S., and page 84, 14 Sup. Ct.:

"If, however, the patent could be sustained at all, it would have to be restricted and confined to the specific combination described in the second claim, as indicated by the letters of reference in the drawings, and each element specifically pointed out is an essential part thereof; * * * for, if not so restricted by the letters of reference, the effect would be to make the claim coextensive with what was rejected in the patent office. If any validity could be conceded to the patent, the limitation and restriction which would have to be placed upon it by the action of the patent office, and, in view of the prior art, would narrow the claim, or confine it, to the specific structure therein described; and, as thus narrowed, there could be no infringement on the part of appellants if a single element of the patentee's combination is left out of the appellants' device."

In *Gordon v. Warder*, the court said:

"We do not regard the patent of Watson, Renwick, and Watson, dated May 13, 1851, as an anticipation of Gordon, although the specification in that case did contain a paragraph stating that it might be advantageous, in some cases, to make the binder adjustable in respect to the cutting apparatus. No means were there provided, or method pointed out, whereby such a desirable result could be obtained. Nor do we find, in the other patents put in evidence by the defendants, any such anticipation of the Gordon claim, as above defined, as to invalidate the grant made to Gordon on May 12, 1868, though such a state or condition of the art was brought about by these earlier patents as to require us to restrict the scope of the Gordon patent closely to the devices and methods claimed by him."

Looking at Tirrell's improvement in issue here from this point of view, it consists of mechanical details, accomplishing a useful result, but of a low order; and the mechanical details of respondents' devices are different, in the sense of the patent law, and accomplish a result also in a large part different, and cannot be held to infringe.

Decree of circuit court affirmed.

RIGGIN v. BROWN et al.

(District Court, D. Maryland. February 16, 1894.)

1. STATES AND STATE OFFICERS — BOARD OF PUBLIC WORKS — OYSTER NAVY — NEGLIGENCE OF COMMANDER.

Code Md. art. 72, regulating the oyster fishery in the waters of the state, charges the board of public works with the duty of keeping in repair the vessels of the state fishery force; and Act Md. 1886, c. 296, provides for the appointment of commanders for such vessels by the board. These commanders are required by law to take an oath, and give bond to the state. *Held*, that such a commander is himself a public officer, and hence the members of the board are not personally liable for injuries resulting from his negligence to a workman repairing such vessel, especially where there is nothing to show that the commander is incompetent.

2. SAME — LIABILITY AS OWNERS.

The board of public works, in keeping such vessels in repair, act purely as public officers, and do not come within any rule by which charterers or others who have obtained the exclusive navigation of a vessel may be held liable as owners for injuries resulting from the negligence of its officers or crew.

In Admiralty. Libel to recover for injuries by William H. Riggin against Frank Brown, Marion De K. Smith, and Spencer C. Jones.

Code Md. art. 72, regulating the oyster fishery in the waters of the state, provides for the maintenance by the board of public

works of vessels to guard those waters and prevent violations of the law. Act Md. 1886, c. 296, imposes upon the board the additional duty of appointing a commander in chief of the state fishery force, and deputy commanders for the several vessels thereof, and of supervising the former in his administration and control of the force.

Thomas S. Hodson, for complainant.

John P. Poe, Atty. Gen., for board of public works.

MORRIS, District Judge. This is a libel to recover for injuries which the libelant alleges he sustained by the falling upon him of the main boom of the schooner Helen Baughman, and which injury, it is alleged, was caused by the negligence or unskillfulness of the deputy commander, who was in charge of said schooner, or of some one of the crew; the libelant being employed at the time in doing some necessary repairs to the mast of the schooner. The defendants are the governor, comptroller, and treasurer of Maryland, and compose the board of public works, who are by law charged with the duty of keeping the vessels of the state fishery force in good order and repair, and of appointing the commanders of said vessels. The schooner Helen Baughman is one of the vessels of the state fishery force, and the theory of the libel is that, if the commander of the vessel or his crew were negligent or unskillful, and through their fault the libelant received the injury complained of, the members of the board of public works are personally liable. This contention is manifestly untenable. The board of public works have a purely official connection with the state fishery force, and it is not alleged that the commander of the schooner appointed by them was not competent. The commander of the schooner, although appointed by the board, was, when he had taken the oath of office and given bond as required by law, (section 32,) himself a public officer. The law is that each public officer is answerable for his own negligence only, and not for that of others, although selected by him, and subject to his orders. *Robertson v. Sichel*, 127 U. S. 507, 8 Sup. Ct. 1286. But it is contended that in admiralty, by reason of a rule which in some cases makes the charterer or other person who, by agreement with the general owner, has obtained the exclusive possession, command, and navigation of a vessel, liable as if actual owner, being regarded *pro hac vice* as the actual owner, the members of the board of public works are to be regarded as owners *pro hac vice* of the schooner Helen Baughman. The mere statement of this contention, it seems to me, is its own refutation. Neither the board of public works nor the individual members of it have ever obtained from the state of Maryland, which is the actual owner of the schooner, any possession or command of her. She is a public vessel, the property of the state, engaged under the command of public officers in the enforcement of the laws regulating the taking of oysters in the waters of Maryland. It is made the duty of the board of public works to see that the state's vessels are kept in good repair, but

in obeying this provision of the law they are acting purely as public officers; and it is a contention not countenanced by any rule of the admiralty or of the common law that they can be held personally liable, because, while one of these vessels is at the shipyard, it happens by the negligence of one of her officers or crew that a workman employed on the repairs is unfortunately injured.

THE BERKSHIRE.

NORFOLK & W. R. CO. et al. v. THE BERKSHIRE.

(District Court, D. Rhode Island. December 26, 1893.)

COLLISION—COASTING VESSELS—ACT FEB. 13, 1893.

The third section of the act of February 13, 1893, which in terms exempts vessels in the coasting trade and their owners from all liability in certain cases, applies only to the mutual rights and liabilities of owners and shippers, and does not abolish liability to third persons for collisions, or other marine torts.

In Admiralty. Libel by the Norfolk & Western Railroad Company and others against the steamer Berkshire to recover damages for a collision. Heard on exceptions to the answer. The exceptions are sustained.

This is a libel in admiralty for a collision. The claimant answers, among other things, that the steamer "was a ship engaged in the transportation of merchandise and property between the ports of the United States of America, to wit, between the ports of Providence, R. I. and Norfolk, Va., and was engaged in the transportation of merchandise on the said 16th day of August, 1893; that the said Berkshire was in all respects seaworthy, properly manned, equipped, and supplied, and that by and under section 3 of the statute of the United States entitled 'An act relating to the navigation of vessels,' etc., approved February 13, 1893, and to go into effect the first day of July, 1893, the said steamship Berkshire is not responsible for the collision heretofore described, even if it resulted from faults or errors in the navigation or in the management of said steamship, inasmuch as the said collision occurred after said statute went into effect." To this part of the answer the libellant excepts.

W. G. Roelker, for libelants.

E. P. Carver, for claimant.

CARPENTER, District Judge, (after stating the facts.) The whole of the act which is here pleaded, (27 Stat. 445,) seems to me to relate to the rights and liabilities of owners and shippers, as between themselves, with respect to the cargo; and the third section of the act, therefore, although in terms it exempts vessels and their owners from all liabilities whatever in certain cases, must be read with this limitation. The frame of the act shows that this is the only purpose; and the exemption stated in the third section is apparently intended as a compensation to shipowners for the additional duties and liabilities put on them by the other sections of the act.

The construction for which the claimant contends is that the statute abolishes all liability and remedy for all marine torts of vessels transporting merchandise to or from any port in the United

States, provided the vessel be seaworthy and properly manned, equipped, and supplied, and leaves unaffected the liability of vessels transporting goods between other ports, and, perhaps, freight vessels in ballast, and also tug boats, pleasure boats, and vessels transporting only passengers. That a statute may be held to abrogate so large a branch of the admiralty law, it is necessary, as it seems to me, that the intent so to do shall appear by express words, or by absolutely necessary implication.

It is also to be observed that there is evidently no reason why the general rule of the admiralty should be changed in respect to this class of vessels, to the exclusion of others; and such partial change of the law is apt to introduce complications in the administration of rights in case of collision between vessels coming under this section and those not coming under it. For this reason, also, the construction which takes the literal words of the section to extend its force beyond the general scope of the act cannot be admitted, unless it be a necessary construction.

The exception will be sustained.

END OF CASES IN VOL. 59.